ARIZONA SUPREME COURT

STATE OF ARIZONA, ex rel. RACHEL H. MITCHELL, Maricopa County Attorney,

Petitioner,

vs.

HON. 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.

No. CR–22–0227–PR

Court of Appeals
No. 1 CA–SA 22–0152

Maricopa County Superior Court
No. CR2004–005097

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEY GENERAL IN SUPPORT OF THE STATE OF ARIZONA

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Linley Wilson
Deputy Solicitor General /
Section Chief of Criminal Appeals

Eliza C. Ybarra
Assistant Attorney General
Criminal Appeals Section
2005 N. Central Ave.
Phoenix, Arizona 85004
Telephone: (602) 542–4686
CADocket@azag.gov
(State Bar Number 022395)
Attorneys for Amicus Curiae
Arizona Attorney General

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INTEREST OF AMICUS CURIAE

The Arizona Attorney General, as the State's chief legal officer, *see* A.R.S. § 41-192(A), has a manifest interest in ensuring that criminal defendants' sentences are correctly and constitutionally imposed. The Attorney General also has an interest in ensuring that state and federal courts correctly resolve federal constitutional claims raised by state-convicted defendants. Notably, the Attorney General's Office is the only prosecutorial agency in Arizona that regularly litigates federal habeas corpus cases arising from state-court convictions.

Federal habeas courts have the power to unravel state convictions and sentences that would otherwise be final—but only if they are contrary to or an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d). Accordingly, it is paramount that Arizona courts exercise "their rightful opportunity to adjudicate federal rights" in a manner that furthers "the principles of comity, finality, and federalism." *See Williams v. Taylor*, 529 U.S. 420, 436-37 (2000). When Arizona courts consistently resolve federal constitutional claims, this consistency reduces the likelihood that federal courts will later "use[] federal habeas corpus review as a vehicle to second-guess [Arizona's] reasonable decisions." *Renico v. Lett*, 559 U.S. 766, 779 (2010).

INTRODUCTION

Bassett received different prison sentences for each of the two murders he committed on June 16, 2004. *See* Petition, Attachment A ("Decision") at 2. One sentence gave him the possibility of release after a period of years. The other, his natural life sentence, did not. *Id.* Despite the clear availability of the lesser sentence (which Bassett actually received for the other conviction), the superior court inexplicably found that Bassett's greater, natural life sentence was "mandatory" in violation of *Miller v. Alabama*, 567 U.S. 460, 465 (2012). *Id.* at 4-5.

The superior court ignored a decade of Arizona precedent in reaching this conclusion, which conflicts with dozens of state cases and contradicts federal habeas cases interpreting Arizona law. It failed to distinguish prior cases holding that natural life sentences imposed on juvenile defendants within the same time period were not "mandatory" within the meaning of *Miller*.

The superior court also committed another error of law when it decided that an irreparable corruption finding continues to be necessary before a juvenile offender may be sentenced to natural life. Decision, at 3-5. Based on this dubious conclusion, the superior court ordered an unwarranted *Valencia* hearing. Decision, at 4-6; *see State v. Valencia*, 241 Ariz. 206 (2016).

Without analysis, the court of appeals declined to accept special action review. *See* Petition, Attachment C. Until this Court accepts review of the important legal issues presented in the State's petition for review, lower courts will presumably continue to order such hearings, even though the issue to be decided at them is now constitutionally irrelevant, squandering precious judicial resources. *See State v. Odom*, 1 CA-CR 21-0537-PRPC, 2022 WL 4242815, at *1, ¶ 6 (Ariz. App. Sept. 15, 2022) (stating, in a similar case, that it "would be helpful" for this Court to clarify whether *Valencia* hearings should continue to be held). This has already occurred in four other cases, including three currently pending before this court: *State v. Wagner*, 253 Ariz. 201 (App. 2022) (petition pending); *State v. Cabanas*, 1 CA-CR 21-0534-PRPC, 2022 WL 2205273 (Ariz. App. June 21, 2022) (petition pending); *State v. Arias*, 1 CA-CR 22-0064-PRPC, 2022 WL 3973488 (Ariz. App. September 1, 2022) (petition pending), and *Odom*, 2022 WL 4242815 (petition anticipated).

Due to the recurring nature of this statewide issue, this Court should grant review. Only this Court can remedy the widening gulf between existing Arizona law and cases following *Wagner*'s reasoning (like the Decision, *Cabanas*, *Arias*, and *Odom*). Contrary to the superior court's conclusion, Decision, at 4-5, a permanent incorrigibility inquiry is no longer required. *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). *See Valencia*, 241 Ariz. at 210, ¶ 18.

ARGUMENTS

I. The Decision Is Irreconcilable with a Decade of Arizona Precedent and Conflicts with Federal Habeas Decisions Analyzing Arizona Law.

A brief summary of the law governing *Miller* claims shows that the superior court was misguided in insisting that contemporaneous parole implementation procedures must exist to satisfy *Miller*.

A. *Miller* requires individualized sentencing and the consideration of youth and attendant circumstances prior to imposing a life sentence without the possibility of parole.

Miller held that mandatory life-without-parole sentences for juvenile homicide offenders were unconstitutional. 567 U.S. at 470. Life-without-parole sentences are permitted, but only if states provide an individualized sentencing hearing where the sentencer considers whether the defendant's youth and attendant circumstances merit a lesser sentence. *Id.* at 483.

In *Miller*, the two defendants received automatic life-without-parole sentences because their state statutory schemes provided only one option for juvenile homicide offenders. *See id.* at 474 ("[T]he mandatory penalty schemes at issue here *prevent* the sentencer from taking account" the characteristics of youth.) (emphasis added); *see id.* at 466, 469. Because of the automatic, single sentencing option (given that death was unconstitutional for juvenile offenders), the *Miller* sentencers were prevented from considering whether youth and immaturity might justify a lesser sentence. *Id.* at 466, 469.

Miller forbids life-without-parole sentences that are imposed automatically, due to the lack of any other option, without considering whether the juvenile's youth and attendant circumstances might justify a lesser sentence. However, "a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth." *Jones*, 141 S. Ct. at 1321; *see id.* at 1314 ("*Miller* mandated *only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence.") (cleaned up; emphasis added).

B. Arizona's statutory scheme has always provided sentencing judges with a choice between two options, despite the temporary elimination of parole procedures.

In 1994, Arizona removed the authority of any agency to implement parole procedures and did not restore this authority until 2014. *Valencia*, 241 Ariz. at 208, ¶ 11.

During the 20-year period in which parole procedures were not available, Arizona's first-degree murder statute, "A.R.S. § 13-703[,] provided two sentencing options for juveniles convicted of first-degree murder: (1) natural life; and (2) life without eligibility for release 'until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five if the victim was under fifteen years of age." *Id.* at 208, ¶ 10 (quoting A.R.S. § 13-703 (A) (Supp. 1995)).

Because sentencers *always* had a choice between two options, the harshest option was not imposed automatically, by default. Unlike the sentences at issue in *Miller*, it was *never* the only available choice.

The availability of the two choices is particularly clear in the present case, where Bassett received both types of sentences. The superior court ignored this reality and found a *Miller* violation based on the lack of available parole procedures during the 20-year period. Decision at 5.

The superior court brushed aside a 2014 Arizona statute that made parole eligibility available to those who received the lesser, release-eligible sentence. Under A.R.S. § 13-716, "[n]otwithstanding any other law," a person serving a life sentence with the possibility of release after a period of years for a crime committed while a juvenile "*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." (Emphasis added); *see Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (approving of such a process).

Because of § 13-716, sentencers always had the power to impose a release-eligible sentence that would become parole-eligible by operation of law in 2014. Though parole-eligibility changed, the sentence itself did not. In other words, they always had the power to impose a parole-eligible sentence, even during the 20-year period when parole procedures were not available.

The superior court did not dispute the availability of release-eligible sentences or the fact that they would later become parole-eligible due to § 13-716. Instead, it fixated on the irrelevant point that release is different than parole. *See* Decision at 5. But because § 13-716 expressly makes *parole* eligibility available to sentences that were previously only release-eligible, the difference is immaterial here.

In sum, regardless of whether parole procedures were available, at all relevant periods, there was always more than one sentencing option available to the sentencer. Because of this choice, neither option was mandatory. While deciding between the two options, sentencers were required to consider age, maturity, and responsibility as mitigating circumstances. *See Valencia*, 241 Ariz. at 212, ¶ 30 (Bolick, J., concurring). In other words, sentencers followed the process required by *Miller* of considering youth and attendant characteristics before imposing a life-without-parole sentence. Moreover, only those offenders who merited the harshest type of sentence are not presently eligible for parole.

C. Arizona appellate courts, for a decade, have repeatedly recognized that natural life sentences were not mandatory under *Miller*.

In the decade since *Miller*, Arizona courts consistently (and correctly) recognized that natural life sentences were not mandatory under Arizona's first-degree murder statute until *Wagner*.

Soon after *Miller* was decided, *Vera*, the leading court of appeals' opinion on this issue, held that Arizona's statutory scheme is *Miller*-compliant. *State v. Vera*, 235 Ariz. 571, 578, ¶ 26 (App. 2014) ("We cannot agree that Arizona's sentencing statute violated the rule in *Miller* by 'preclud[ing] a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.'") (quoting *Miller*, 567 U.S. at 476). The court of appeals correctly reasoned, "at all times relevant to this decision, the sentencing statute has provided what appears to be a lesser alternative to a sentence of "natural life," which renders a defendant ineligible 'for commutation, parole, work furlough, work release, or release from confinement on any basis." *Id.*

Vera viewed the lack of available parole procedures at the time of sentencing as merely an implementation problem that was cured by § 13-716. *Id.* at 576-78, ¶¶ 21-22, 26 (explaining that "§ 13-716 does not alter Vera's penalty, create an additional penalty, or change the sentence imposed," and instead merely "affect[ed] only the implementation of Vera's sentence by establishing his eligibility for parole after he has served the minimum term of twenty-five years").

Dozens of Arizona decisions have followed *Vera*'s reasoning. In several, the court of appeals expressly held that natural life sentences are not mandatory under *Miller*. *See* Petition for Review, Addendum B (citing 6). However, most cases involved release-eligible or parole-eligible sentences because those sentences

were imposed most frequently—illustrating that natural life sentences could not have been mandatory as a legal or practical matter. *See id.*, Addenda C & D (citing 28 total).

In 2016, this Court confirmed, consistent with *Vera*, that Arizona's first-degree murder statute provided "two sentencing options for juveniles convicted of first-degree murder: (1) natural life; and (2) life without eligibility for release" until after a period of years. *Valencia*, 241 Ariz. at 208, ¶ 10. It further explained that "[t]he natural life sentences at issue *were not mandatory* but did amount to sentences of life without the possibility of parole." *Id.* at 208, ¶ 11 (emphasis added).

The superior court ignored this decade of precedent by holding that Bassett's natural life sentence was mandatory because his sentencer "could not have legally imposed a sentence that included the possibility of parole." Decision at 5. That erroneous conclusion ignored the two distinct options available under the first-degree murder statute.

By choosing between the two options, Bassett's sentencer has already decided whether the harshest constitutionally available sentence was appropriate in light of Bassett's youth and immaturity. And regardless of whether parole procedures were available at the time of sentencing, had the lesser sentence been imposed, Bassett would now be eligible for parole due to § 13-716. Further, this

would be the case automatically, without the need for resentencing. This is confirmed by Bassett's lesser, parole-eligible sentence (for the other murder) that is not at issue here.

D. Federal courts have likewise held that Arizona's natural life sentences were not mandatory.

The Decision cannot be reconciled with a recent decision of the Ninth Circuit Court of Appeals, *Jessup v. Shinn*, 31 F.4th 1262, 1263 (9th Cir. 2022). *Jessup* is particularly instructive because the Ninth Circuit reversed the district court's grant of habeas relief, and the district court's flawed reasoning resembles the erroneous reasoning of the superior court here.

Jessup received a natural life sentence. *Jessup*, 31 F.4th at 1263. Jessup argued that his sentence was "mandatory" in violation of *Miller* because neither option available to his sentencer would have provided him with any realistic opportunity for parole given that parole had been abolished in 1994. *Id.* at 1267.

Though Arizona state courts rejected his argument, a federal habeas court agreed that Arizona's statutory scheme was fundamentally flawed at the time Jessup was sentenced due to the abolishment of parole. *Jessup v. Ryan*, CV-15-01196-PHX-NVW-JZB, 2018 WL 4095130, at *1 (D. Ariz. Aug. 28, 2018), *rev'd,* 31 F.4th 1262 (9th Cir. 2022). In the district court's view, both sentencing options amounted to life without parole, rendering Jessup's natural life sentence "mandatory" in violation of *Miller*. *Id.* at *8. Further, the district court believed

that Arizona's statutory scheme presented "a categorical violation of *Miller*, so Jessup *and all other juveniles then sentenced to life without parole* are entitled to resentencing[.]" *Id.* at *9 (emphasis added).

The Ninth Circuit reversed, explaining that *Miller* requires "an individualized sentencing hearing during which the sentencing judge assesses whether the juvenile defendant warrants a sentence of life with the possibility of parole." *Jessup*, 31 F.4th at 1266. In Jessup's case, "the sentencing judge thoughtfully considered whether [Jessup] warranted a sentence of life with the possibility of *any* form of release, took into account [Jessup's] youth and characteristics of young people, and concluded that [Jessup] warranted a sentence of life without any possibility of release." *Id.*

The court acknowledged Jessup's argument that "both sentences would result, as a practical matter, in a sentence of life without parole." *Id.* at 1267. However, despite this practical result, the Ninth Circuit concluded that *Miller* did not mandate a resentencing because "*Miller* addressed situations in which the sentencing authority imposed a sentence of life without parole *automatically*, with no individualized sentencing considerations whatsoever." *Id.*

The Ninth Circuit reasoned that Jessup's sentencer, "after fully considering [his] age and other relevant considerations, concluded that [he] did not warrant *any* form of release." *Id.* "Necessarily, then, the sentencing judge concluded that [he]

did not warrant a possibility of parole, which is one form of release." *Id.* "Nothing 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.*

Because Jessup's sentencer could have sentenced him to a release-eligible sentence that would "nearly certain[ly]" have made him eligible for parole in light of § 13-716, the Ninth Circuit found that Jessup's sentence was *Miller*-compliant, as have other federal cases. *Id.* at 1268; *see*, *e.g.*, *Rojas v. Ryan*, 18-15692, 2022 WL 1184162, at *1 (9th Cir. Apr. 21, 2022); *Rue v. Roberts*, 17-17290, 2022 WL 3572946, at *1 (9th Cir. Aug. 19, 2022); *Aguilar v. Ryan*, 17-16013, 2022 WL 3573068, at *1 (9th Cir. Aug. 19, 2022).

This Court should grant review to correct the Decision's unavoidable conflict with *Jessup*. If it stands, it will inevitably lead to litigation in federal courts over the correct characterization of Arizona's first-degree murder statute for *Miller* purposes. As *Jones* makes clear, that question is fundamentally one of Arizona law, not federal law. *See* 141 S. Ct. at 1312 (citing Mississippi law and a Mississippi Supreme Court case for the proposition that "[u]nder Mississippi law at the time, murder carried a *mandatory* sentence of life without parole"). For this reason alone, the Court should grant review.

II. The Superior Court Failed to Recognize That the Purpose of *Valencia* Hearings Is Now Constitutionally Irrelevant.

This Court's review is also necessary because the superior court misinterpreted Supreme Court precedent by failing to recognize that the "permanent incorrigibility" criteria propounded by *Montgomery* is no longer intact after *Jones*. Decision at 3-5.

A. A "permanent incorrigibility" inquiry is not constitutionally required.

Montgomery gave rise to the supposed permanent incorrigibility requirement when it held that *Miller* applied retroactively. *Montgomery*, 577 U.S. at 212. To reach this conclusion, *Montgomery* had to find that *Miller* was a substantive rule, not a procedural one. *Id.* at 200. It did so by claiming that *Miller*'s substantive holding had been "that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* at 210.

Justice Scalia dissented and pointed out that the majority was rewriting *Miller* to suit its retroactivity analysis. *Id.* at 225 (Scalia, J., dissenting) ("It is plain as day that the majority is not applying *Miller*, but rewriting it.").

In 2021, the Supreme Court accepted review in *Jones* to determine whether permanent incorrigibility was a constitutional prerequisite for a life-without-parole sentence, as *Montgomery* had implied. *Jones*, 141 S. Ct. at 1311. It held there was no such constitutional requirement, implicitly rejecting this aspect of *Montgomery*.

Id. at 1314. However, it reaffirmed *Montgomery*'s retroactivity rule and refused to admit that there had been a conflict between *Miller*'s actual holding and *Montgomery*'s characterization of *Miller*'s holding. *Id.* at 1318 n.4. Both the concurrence and the dissent criticized the majority for this and documented the conflict at length. *Id.* at 1323-41.

In any event, after *Jones*, it is clear that a finding of permanent incorrigibility is not required. *Id.* at 1321 ("[A]n on-the-record sentencing explanation with an implicit finding of permanent incorrigibility is not dictated by any historical or contemporary sentencing practice[.]"); *United States v. Briones*, 35 F.4th 1150, 1157 (9th Cir. 2021) ("*Jones* made altogether clear that—irrespective of any seemingly contrary language in *Miller* or *Montgomery*—permanent incorrigibility is not an eligibility criterion for juvenile [life without parole]."") (cleaned up).

B. *Valencia*'s holding was based on the purported permanent incorrigibility requirement.

In the wake of *Montgomery*, this Court considered how to implement the purported requirement that only irreparably corrupt juvenile offenders receive a life-without-parole sentence. *Valencia*, 241 Ariz. at 209, ¶ 14. Meanwhile, five other Arizona defendants had argued that because their sentencers had not considered whether their crimes reflected permanent incorrigibility, their natural life sentences violated *Miller*. *See Tatum v. Arizona*, 137 S. Ct. 11 (2016). The

Supreme Court granted review, vacated, and remanded the cases to state court "for further consideration in light of *Montgomery*." *Id.* at 11. In turn, *Valencia* held that because § 13-716 did not guarantee that such offenders were irreparably corrupt, an evidentiary hearing was required. *Id.* at 210, ¶ 18. *Valencia* relied on *Tatum* in reaching this conclusion; such hearings became known as "*Valencia* hearings." *Id.* at 209, ¶ 16.

However, *Jones* recently made clear that *Montgomery* imposed no such constitutional requirement (which Bassett concedes, *see* Response at 18), *see Jones*, 141 S. Ct. at 1314, endorsing the views of the *Tatum* dissenters, Justices Alito and Thomas. In their view, Arizona's decisions were "fully consistent with *Miller*'s central holding, namely, that mandatory life without parole for juvenile offenders is unconstitutional." *Tatum*, 137 S. Ct. at 13-14 (Alito, J., dissenting). Their life sentences had been imposed, "not because Arizona law dictated such a sentence, but because a court, after taking the defendant's youth into account, found that life without parole was appropriate in light of the nature of the offense and the offender." *Id.*

C. Because there is no permanent incorrigibility requirement, *Valencia* hearings no longer serve any purpose.

By 2020, this Court acknowledged that *Montgomery* had only "muddied the Eighth Amendment jurisprudential waters" by seemingly creating an "'unannounced rule that courts make a finding of "irreparable corruption" before

sentencing a juvenile offender to life imprisonment without parole[.]'" *State v. Soto-Fong*, 250 Ariz. 1, 7, ¶¶ 21-22 (2020) (partially quoting *Valencia*, 241 Ariz. at 211, ¶ 6 (Bolick J., concurring)). Backing away from such a "rule," the Court agreed with Justice Scalia that "*Miller*'*s* holding was narrow[.]" *Id.* at 7, ¶ 23. It required only that "a trial court must consider certain factors before sentencing a juvenile to life without the possibility of parole." *Id.* at 7, 9, ¶¶ 23, 31.

Soto-Fong foreshadowed *Jones* and compels a conclusion that this Court would not have created *Valencia* hearings but for *Montgomery*'s supposed permanent incorrigibility requirement. After *Jones*, a lack of permanent incorrigibility does not entitle a defendant to relief. *See Odom*, 2022 WL 4242815, at *1, ¶ 6 (confirming that "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 purely legal issue here—whether *Valencia*'s holding remains valid after *Jones* and *Soto-Fong*—is ripe for review. Absent this Court's intervention, state courts will be inundated with unnecessary evidentiary hearings while federal courts attempt to discern the correct interpretation of Arizona law in habeas litigation. This recurring issue of statewide importance indisputably warrants this Court's review.

CONCLUSION

The Attorney General respectfully requests that this Court grant the State's Petition for Review of the Decision, or alternatively, grant review of *Cabanas,* or *Wagner* (or all three).

Respectfully submitted,

Mark Brnovich
Attorney General

Linley Wilson
Deputy Solicitor General /
Section Chief of Criminal Appeals

/s/
Eliza C. Ybarra
Assistant Attorney General

Attorneys for Amicus Curiae
Arizona Attorney General