IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Plaintiff/Respondent, v. JONATHAN ANDREW ARIAS, Defendant/Petitioner.	No. 1 CA-CR-_____-PRPC Maricopa County Superior Court No. CR1999-012663-002

Petition for Review to the Arizona Court of Appeals

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ISSUE PRESENTED

A decade ago, the United States Supreme Court declared that the Eighth Amendment prohibits mandatory life-without-parole sentencing schemes for juveniles convicted of homicide. But not one juvenile has obtained the benefit of this constitutional rule in Maricopa County.

Six years ago, the United States Supreme Court vacated this Court's affirmance of Mr. Arias's mandatory life-without-parole sentence. On remand to this Court, MCAO had an opportunity to argue that Mr. Arias must meet Arizona's post-conviction burden proving that his life-without-parole sentence was unconstitutional before he would be entitled to resentencing. Instead, MCAO stipulated that Mr. Arias was entitled to resentencing. This Court accepted the MCAO stipulation, granted relief, and remanded to the trial court for resentencing.

MCAO reneged on its stipulation. The trial court then dismissed Mr. Arias's case after concluding that *Jones v. Mississippi*, 141 S.Ct. 1307 (2021) was a significant change in the law that justified defying this Court's directive. But as the United States Supreme Court expressly stated, *Jones* changed nothing.

Did the lower court err by ignoring this Court's mandate and dismissing this case instead of imposing a parole-eligible sentence or conducting a resentencing?

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INTRODUCTION

Mr. Arias was sentenced to natural life sentences for offenses committed in 1999, when the death penalty for juveniles was still constitutional[1] and parole had been abolished for all offenses.[2] (App-A at 5A).

Following a sea-change in Eighth Amendment law which saw the death penalty outlawed for juveniles and the imposition of life-without-parole sentences on juveniles limited to rare circumstances, Mr. Arias pursued an Eighth Amendment claim all the way to the United States Supreme Court.[3] The highest court of the land vacated a decision of this Court, and the Maricopa County Attorney Office (MCAO) stipulated that Mr. Arias was entitled to resentencing.

In the decade since *Miller v. Alabama*, 567 U.S. 460 (2012) was decided, the Maricopa County Superior Court has come full circle in its refusal to adhere to United States Supreme Court precedent and the mandate of this Court. (App-G).

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[1] *See Roper v. Simmons*, 543 U.S. 551 (2005).
[2] *See* 1993 Ariz. Sess. Laws, ch. 255, § 86.
[3] *Arias v. Arizona*, 137 S.Ct. 370 (2016).

Judge Starr dismissed Mr. Arias's case without complying with this Court's mandate. (App-A). Mr. Arias now petitions this Court for review of the dismissal of his resentencing.

FACTS

A. Judge Reinstein holds that *Miller* is inapplicable to Arizona and dismisses Mr. Arias's *Miller* post-conviction petition.

Mr. Arias filed a pro per Notice of Post-Conviction Relief under Arizona Rules of Criminal Procedure 32.1(g) alleging there was "a significant change in the law that would overturn his…sentence." (App-B at 11A). Mr. Arias alleged that, in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the United States Supreme Court "ruled that mandatory life-without-parole sentences for juveniles are unconstitutional." (*Id.*).

Judge Peter Reinstein dismissed the PCR proceedings, concluding that the original sentencing judge had "considered the Defendant's age as a mitigating factor," and yet still chose to impose a natural life sentence. (App-C at 14A). Apparently conflating clemency with parole, Judge Reinstein explained that the sentencing judge had the "discretion to order life with the possibility to release but chose not to." (*Id.*). Thus, Judge Reinstein concluded that *Miller* was not a significant change in the law as applied to Mr. Arias's case. (*Id.*).

Judge Reinstein's ruling failed to account for the fact that the original sentencing occurred at a time when the death penalty was still available for juveniles,

or otherwise acknowledge that the sentencing judge had the discretion to reject the plea agreement if he thought death was the appropriate penalty. (*Id*.).

The Arizona Justice Project ("AJP") filed an *amicus curiae* brief in support of reconsideration of Judge Reinstein's ruling. (App-D). AJP argued that Arizona had abolished parole and the availability of executive clemency did not satisfy *Miller*. (App-D at 18A-19A). Thus, Judge Reinstein's ruling was erroneous because Arizona had a mandatory life-without-parole scheme applicable to juveniles. (*Id*.).

Judge Reinstein considered the AJP amicus brief on the merits and reiterated his prior ruling, which conflated "release" with *Miller's* parole requirement and found the original sentencing proceeding to be sufficient under *Miller*. (App-E at 88A).

B. The United States Supreme Court grants review, vacates this Court's decision affirming the dismissal of Mr. Arias's *Miller* claim, and remands to this Court.

Mr. Arias petitioned this Court for review, and this Court affirmed Judge Reinstein's ruling. (App-F). Although Judge Winthrop's decision for this Court correctly noted that *Miller* prohibited mandatory life-without-parole sentences for juveniles, it applied an incorrect standard by asserting that Arizona law did not

conflict with *Miller* because it did not mandate "natural life" sentences. (App-F at 92A, ¶ 3).

However, the United States Supreme Court intervened by granting review, vacating Judge Winthrop's ruling, and remanding to this Court "for further consideration in light of *Montgomery v. Louisiana*, 577 U.S. 190 (2016)." *Arias v. Arizona*, 137 S.Ct. 370 (2016). Justice Sotomayor issued a concurring statement and Justice Alito a dissenting statement, but neither carried the force of law.[4] *See Tatum v. Arizona*, 137 S.Ct. 11 (2016).

C. On remand to this Court, MCAO declines to hold Mr. Arias to the *Valencia* burden and instead stipulates that Mr. Arias is entitled to resentencing.

On remand, this Court complied with the order issued by the United States Supreme Court by vacating its prior mandate and stayed this case pending the outcome of the Arizona Supreme Court's decision in *State v. Valencia*, 241 Ariz. 206 (2016). (App-G). This Court ordered the parties to file simultaneous briefs on "the effect of *Montgomery v. Louisiana* and the effect, if any, of the *State v. Valencia* decision on the issues to be decided by this case." (App-G at 96A).

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[4] *See Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam) (explaining scope of GVR orders).

After *Valencia* was decided and the United States Supreme Court declined review,[5] MCAO waived an argument that the original sentencing complied with *Montgomery* or that Mr. Arias was required to meet the post-conviction burden established in *Valencia*, instead stipulating Mr. Arias was entitled to resentencing. (App-H). This Court accepted MCAO's stipulation and issued a mandate granting relief and remanding to the trial court for "resentencing in light of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)." (App-H at 98A).

D. Judge Duncan predicts the holding in *Jones.*

On remand to the sentencing court, the Maricopa County Superior Court neglected to address the significance of MCAO's stipulation that *Valencia* requirements were inapplicable to this case and instead focused on conducting a *Montgomery*-compliant resentencing. (App-I).

Instead, litigation eventually[6] centered on whether a *Montgomery*-compliant sentencing procedure required the trial court to make explicit factual findings concerning permanent incorrigibility or if the state bore a burden of proving

[5] *See Valencia v. Arizona*, 138 S.Ct. 467 (2017).

[6] The proceedings were initially diverted because MCAO improperly removed Judge Duncan by invoking Rule 10.2, Ariz.R.Crim.P. This Court intervened and reinstated Judge Duncan. *See* Tr. Dock. at 863-865; 867-870; 874.

permanent incorrigibility before the sentencer could impose a life-without-parole sentence. (*See* App-J–App-Q).

Although MCAO had previously waived the opportunity to brief the applicability of *Valencia*, it nonetheless argued before Judge Duncan that Mr. Arias was required to meet the post-conviction burden of proving transient immaturity before he could receive a parole-eligible sentence. (App-K at 127A-128A). Even then, MCAO conceded that *Valencia* applied "in the context of…a PCR petition." (App-K at 128A). Nonetheless, MCAO urged Judge Duncan to apply *Valencia's* post-conviction burden to the resentencing proceedings. (*Id.*). Mr. Arias argued that *Montgomery* imposed upon the state the burden of proving permanent incorrigibility before the sentencer could impose a life-without-parole sentence. (App-J at 105A-107A).

Judge Duncan rejected both arguments and concluded that the law did not require a presumption for or against life-without-parole sentences. (App-L at 132A). Rather, Judge Duncan held that Arizona's scheme required the state to prove aggravating factors beyond a reasonable doubt and a defendant to prove mitigating factors by a preponderance of the evidence. (*Id.*). *Montgomery* and *Miller* merely

required that the sentencer have discretion to choose between a parole-ineligible sentence and a parole-eligible sentence. (App-L at 132A; App-M at 170A).

Mr. Arias filed a special action with this Court challenging Judge Duncan's ruling. (App-N). This Court declined review. (App-O).

Mr. Arias petitioned the Arizona Supreme Court for review but was denied review. (App-P; App-Q).

Mr. Arias later moved to stay the resentencing proceedings once the United States Supreme Court agreed to decide "Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without-parole." (App-R at 231A).

Criminal Presiding Judge Starr granted the request. (App-S).

E. Judge Starr dismisses this case without complying with this Court's mandate.

The United States Supreme Court ultimately declined to expand either *Miller* or *Montgomery* and held that a sentencer is not required to make any explicit findings concerning permanent incorrigibility before imposing a parole-ineligible sentence. *Jones v. Mississippi*, 141 S.Ct. 1307, 1311 (2021).

MCAO filed a "Motion to Withdraw from the Stipulation to Resentencing, Vacate the Pending Resentencing, and Dismiss the Matter." (App-T). MCAO argued:

- Justice Sotomayor's concurring statement supporting the GVR Order in *Tatum v. Arizona*, 137 S.Ct. 11 (2016) had created binding precedent. (App-T at 248A).

- *Jones* invalidated *Valencia's* holding that the Eighth Amendment prohibits life-without-parole sentences for juveniles whose crimes reflected transient immaturity. (App-T at 250A).

- *Miller* did not apply to Arizona because *Miller* prohibited mandatory natural life sentences rather than mandatory life-without-parole sentences. (App-T at 253A; App-V at 274A).

- Resentencing was no longer required because *Miller* did not require explicit findings before imposing life-without-parole. (App-T at 254A).

Notably, MCAO's motion omitted any reference to the extensive litigation that Judge Duncan had already conducted which had resulted in a ruling that the sentencer need not make findings concerning permanent incorrigibility. (*See* App-T; App-U).

Mr. Arias's Response explained:

- *Jones* changed nothing about *Montgomery* or *Miller*. (App-U at 265A).

- *Jones* only declined to add a burden of proof regarding permanent incorrigibility while also declining to require judges to make explicit factual findings concerning permanent incorrigibility. (App-U at 266A).

- Mr. Arias was sentenced under a mandatory life-without-parole scheme in violation of *Miller*. (App-U at 268A).

- Judge Starr was bound by this Court's mandate because *Jones* was not a change in the law. (App-U at 263A-264A).

Judge Starr held oral argument, noting that MCAO had also moved to get out of its stipulation in other "*Tatum*" cases.[7] Because the arguments were similar, Judge Starr announced that a ruling would be made in each of the "*Tatum*" cases contemporaneously. (App-X).

Judge Starr dismissed the case without complying with this Court's mandate to conduct a resentencing. (App-A). Judge Starr's ruling held:

- *Miller* did not apply to Mr. Arias's case because "the sentencing options available to the trial court were natural life or life with the possibility of release after 25 years. Thus, Arias's natural life sentence was not mandatory." (App-A at 6A).

[7] The United States Supreme Court had issued GVR Orders in *State v. Purcell*, CR1998-008705 and *State v. DeShaw*, CR1994-011396, which also led to mandates by this Court for resentencing upon the stipulation of MCAO.

- The question of whether Mr. Arias's original sentencing complied with *Miller* was before the court on remand. (App-A at 6A).

- *Jones* eviscerated the rationale of *Valencia* because *Jones* disavowed the interpretation of *Montgomery* embraced by *Valencia*. (App-A at 7A).

- Mr. Arias had not asserted a colorable claim for post-conviction relief. (App-A at 7A).

- "The state of the law" had changed, justifying the evasion of this Court's mandate. (App-A at 7A).

Nothing in Judge Starr's ruling reconciled her view of *Jones* with Judge Duncan's prior ruling refusing to adopt a permanent incorrigibility burden. (App-A).

Judge Starr later granted Mr. Arias's request to extend the deadline to file a Petition for Review to February 10, 2022. (App-Y).

Mr. Arias now seeks review of Judge Starr's ruling dismissing this case in defiance of this Court's mandate. This Court has jurisdiction pursuant to Rule 33.16 of the Arizona Rules of Criminal Procedure and A.R.S. §§ 13-4239(C) & (G).

REASONS THIS COURT SHOULD GRANT REVIEW

In the decade since the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), not one juvenile sentenced under Arizona's mandatory life-without-parole scheme has been resentenced in Maricopa County.[8]

Nearly a decade of litigation has come full circle. Despite the intervention of the United States Supreme Court[9] and a subsequent trial-level ruling on sentencing procedures that were predictively aligned with *Jones v. Mississippi*, 141 S.Ct. 1307 (2021) (App-L), the Maricopa County Superior Court has reverted back to its 2013 rationale (App-C) in dismissing this case. (App-A).

But *Jones* did not change the standard announced in *Miller* or *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

The Maricopa County Superior Court has simply refused to acknowledge and adhere to the Eighth Amendment's prohibition on mandatory life-without-parole sentences for juveniles. In recycling a rationale rejected by both the United States Supreme Court and the Arizona Supreme Court, the Maricopa County Superior

[8] *See State v. Valenzuela*, 109 Ariz. 109, 110 (1973) (noting that appellate court may take judicial notice of superior court records).
[9] *Arias v. Arizona*, 137 S.Ct. 370 (2016).

Court has improperly evaded this Court's mandate (App-H) and taken upon itself the authority to overrule binding precedent. (App-A).

Lower courts may not evade mandates of higher courts. *Vargas v. Superior Court of Apache Cty.*, 60 Ariz. 395, 397 (1943).

Lower courts may not ignore binding precedent upon belief that a higher court will subsequently overrule itself. *Sell v. Gama*, 231 Ariz. 323, ¶ 31 (2013).

Even if lower courts possessed such authority, it was not warranted here because *Jones* did not change anything about Eighth Amendment law.

Arizona law aligned with *Jones* before *Jones* was decided. *Valencia*, 241 Ariz. 206, 210, ¶ 17 (quoting *Montgomery*, 577 U.S. at 212). Arizona law remains aligned with *Jones* after it was decided. *Id*; *Jones*, 141 S.Ct. at 1317 (quoting *Montgomery*, 577 U.S. at 211).

But Arizona law has not been applied in Maricopa County. (App-A). That must change.

This Court should grant review and relief. *See State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012) (relief warranted where denial of post-conviction relief is predicated upon legal error).

A. Judge Starr's failure to implement this Court's mandate was error because *Jones* changed nothing, and trial courts are not free to predict changes in precedent.

Nearly 80 years ago, our Supreme Court set forth a clear directive to respondent courts on remand

> The duty of the respondent court and judge to comply with the mandate may not be questioned or evaded. The law is that the mandate must be strictly followed. It is binding on the trial court and enforceable according to its true intent and meaning.

Vargas v. Superior Court of Apache Cty., 60 Ariz. 395, 397 (1943); *see also Raimey v. Ditsworth*, 227 Ariz. 552, 559, ¶ 19 (App. 2011) (citing *Vargas* for the point that "the trial court's jurisdiction on remand is limited by the terms of the mandate, which must be strictly followed").

This Court's mandate unequivocally remanded "to the trial court for resentencing in light of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)". (App-H at 98A).

Judge Starr's ruling cited no authority to support her evasion of this Court's mandate. (App-A at 7A). Each of MCAO's arguments requesting Judge Starr to evade this Court's mandate were legally untenable, and this Court should reject them.

1. MCAO's stipulation carried the force of a mandate.

MCAO argued below that it should be relieved of its stipulation because it was "bound by the Supreme Court's language in *Tatum*, 137 S.Ct. at 13." (App-T at 248A).

This is simply wrong. MCAO was not bound by Justice Sotomayor's concurring opinion issued in support of the GVR Order in *Tatum v. Arizona*, 137 S.Ct. 11 (2016).

When the United States Supreme Court[10] grants review, vacates a decision below, and remands a case, it often does so because the opinion below "*might* (or might not) have relied on a standard [nonapplication of the prior Supreme Court decision] that *might* (or might not) be wrong [and] that *might* (or might not) have affected the outcome." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 169 (1996) (emphasis in original). Thus, "it is important that the meaningful exercise

[10] This process is referred to as a "GVR Order." *See* Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 Cornell L. Rev. 203, 217 (2011) (explaining that, "In issuing a GVR, the Court does not determine that the intervening event necessarily changes the outcome in the case, just that it reasonably might. The virtue of the GVR is that it keeps cases alive on direct review without requiring the Court to definitively resolve the merits of each case under the new law.")

of [United States Supreme] Court's appellate powers not be precluded by uncertainty as to what the court below "*might*…have relied on." *Id*.

Here, the United States Supreme Court vacated this Court's memorandum decision (App-F) for "further consideration in light of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)." *Arias v. Arizona*, 137 S.Ct. 370 (2016). This Court's ruling was decided before *Montgomery* was decided, thus this Court could not have applied it.

On remand, MCAO had the opportunity to brief the significance of *Montgomery* to this Court but waived such argument and instead stipulated to resentencing. (App-G at 96A; App-H).

At no point was this Court or MCAO "bound" by Justice Sotomayor's concurring opinion. Even Justice Alito made this clear with his dissent in *Tatum*, 137 S.Ct. at 13, fn †.

MCAO's post-hoc rationalization for its stipulation must be rejected.

The other cases cited by MCAO's argument below are also inapposite, for they do not stand for the proposition that a lower court may evade the mandate of a higher court. (App-T at 248A). None of the stipulations in those cases were entered

in a higher court and then enforced by a higher court's mandate to a lower court. Consider the cases relied upon by MCAO:

- Stipulation entered under duress of directed verdicts of prior trial not enforced by second trial court. *Harsh Bldg. Co. v. Bialac*, 22 Ariz.App. 591, 594 (1975).

- Trial court did not err in relieving party of its own stipulation despite later recantation. *Rutledge v. Arizona Bd. of Regents*, 147 Ariz. 534, 550 (App. 1985).

- Appellate court found error where trial court allowed party out of stipulation entered in trail court. *Higgins v. Guerin*, 74 Ariz. 187, 190 (1952).

"Unless stipulations are enforced, they are apt to prove a trap for even the most wary and circumspect." *Higgins*, 74 Ariz. at 190 (1952).

Thus, they must be enforced by trial courts and appellate courts.

Not one case above stands for the remarkable proposition that a trial court may evade an appellate court's mandate by also allowing a party to renege on a stipulation.

2. Judge Starr was bound by this Court's mandate and not free to examine the sufficiency of the prior proceedings or predict a change in precedent.

Judge Starr's ruling is premised upon her own unsupported conclusion that our Supreme Court will eventually overrule or abrogate *State v. Valencia*, 241 Ariz. 206 (2016). (App-A at 6A-7A).

The Arizona Supreme Court forbids trial judges from ignoring binding precedent under the theory that a higher court will eventually overrule itself.

"Whether prior decisions of the highest court in a state are to be disaffirmed is a question for the court which makes the decisions. Any other rule would lead to chaos in our judicial system." *McKay v. Indus. Comm'n*, 103 Ariz. 191, 193 (1968). The appellate court in *McKay* incorrectly predicted a change in workers' compensation law. *Id*. In *Sell v. Gama*, 231 Ariz. 323, ¶ 31 (2013), Justice Pelander reiterated *McKay's* fundamental principle that, "The lower courts are bound by our decisions, and this Court alone is responsible for modifying that precedent."

Valencia is still good law. Whether it remains so is not for Judge Starr or this Court to decide. Thus, Judge Starr erred by evading this Court's mandate.

"The duty of the respondent court and judge to comply with the mandate may not be questioned or evaded. The law is that the mandate must be strictly followed.

It is binding on the trial court and enforceable according to its true intent and meaning." *Vargas v. Superior Court of Apache County*, 60 Ariz. 395, 397 (1943).

This Court has an obligation to end the chaos engendered by the ruling below by reversing and insisting its mandate is followed. *Id.*

3. *Jones* did not change the law.

The substance of MCAO's *Jones* argument and Judge Starr's ruling below is also erroneous.

MCAO concedes that it has argued from "the beginning" (App-W at 289A) that *Miller* does not apply in Arizona because "natural life" sentences were not mandatory after parole was abolished in 1994. This argument has been wrong "from the beginning," and *Jones* provides no occasion to reconsider it.

Jones changed nothing about Eighth Amendment law.

Chief Justice Bales predicted *Jones* in *Valencia* and Judge Duncan did the same in her rulings below. *See Valencia*, 241 Ariz. 206, 210, ¶ 17 (quoting *Montgomery*, 577 U.S. at 212); (App-L).

Thus, *Jones* provides no basis for speculation about the Arizona Supreme Court's decision in *Valencia*.

a. The Eighth Amendment prohibits mandatory life-without-parole sentences for juveniles, not mandatory "natural life."

MCAO (App-T at 253A; App-V at 274A), Judge Starr (App-A at 6A), Judge Reinstein (App-C at 14A), and Judge Winthrop (App-F at 92A, ¶ 4) have all substituted the term "mandatory natural life" for the applicable threshold: "mandatory life-without-parole." *See Miller*, 567 U.S. at 489; *Montgomery*, 577 U.S. at 195; *Jones*, 141 S.Ct. at 1314 (explaining the Eighth Amendment prohibits mandatory life-without-parole schemes for juveniles.)

Parole was abolished in 1994. *See* 1993 Ariz. Sess. Laws, ch. 255, § 86.

The offenses in this case occurred in 1999.

The sentences available at the time were death, natural life and life with the possibility of executive clemency after 25 years. MCAO argues that *Miller* does not apply because natural life was not mandatory. (App-T at 253A; App-V at 274A). MCAO's argument can be reduced to the following three-part syllogism:

> 1. Natural life is a version of life-without-parole.
>
> 2. The original sentencing judge had the discretion to impose a sentence less than natural life because life with the possibility of executive clemency was also a sentencing option.
>
> 3. Therefore, Arizona's sentencing scheme complied with *Miller* because there was discretion to impose a sentence less than natural life.

However, MCAO's legal syllogism breaks down at the second step. A life sentence with the possibility of clemency is also a version of life-without-parole.

This is because clemency is not equivalent to parole. *See Solem v. Helm*, 463 U.S. 277, 300-01 (1983).

Thus, the choice available at the second step of MCAO's syllogism was between two versions of life-without-parole sentences.

In *Chaparro v. Shinn*, 248 Ariz. 138, 141-42, ¶¶ 14-16 (2020), our Supreme Court noted the differences between executive clemency and parole. Clemency is an executive's act of grace to substitute mercy for a proscribed punishment whereas parole is conditional release dependent upon proof of rehabilitation. *Id.* Clemency requires clear and convincing evidence that the offender's conduct will conform to the law upon release whereas parole requires only a showing of a substantial probability. *Id.* Clemency is only subject to review every five to ten years whereas parole is every six months to one year. *Id.* Clemency is an ad hoc executive function, whereas parole is a regular part of the rehabilitation process. *Id.*

Miller unequivocally held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. This is because mandatory life-without-parole

"disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 478.; *see, also Graham v. Florida*, 560 U.S. 48, 70 (2010) (finding Florida's executive clemency insufficient because, unlike parole, it does not mitigate the extreme nature of a life sentence imposed upon a juvenile).

Nothing in *Jones* suggests that *Miller's* holding changed. As Justice Kavanaugh declared, *Jones*:

> [C]arefully follows both *Miller* and *Montgomery*. The dissent nonetheless claims that we are somehow implicitly overruling those decisions. We respectfully but firmly disagree: Today's decision does not overrule *Miller* or *Montgomery*. *Miller* held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding. *Montgomery* later held that *Miller* applies retroactively on collateral review. Today's decision likewise does not disturb that holding.

Jones, 141 S.Ct. at 1321.

Judge Starr's ruling below perpetuated an error that MCAO has wrongly insisted to be true "from the beginning." (App-A at 6A; App-W at 289A).

Nearly a decade of error is enough.

b. *Jones* declined to add fact-finding requirements before a JLWOP sentence may be imposed.

The issue presented in *Jones* was whether a "sentencer must also make a separate factual finding of permanent incorrigibility before sentencing a murderer under 18 to life-without-parole." *Jones*, 141 S.Ct. at 1314.

Thus, the holding in *Jones* was narrow, albeit predicted by *Miller* and *Montgomery*, which "squarely rejected such a requirement." *Id*.

Jones did not overrule *Miller* or *Montgomery*. *Id*. at 1321. As *Jones* noted, "*Montgomery* then flatly stated that '*Miller* did not impose a formal factfinding requirement' and that 'a finding of fact regarding a child's incorrigibility…is not required.'" *Id.* at 1314 (quoting *Montgomery*, 577 U.S. at 21).

Judge Starr and MCAO are both wrong in concluding that *Jones* changed anything. (App-A at 7A; App-T at 251A).

Montgomery explicitly rejected formal fact-finding requirements concerning permanent incorrigibility before a JLWOP sentence may be imposed. *Montgomery*, 577 U.S. at 21. *Jones* upheld the existing rationale announced in *Montgomery*. *Jones*, 141 S.Ct. at 1314.

The law simply did not change. Rather than change the law, *Jones* reinforced the analysis of our own Supreme Court in *State v. Valencia*, 241 Ariz. 206 (2016).

c. *Valencia* predicted *Jones*.

Judge Starr concluded that the United States Supreme Court decision in *Jones* to not add formal fact-finding requirements or to impose a permanent incorrigibility burden on sentencers before imposing life-without-parole sentences meant that the Arizona Supreme Court wrongly decided *State v. Valencia*, 241 Ariz. 206 (2016). (App-A at 6A-7A).

But Judge Starr conflated the issue decided in *Valencia* to be the same as the issue decided in *Jones*. This was clear error.

Valencia addressed the burden a juvenile must carry in proving his previously imposed life-without-parole sentence is unconstitutional during subsequent post-conviction proceedings. 241 Ariz. at 210, ¶ 18. *Valencia* did not require sentencing courts to make a permanent incorrigibility finding before imposing a life-without-parole sentence. *Id*. Rather, Chief Justice Bales expressly disavowed that trial courts were required to make such findings when he explained that "*Montgomery* noted that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility.'" *Id*. at 210, ¶ 17 (quoting *Montgomery*, 136 S.Ct. at 736).

Instead of simply giving every juvenile sentenced under Arizona's mandatory life-without-parole scheme a *Miller*-compliant resentencing hearing, *Valencia* required juveniles to first carry the burden of proof, by a preponderance of the evidence under existing post-conviction rules, that the sentence was unconstitutional by showing the crimes reflected transient immaturity. *Valencia* 241 Ariz. at 210, ¶ 18 (citing *Montgomery*, 136 S.Ct. at 736-37).

Nothing in *Jones* undermines *Valencia's* procedure or burden concerning an as-applied challenge to a JLWOP sentence. Rather, *Jones* expressly embraced Eighth Amendment transient immaturity standard.

d. *Jones* embraced *Valencia's* transient immaturity standard for as-applied challenges to JLWOP sentences.

The defendant in *Jones* was resentenced after *Miller* was decided. *Jones*, 141 S.Ct. at 1312-1313. Like Arizona, Mississippi had a mandatory life-without-parole sentencing scheme where the only mechanism for release was executive clemency. *Parker v. State*, 119 So.3d 987, 997 (Miss. 2013) (explaining that Mississippi's "[c]onditional release is more akin to clemency," which did not satisfy *Miller*.).

Unlike Arizona, Mississippi gave every juvenile resentencing hearings simply upon a showing that they were sentenced under a mandatory JLWOP scheme.

Juveniles in Mississippi did not bear a post-conviction burden of proving JLWOP was unconstitutionally applied in their case before getting resentenced. *Jones v. State*, 122 So.3d 698, 703 (Miss. 2013).

The juvenile in *Jones* was resentenced under a *Miller*-compliant scheme which afforded the sentencer the discretion to impose a parole-eligible sentence. *Jones*, 141 S.Ct. at 1313

The juvenile in *Jones* was resentenced to life-without-parole. *Id.*

But the juvenile in *Jones* did not raise an as-applied challenge to his sentence on appeal to the United States Supreme Court. Justice Kavanaugh noted the limited nature of the *Jones* holding: "Moreover, this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence." 141 S.Ct. at 1322

Even though *Jones* did not address an as-applied challenge, it nonetheless reaffirmed the Eighth Amendment standard announced in *Montgomery* and applied in *Valencia*. Justice Kavanaugh noted that even though a

> finding of [permanent incorrigibility] is not required . . . should not be construed to demean the substantive character of the federal right at issue. That *Miller* did not impose a formal factfinding requirement **does not leave States free to sentence a child whose crime reflects**

> **transient immaturity to life without parole.** To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.

Jones, 141 S.Ct. at 1315, fn. 2 (citing *Montgomery*, 577 U.S. at 211) (emphasis added).

Judge Starr's reading of *Jones* was simply wrong. Judge Starr conflated the absence of a need for formal factual findings before imposing a sentence with the constitutional standard for attacks on the application of JLWOP sentences.

Jones embraced *Valencia's* as-applied transient immaturity burden applicable to post-conviction challenges to JLWOP sentences. *Jones*, 141 S.Ct. at 1315, fn. 2.

Unlike Judge Starr, Judge Duncan's prior ruling on the applicable sentencing procedures properly delineated the difference between a post-conviction *Valencia* hearing and *Miller*-compliant sentencing hearing.

e. Judge Duncan accurately predicted *Jones* in this case.

Judge Starr's ruling completely ignored Judge Duncan's prior rulings in the same case. (App-A). Judge Duncan rejected MCAO's argument that *Valencia's* transient immaturity standard would apply at the resentencing because this Court had granted relief and remanded for resentencing, not a post-conviction evidentiary hearing. (*Compare* App-L *with* App-K). Similarly, Judge Duncan rejected Mr.

Arias's arguments that the state bore a burden of proving permanent incorrigibility beyond a reasonable doubt. (*Compare* App-L *with* App-J). When asked whether there was a burden regarding permanent incorrigibility or transient immaturity, Judge Duncan reiterated her ruling that there was not "any burden" because there is "no presumption." (App-M at 170A). Consistent with *Montgomery*, *Valencia*, and *Jones*, Judge Duncan intended to apply her discretion in deciding whether to impose a parole-ineligible sentence. (App-L; App-M at 158A).

This discretionary procedure is all that *Jones* says *Miller r*equires. *Jones*, 141 S.Ct. at 1317.

Nothing in *Jones* required reconsideration of Judge Duncan's ruling. Certainly, nothing justified Judge Starr's evasion of this Court's mandate because *Jones* changed nothing about Eighth Amendment law.

B. This Court must enforce its mandate.

The United States Supreme Court changed nothing about its Eighth Amendment jurisprudence when it decided *Jones v. Mississippi*, 141 S.Ct. 1307 (2021). The Arizona Supreme Court has not overruled *State v. Valencia*, 241 Ariz. 206 (2016).

Therefore, this Court must correct the chaos that has been caused by the ruling below and enforce this Court's prior mandate. *See McKay v. Indus. Comm'n*, 103 Ariz. 191, 193 (1968).

1. By stipulating to re-sentencing, MCAO has conceded that a JLWOP sentence is unconstitutional in this case.

When the Arizona Supreme Court announced the transient immaturity post-conviction burden in *State v. Valencia*, 241 Ariz. 206 (2016), Chief Justice Bales provided only one caveat, where, if met, juveniles would not be subjected to the burden before being entitled to resentencing. The caveat was: "If the State does not contest that the crime reflected transient immaturity, **it should stipulate to the defendant's resentencing** in light of *Montgomery* and *Miller*." *Valencia*, 214 Ariz. at 210, ¶ 18. (Emphasis added).

After the United States Supreme Court vacated this Court's prior decision and remanded for consideration in light of *Montgomery*, this Court ordered MCAO to submit briefing on the applicability of both *Valencia* and *Montgomery* to this case. (App-G).

Rather than argue that Mr. Arias must meet *Valencia*'s post-conviction transient immaturity standard, MCAO waived the argument and stipulated to resentencing. (App-H).

Instead of proceeding directly with resentencing, the lower court evaded this Court's mandate from the moment it was remanded. Admittedly, Mr. Arias's counsel stipulated to delaying the proceedings and apparently agreed that the scope of this Court's remand included a resentencing hearing where life-without-parole could be imposed. (*See* App-I; App-J). But mandates may not be evaded under any circumstance, even upon stipulation of the parties. They must be strictly followed.

"The duty of the respondent court and judge to comply with the mandate may not be questioned or evaded. The law is that the mandate must be strictly followed. *Vargas v. Superior Court of Apache County*, 60 Ariz. 395, 397 (1943). Orders issued by a lower court in violation of a higher court's mandate are invalid because they exceed the scope of the lower court's jurisdiction on remand; thus, they must be vacated. *Raimey v. Ditsworth*, 227 Ariz. 552, 559, ¶ 19 (App. 2011).

Therefore, the lower court's failure to abide this Court's mandate and hold MCAO to its stipulation was prejudicial fundamental error, as the failure to abide by

the strict mandate went to "the foundation of the case." *See State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018).

The Maricopa County Superior Court lacked subject matter jurisdiction to do anything that exceeded the scope of this Court's mandate. Parties are powerless to stipulate to an unlawful extension of a lower court's jurisdiction on remand. *See State v. Maldonado*, 223 Ariz. 309, 311, ¶ 14 (2010) (explaining limited nature of subject-matter jurisdiction of a lower court on remand).

This Court should hold MCAO to its stipulation and remand, directing the lower court to impose a parole-eligible sentence.

2. Alternatively, Mr. Arias is entitled to a discretionary *Miller*-compliant sentencing proceeding.

If this Court does not ascribe the plain meaning to MCAO's stipulation articulated in *Valencia*, it nonetheless must grant relief. *Jones* changed nothing about Eighth Amendment law. Mr. Arias was sentenced under a mandatory JLWOP scheme. Thus, Judge Starr's failure to abide this Court's mandate was legally erroneous. The lower court did not have subject matter jurisdiction to examine the original sentencing and find it sufficient. *Maldonado*, 223 Ariz. 309, 311, ¶ 14

On remand, the Maricopa County Superior Court must be ordered to do what it has flatly refused to do for nearly a decade: follow *Miller's* directive. *See State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012) (relief warranted where denial of post-conviction relief is predicated upon legal error).

CONCLUSION

Almost a decade has passed since *Miller* was decided. But not one juvenile sentenced to natural life in Maricopa County for a homicide offense has been resentenced.

Justice Kavanaugh noted that *Miller* and *Montgomery* have been consequential because "many homicide offenders under 18 who received life-without-parole sentences that were final before *Miller* have now obtained new sentencing proceedings and have been sentenced to less than life without parole." *Jones*, 141 S.Ct. at 1322.

But Maricopa County lags behind the rest of the country and the rest of the state. *See* Ariz.R.Evid. 201(c)(2); *State v. Valenzuela*, 109 Ariz. 109, 110 (1973) (authorizing "judicial notice of the records of the Superior Court.").

It simply refuses to apply the law.

This Court should grant review and issue a second mandate directing the Maricopa County Superior Court give force to MCAO's stipulation and this Court's mandate to resentence Mr. Arias to parole-eligible sentences.

Alternatively, this Court should grant review and order the Maricopa County Superior Court to conduct a *Miller*-compliant sentencing.

RESPECTFULLY SUBMITTED February 10, 2022.

MARICOPA COUNTY PUBLIC DEFENDER

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