ARIZONA SUPREME COURT

STATE OF ARIZONA ex rel. RACHEL H. MITCHELL, Maricopa County Attorney Petitioner/Plaintiff, vs. THE HONORABLE KATHERINE COOPER, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, LONNIE ALLEN BASSETT, Real Party in Interest/Defendant.	No. CR-22-0227-PR No. 1 CA-SA 22-0152 Maricopa County Superior Court No. CR2004-005097 **STATE'S PETITION FOR REVIEW REPLY**

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A. Bassett's natural life sentence is not mandatory within the meaning of *Miller*.

Bassett misunderstands the State's preclusion argument. To the extent Respondent Judge *relied only on Miller v. Alabama*, 567 U.S. 460 (2012), in finding his natural life sentence was mandatory, that claim is precluded because it was finally adjudicated in 2013 when the postconviction court expressly found Bassett's natural life sentence was not mandatory and that he was not entitled to relief pursuant to *Miller* and when Bassett did not petition for review of that finding. *See* Ariz. R. Crim. P. 32.2(a)(2) & (3), (b). Because none of the cases *after Miller*, including *Montgomery v. Louisiana*, 577 U.S. 190 (2016) and *State v. Valencia*, 241 Ariz. 206 (2016), address the characterization of Bassett's natural life sentence in Count 1—whether it was mandatory—there was no change in the law allowing Respondent Judge to revisit, much less overturn, that previous determination. Thus, contrary to Bassett's assertion, his claim that his natural life sentence was unconstitutional based on *Miller* alone is precluded because it was finally adjudicated in 2013. (Resp. at 8-9.)

Notwithstanding preclusion, all of Bassett's arguments that his natural life sentence on Count 1 was mandatory simply cannot be reconciled with his sentence of life with the possibility of parole after 25 years that was imposed on Count 2. Bassett's assertions that the sentencing scheme in effect when he was sentenced was unconstitutional because it "failed to afford the court the discretion to impose a

sentence that carried the possibility of parole," is belied not only by Bassett's individualized sentencing hearing wherein his mitigation was presented through the lens of *Roper v. Simmons*, 543 U.S. 551 (2005) and considered as required by Arizona law, but by the very sentence that was imposed on Count 2. (Resp. at 10, 11.)

Bassett's contention that the State has not offered any legal argument that counters "the Supreme Court's finding in *Miller* that included Arizona as a state with mandatory sentencing scheme," completely ignores the State's citations to *State v. Wagner,* 194 Ariz. 310, 313 ¶11 (1999), *State v. Fell*, 210 Ariz. 554, 557, ¶11 (2005), and *State v. Cruz*, 218 Ariz. 149, 160, ¶42 (2008), where this Court interpreted § 13-703 as discretionary and viewed the alternative life sentences in § 13-703 as natural life and life *with the possibility of parole*. (Pet. at 16-17.) Neither the United States Supreme Court, including *Miller*, nor "any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

Indeed, the *Valencia* concurrence recognized that although *Miller*'s footnote 13 "implied" life without the possibility of parole was mandatory, a review of Arizona's statutes show it was not. 241 Ariz. at 210, ¶ 23. Consistent with this Court's interpretation of § 13-703 (now § 13-752), the Ninth Circuit recently rejected an Arizona defendant's argument that his natural life sentence violated *Miller*

because Arizona was listed as a jurisdiction that required life without parole sentences. *Jessup v. Shinn*, 31 F.4th 1262, 1267 (9th Cir. 2022). *Jessup* found "*Miller* addressed situations in which the sentencing authority imposed a sentence of life without parole *automatically*, with no individualized sentencing considerations whatsoever," which is clearly not what happened in Bassett's case.

In any event, footnote 13 of *Miller* was dicta and is not binding on this Court. *See State v. Soto-Fong*, 250 Ariz. 1, 9, ¶32 (2020) ("This Court, of course, is bound to follow applicable *holdings* of United States Supreme Court decisions, but not mere dicta or other statements that allegedly bear on issues neither presented nor decided in such decisions.") (emphasis added). *Miller*'s holding had nothing to do with Arizona's statutory scheme or footnote 13. The focus in *Miller* was discretion in sentencing. Moreover, by citing to "Ariz. Rev. Stat. Ann. § 41-1604.09(I) (West 2011)," the Supreme Court's reliance on the then-missing parole procedures to reach that conclusion did not contemplate that Arizona would implement parole procedures in 2014 via A.R.S. § 13-716, which was applied to Bassett's sentence in Count 2.

Contrary to Bassett's assertion, the court's ability to impose a parole-eligible sentence was certainly not theoretical in Bassett's case. (Resp. at 13.) And Bassett's recognition that even after the elimination of parole, prosecutors continued to offer parole and judges continued to accept such agreements *supports* the State's argument

that Bassett's natural life sentence was discretionary, not mandatory. (Resp. at 13.) As *Jessup* recognized, this "misunderstanding by the sentencing judge and everyone else … was apparently common" and the "Arizona reporter is full of cases in which the sentencing judge mistakenly thought that he or she had discretion to allow parole." *Id*. at 1267 n.1 (Citing *Chaparro v. Shinn*, 248 Ariz. 138 (2020) and *State v. Vera*, 235 Ariz. 571 (App. 2014.))

In arguing his natural life sentence was mandatory, Bassett contends that "Respondent Judge's reliance on the analysis of *Valencia* and *Wagner* was consistent with the holdings of *Miller* and *Jones*." (Resp. at 15.) This contention is incorrect not only because *Valencia* and *Wagner* are not consistent with *Miller*'s holding as narrowly construed by *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), but also because *State v. Wagner*, 253 Ariz. 201 (App. May 10, 2022), was not decided when Respondent Judge issued her ruled on April 25, 2022. (*See* Attachment A.) To the extent that *Wagner* found Wagner's natural life sentence was mandatory, the State respectfully asserts Wagner was wrongly decided for the same reasons set forth above and in the State's petition and the State's petition for review in that case is currently pending before this Court. Moreover, Bassett's assertion ignores that *Valencia* specifically found petitioners' natural life sentences "were not mandatory." 241 Ariz. at 208, ¶11.

Lastly, Bassett provides no support for his assertion that his natural life

sentence was mandatory because parole procedures did not contemporaneously exist at the time of sentencing. (Resp. 14-15.) Notwithstanding his unsupported assertion, that argument was correctly rejected in *Jessup*. *Jessup* found "[n]othing in the record suggests that the precise form of potential release at issue had any effect on the sentencing judge's exercise of discretion." *Id*. at 1267. Moreover, the focus in *Miller* was discretion in sentencing, which was undeniably exercised here. Bassett simply cannot overcome the reality that he was sentenced to a parole-eligible sentence for Count 2, which indisputably demonstrates his sentencer had the discretion required by *Miller*.

B. Bassett is not entitled to an evidentiary hearing "pursuant to *Valencia*" for "adequate consideration" of, or to give the "required weight" to, Bassett's youth and attendant characteristics because neither *Miller* nor *Valencia* contain such a requirement.

Basset contends that "*Miller* requires, for a juvenile offender, an individualized sentencing hearing during which the sentencing judge assesses whether the juvenile defendant warrants a sentence of life with the possibility of parole." (Resp. at 22.) That is precisely the type of sentencing hearing that Bassett already received in 2006 when his sentencer determined a natural life sentence was appropriate for Tapia's murder (Count 1) and a sentence of life with the possibility of parole after 25 years was appropriate for Pedroza's murder (Count 2).

The overall flaw in Bassett's response is his unsupported perpetuation of Respondent's Judge's erroneous interpretation of *Miller* and its progeny. Consistent

with Respondent Judge's ruling, Bassett repeatedly asserts that he is entitled to a hearing because his youth and attendant characteristics were not "adequately considered" as required by *Miller*.[1] (Resp. at 2, 5, 18, 22.) But like Respondent Judge, Bassett fails to quote or cite anything in *Miller* supporting that finding. This is because *Miller*, 567 U.S. 460, contains no such requirement. Nor does *Valencia*, 241 Ariz. 206.

Likewise, a constitutional sentencing that satisfies *Miller* does not require "the judge to determine whether [Bassett] was among the 'rarest of juvenile offenders.'" (Resp. at 21.) That language comes from *Montgomery*, 577 U.S. at 209, and is not part of *Miller*'s holding. *Jones*, 141 S. Ct. at 1314-16, 1321. Additionally, Bassett's assertion that *Miller*'s "substantive holding" is "life without parole is an excessive sentence for children whose crimes reflect transient immaturity" is also not part of *Miller*'s holding. (Resp. at 19.) Again, that language comes from *Montgomery*, as recognized by Bassett with his citation to *Montgomery*. (*Id*.) Finally, Bassett's argument that a sentencer must consider the "sentencing factors" described in *Miller*, is also not found in *Miller*, but in *Montgomery*. (Resp. at 19.)

Bassett's contention that *Miller* has all these requirements that were not met

[1] Curiously, Bassett does not also argue that he was entitled to a hearing because his sentencer did not give "Bassett's youth and attendant characteristics the weight required by *Miller*" as found by Respondent Judge. (Attachment A at 4.) Presumably, Bassett recognized that *Miller* contains no such requirement.

in Bassett's sentencing is simply irreconcilable with *Miller*, as narrowly construed by *Jones*, 141 S. Ct. at 1311-16, 1321 (2021) and by this Court in *Soto-Fong*, 250 Ariz. at 7, ¶¶19-23, which both clarified *Miller* mandates only "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." Furthermore, *Jones* clarified that *Montgomery* only made *Miller* retroactive and "did *not* purport to *add* to *Miller*'s requirements." *Jones*, 141 S. Ct. at 1311-16, 1321 (emphasis added.).

Nothing in *Miller* requires a particular "weight" or dictates "adequate consideration" of a juvenile's youth and attendant characteristics. Nor does *Miller* prescribe what, or how much, information must be presented when sentencing a juvenile offender. *Jones* confirmed that *Miller* does not require a court make formal or specific findings, use magic words, or make an "on-the-record sentencing explanation." *Jones*, 141 S. Ct. at 1319-21. Unless the record affirmatively establishes otherwise, which it does not here, the sentencing court "will be deemed to have considered the relevant criteria, such as mitigating circumstances enumerated in the sentencing rules" and presented to the court. *Id.*

In addition to ignoring the State's detailed recitation of what was presented at sentencing and inaccurately claiming his sentencer merely acknowledged his age, Bassett also ignores Arizona sentencing scheme, which *required* Bassett's sentencer to consider his age. *See Valencia*, 241 Ariz. at 210-11, ¶23 (Bolick, J., concurring)

(citing § 13-701(E)(1)). And, in considering a juvenile's age, Arizona law required consideration of a "defendant's level of maturity, judgment and involvement in the crime," *State v. Greenway*, 170 Ariz. 155, 170 (1991), and, as noted by the prosecutor in Bassett's case, a defendant's "1) level of intelligence, 2) maturity, 3) participation in the murder, and 4) criminal history and past experience with law enforcement." *Id*. (App106 (citing *State v. Clabourne*, 194 Ariz. 379 (1999).)

Despite *Miller*'s holding, as narrowly construed by *Jones* and *Soto-Fong*, and the State's detailed recitation of what was presented at sentencing, Bassett continues to claim that "more" is needed for his natural life sentence to pass constitutional muster—more consideration (or more weight) of his youth and attendant characteristics, more information, consideration of whether his "crimes reflect transient immaturity," and a determination that he is the "rarest of juvenile offenders." (Resp. at 18-23.) But again, nothing in *Miller*'s holding requires this "more" as asserted by Bassett.

Although Bassett seems to recognize that a "judge is not constitutionally required to make a particularized factual finding that a juvenile is permanently incorrigible or to provide an on-the-record sentencing explanation," he nonetheless continues to make these unsupported assertions that more is required. (Resp. at 18-19 (also seeming to recognize that *Miller*'s holding is narrow and mandates only that a sentencer must follow a certain process and consider an offender's youth and

attendant characteristics before imposing a life without parole sentence).) This is likely because, as recognized by Justice Thomas in his *Jones*' concurrence, "[w]ithout more, the fact that *Miller* was now retroactive" does not help Bassett "as he had already received the 'individualized' hearing *Miller* required." *Jones*, 141 S. Ct. at 1324 (Thomas, J., concurring).

Lastly, *Wagner* does not support Respondent Judge's findings and Bassett's assertions that "more" is required under *Miller*. *Wagner* found that *Valencia*'s requirement that petitioners "were entitled to evidentiary hearings where they would 'have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity,'" was still tenable after *Jones*. *Wagner*, 253 Ariz. at ¶11 (quoting *Valencia*, 241 Ariz. at 210, ¶18.)[2] But Respondent Judge did not find Bassett was entitled to a hearing to establish that his "crimes did not reflect irreparable corruption but instead transient immaturity." Thus, *Wagner* does not support Respondent Judge's findings or Bassett's arguments.

[2] Of note, as recently recognized by the court of appeals in *State v. Odom*, No. 1 CA-CR 21-0537 PRPC, 2022 WL 4242815 (Ariz. Ct. App. Sept. 15, 2022), "courts throughout Arizona have applied *Jones* differently," and "if not for the *Valencia* precedent, we would affirm the superior court's dismissal here because both the *Miller* and *Montgomery* requirements were met." The court further suggested that it "would be helpful for the Arizona Supreme Court to clarify whether it required *Valencia* hearings only based on its pre-*Jones* reading of *Miller* and *Montgomery* or wants to continue requiring the superior court to hold *Valencia* hearings in light of *Jones*." *Id*. at ¶6. The State intends to petition for review of *Odom*.

In sum, Bassett received a constitutionally individualized sentencing that complied with *Miller*. He is not entitled to hearing to present "more" or what he, and Respondent Judge, deem "necessary" for "adequate consideration" of his youth and attendant characteristics. This Court should grant review, clarify that *Jones* abrogated *Valencia*'s holding and that *Miller*'s holding is narrow, mandating '*only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence," *Jones*, 141 S. Ct. at 1314-16, 1321, and reverse and vacate Respondent Judge's findings to the contrary.

Respectfully Submitted October 14, 2022.

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