SUPREME COURT OF ARIZONA

STATE OF ARIZONA ex rel. RACHEL H. MITCHELL, Maricopa County Attorney, Petitioner; v. THE HONORABLE KATHERINE COOPER, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge; -and- LONNIE ALLEN BASSETT Real Party in Interest.	Arizona Supreme Court No. CR-22-0227-PR Arizona Court of Appeals Division One No. 1 CA-SA 22-0152 Maricopa County Superior Court No. CR2004-005097

BRIEF OF *AMICUS CURIAE* ARIZONA JUSTICE PROJECT IN SUPPORT OF REAL PARTY IN INTEREST LONNIE BASSETT

Karen S. Smith (No. 33494)
Randal McDonald (No. 32008)
ARIZONA JUSTICE PROJECT
4001 N. 3rd Street, Suite 401
Phoenix, AZ 85012
Karen.Smith@azjusticeproject.org
Randal.McDonald@asu.edu

Attorneys for Amicus Curiae Arizona Justice Project

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

INTERESTS OF AMICUS CURIAE

The Arizona Justice Project (AJP) is a non-profit organization dedicated to preventing and overturning wrongful convictions and other manifest injustices, such as excessive or unconstitutional sentences. Now in its 24th year, AJP has received several thousands of requests for assistance from Arizona inmates and has represented numerous individuals before courts of law and the Arizona Board of Executive Clemency, including many juvenile offenders who have been successfully rehabilitated. AJP has a compelling interest in ensuring affected juvenile defendants receive sentences that comply with the Eighth Amendment's prohibition on cruel and unusual punishment.

INTRODUCTION

Over the past twenty years, there has been a dramatic change in how juvenile offenders are understood. Accordingly, the U.S. Supreme Court has imposed both substantive limitations on the sentences juvenile offenders may receive and has increased procedural protections afforded to juvenile offenders in sentencing proceedings to help protect against unconstitutionally disproportionate sentences in such cases.

A sentence is unconstitutionally excessive under the Eighth Amendment if it is disproportionate to an offender's individual culpability and does not advance a legitimate penological goal when compared to a lesser sentence. *Graham v. Florida*,

560 U.S. 48, 67 (2010). In applying this analysis to juvenile offenders, the Supreme Court has repeatedly concluded that children are different from adults. In 2005, the Court outlawed the death penalty for all juvenile offenders, recognizing their "diminished culpability" and that the "penological justifications" for the most severe penalty "apply to them with lesser force than to adults." *Roper v. Simmons*, 543 U.S. 551, 571 (2005). The Court extended this analysis in *Graham v. Florida*, holding that life-without-parole (LWOP) sentences are unconstitutional for juveniles convicted of non-homicide offenses. 560 U.S. 48, 79 (2010).

In 2012, the Supreme Court held in *Miller v. Alabama* that mandatory life-without-parole sentences for juvenile homicide offenders violate the Eighth Amendment. 567 U.S. 460 (2012). The *Miller* court made clear that a sentencing judge must have discretion to impose a sentence that would provide the juvenile offender with a "'meaningful opportunity to obtain release.'" *Id.* at 479 (quoting *Graham*, 560 U.S. at 75). In 2016, the Court held that *Miller* applied retroactively. *Montgomery v. Louisiana*, 577 U.S 190 (2016). The *Montgomery* Court held that one possible remedy for "*Miller* violation[s]"—referring to the juveniles already unconstitutionally sentenced to LWOP—would be to extend parole eligibility to such offenders, which would allow "[t]he opportunity for release [to] be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 577 U.S. at 212.

In *Tatum v. Arizona*, the U.S. Supreme Court vacated several Arizona court dismissals of claims for post-conviction relief under *Miller*, ordering further consideration in light of *Montgomery*. 137 S. Ct. 11 (2016). In a concurrence explaining the Court's decision, Justice Sotomayor concluded that remand was necessary because Arizona courts had not "'take[n] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id.* (citing *Miller*, 567 U.S. at 480). Following *Montgomery* and *Tatum*, this Court held that juvenile offenders who were sentenced to natural life are entitled to evidentiary hearings to determine whether their sentences are unconstitutional under *Miller*. *State v. Valencia*, 241 Ariz. 206 (2016).

Finally, in 2021, the U.S. Supreme Court held in *Jones v. Mississippi* that sentencing courts are not required to make a finding of permanent incorrigibility before sentencing juvenile offenders to life-without-parole sentences. 141 S. Ct. 1307 (2021). However, the Court in *Jones* reiterated the central holdings of both *Miller* and *Montgomery*—that "discretionary sentencing" is necessary to "ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Id.* at 1317–18.

In its Petition for Review (PFR), the State ignores this sea change in the constitutional boundaries of juvenile offender sentencing by arguing—contrary to its prior stipulation in this case—that Mr. Bassett's sentencing proceeding, which occurred several years before *Miller* was decided, complies with the Eighth

Amendment. This Court should conclude that the Respondent Judge correctly held that Mr. Bassett's sentencing ran afoul of *Miller* and deny review.

ARGUMENT

I. THE RESPONDENT JUDGE CORRECTLY CONCLUDED THAT, AT THE TIME HE WAS SENTENCED, MR. BASSETT COULD NOT LEGALLY HAVE RECEIVED A SENTENCE THAT PROVIDED THE POSSIBILITY OF PAROLE.

"The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. 460, 479 (2012). *See also Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021) ("Today's decision does not disturb [the] holding" of *Miller* "that a State may not impose a mandatory life-without-parole sentence on a murderer under 18.").

All parties to this case agree that, effective January 1, 1994, the Arizona legislature eliminated the state's parole scheme. A.R.S. § 41-1604.09; *see also State v. Vera*, 235 Ariz. 571, 575 ¶ 17 (App. 2014) ("Because the Arizona legislature had eliminated parole for all offenders who committed offenses after January 1, 1994, and replaced it with a system of 'earned release credits,' *see* 1993 Ariz. Sess. Laws, ch. 255, § 86—which has no ready application to an indeterminate life sentence—Vera's only possibilities for release would be through a pardon or commutation by the governor.") (cleaned up).

When Mr. Bassett was sentenced in 2006, no sentence the judge could have legally imposed would have allowed for the possibility of parole. *See State v.*

Wagner, 253 Ariz. 201¶ 22 (App. 2022). Arizona law at that time provided two potential sentences for juveniles convicted of first-degree murder: (1) imprisonment for natural life without ever having the possibility of "release[] on any basis," including commutation or parole, or (2) life imprisonment without the possibility of "release[] on any basis" until after a minimum of 25 years had been served. Ariz. Rev. Stat. § 13-703(A) (1994). Because the legislature had abolished the parole system "for all offenses committed on or after January 1, 1994," *Chaparro v. Shinn*, 248 Ariz. 138, 140 ¶ 3 (2020), "the only kind of release for which [an Arizona defendant convicted of first-degree murder who received a sentence with the possibility of "release after 25 years"] would have been eligible . . . is executive clemency." *Lynch v. Arizona*, 578 U.S. 613, 615 (2016).

The State now argues that the scheme under which Mr. Bassett was sentenced was not "mandatory" under *Miller* because the court could have imposed a punishment other than natural life. But it matters what other punishment the judge actually had discretion to impose: *Miller*'s prohibition on mandatory sentencing explicitly requires a sentencer to have discretion to impose a sentence of life with the possibility of *parole* (or a less severe sentence). *See* 567 U.S. at 474–76. Such a sentence was not available under Arizona's sentencing scheme: the only possibility of "release" for which Mr. Bassett was eligible under Arizona's sentencing scheme was executive clemency, which is not constitutionally equivalent to parole. *Lynch*,

578 U.S. at 615–16; *see also Solem v. Helm*, 463 U.S. 277, 303 (1983) ("Recognition of such a bare possibility [of executive clemency] would make judicial review under the Eighth Amendment meaningless.").

The U.S. Supreme Court has explicitly held that "the remote possibility" of executive clemency is not an adequate substitute for parole. *Graham v. Florida*, 560 U.S. 48, 70 (2010). *Graham* considered a scheme similar to Arizona's: Florida had abolished its parole system, leaving executive clemency as the only available form of release. *Id.* at 57 ("Because Florida has abolished its parole system . . . a life sentence gives a defendant no possibility of release unless he is granted executive clemency."). The Court concluded that Florida's sentencing scheme providing for executive clemency was not constitutionally interchangeable with one providing for parole, at least in the case of juveniles. *Id.* at 70.

The Eighth Amendment distinguishes parole, which represents a meaningful opportunity for release, from executive clemency, which—at least in Arizona—amounts to a *de facto* natural life sentence. *See Viramontes v. Attorney General of Arizona*, No. CV-16-00151-TUC-RM, 2021 WL 977170, at *2 (D. Ariz. March 16, 2021) ("Unlike parole, the chances of obtaining release through executive clemency are slim."); *id.* at *2 n.2 (citing statistics from 2013 in which parole was granted in approximately 24% of cases, while commutation was granted in only 0.005% of cases); *see also State v. Dansdill,* 246 Ariz. 593, 603 ¶ 37 n.10 (App. 2019). The State fails to acknowledge the constitutionally significant difference between the

only type of release Mr. Bassett's sentencing judge could lawfully permit—executive clemency—and the type of release *Miller* requires a judge have discretion to impose—parole.

The State repeatedly cites to cases in which Arizona courts have held that *natural life* sentences were not mandatory. This is technically true—the sentencing court had the choice between a life sentence with no possibility of release at all (natural life) or a life sentence with the possibility of clemency. But neither legally available option provided for the possibility of *parole*. Thus, under Arizona law at the time of Mr. Bassett's sentencing, a *life-without-parole* sentence (as opposed to *natural life*) *was* mandatory, in violation of *Miller.*[1]

The State also suggests that some Arizona courts' mistaken belief that parole was still available after 1994 somehow converts Arizona's sentencing scheme into one that did not mandatorily impose life-without-parole for first-degree murder. But this Court has recently made clear that a parole-eligible sentence was *not* legally available when Mr. Bassett was sentenced. *See Chaparro* 248 Ariz. at 140–42 ¶¶ 3, 18. Indeed, State agents have taken an opposite legal position in another case

[1] For the reasons explained in Mr. Bassett's Response to the PFR, his *Miller* claim is not precluded. Moreover, the 2013 post-conviction court's finding that Mr. Bassett's *Miller* claim failed because his natural life sentence "was not statutorily mandated and the Court had the discretion to order life with the possibility of parole but chose not to" is clearly inconsistent with this Court's holdings in *Chaparro* and *Valencia*, the U.S. Supreme Court's holding in *Lynch*, and the Courts of Appeals' holdings in *Wagner*, *Vera*, and *Dansdill*.

currently pending before this court. *Shinn v. Board of Executive Clemency*, No. CV-21-0275-PR, Supplemental Merits Brief of ADC Director David C. Shinn, at 5 ("[I]n 1994, first-degree murderers . . . were not statutorily eligible for parole; they were eligible only for "release," i.e. commutation or pardon."). In *Chaparro*, this Court clarified that earlier decisions in *Wagner*, *Fell*, and *Cruz* (the cases the State claims control) were incorrect in stating that life without parole was not a mandatory sentence for first-degree murder in Arizona in 1999.[2]

Moreover, since the Respondent Judge issued her decision, the Court of Appeals has issued a published decision confirming that she correctly interpreted the law. *State v. Wagner,* 253 Ariz. 201 (App. 2022). The *Wagner* court confirmed that Mr. Bassett faced a mandatory LWOP sentencing scheme because the sentencing laws in effect at the time of his sentencing did not allow a court the discretion to impose a life-with-the-possibility-of-parole sentence. *Id.* at ¶ 21. The court of appeals convincingly rejected the State's argument—raised again here—that *Miller*

[2] Notably, Wagner was sentenced before the U.S. Supreme Court outlawed death sentences for juveniles in *Roper*. Thus, *Wagner*'s sentencing judge actually concluded that he did *not* merit the harshest sentence available under law. 253 Ariz. 201 at ¶¶ 2–5. *Cruz* similarly involved a capital sentencing proceeding: the court of appeals there incorrectly held that parole was available and that Cruz was not entitled to a *Simmons* instruction. 218 Ariz. 149, 140 ¶ 42 (2008). The U.S. Supreme Court explicitly overruled this holding in *Lynch*, 578 U.S. at 614–16. This Court since recognized that the *Cruz* decision upon which the State relies amounted to a "misapplication" of law. *State v. Cruz*, 251 Ariz. 203, 206 (2022).

did not apply because the superior court could have imposed an illegal, parole-eligible life term:

> If a court's theoretical ability to impose a parole-eligible sentence in violation of state law were an exception to *Miller*, the exception would swallow the rule. The mere fact that some courts may have mistakenly sentenced defendants to parole-eligible terms in violation of state law, or erroneously described a non-parole-eligible sentence as parole eligible, does not establish that Wagner's sentencing procedure complied with *Miller*.

Id. at ¶ 25. Moreover, this Court has already held in *Valencia* that the enactment of A.R.S. § 13-716 does not cure the *Miller* violation here because the statute does not "apply to inmates serving natural life sentences for murders committed as juveniles." 241 Ariz. at 210 ¶ 19.

The State is incorrect in asserting that *Wagner* is inconsistent with all prior precedents of Arizona appellate courts. As explained above, *Wagner* follows from this Court's holding in *Chaparro* that, after the legislature eliminated parole, life *with* parole was not a legally available sentence. Moreover, other court of appeals decisions predating *Chaparro* have recognized that the statutory elimination of parole created a mandatory LWOP sentencing system. *See, e.g.*, *State v. Dansdill,* 246 Ariz. 593, 603 ¶ 37 n.10 (App. 2019):

> Parole was eliminated for all offenses committed after January 1, 1994, leaving commutation or pardon as the only possibilities for release. *See* A.R.S. § 41-1604.09(I); *see also State v. Rosario*, 195 Ariz. 264, ¶ 26, 987 P.2d 226 (App. 1999). The likelihood of either is so remote that the mandatory noncapital life sentence for felony murder is constitutionally indistinct from the mandatory noncapital natural life sentence for

premeditated murder. *See State v. Vera*, 235 Ariz. 571, ¶ 17, 334 P.3d 754 (App. 2014).

Thus, the Respondent Judge was correct in finding that the scheme under which Mr. Bassett was sentenced violated *Miller*'s central holding that mandatory LWOP sentences for juveniles are unconstitutional.

II. THE NINTH CIRCUIT'S DECISION IN *JESSUP* DOES NOT CREATE CONFLICTING PRECEDENT THAT REQUIRES REVIEW.

The State further urges this Court to grant review because "Respondent Judge's characterization of Bassett's sentence as mandatory conflicts with the Ninth Circuit Court of Appeals' opinion in *Jessup v. Shinn*, 31 F.4th 1262 (9th Cir. 2022)," while acknowledging that "Ninth Circuit case law is not binding on this Court." (PFR at 15.) Notably, *Jessup* was decided before the court of appeals issued its decision in *Wagner.* Thus, to the extent that *Jessup* characterizes Arizona's sentencing scheme as not mandatory, it is in conflict with binding precedent of the Arizona courts. *Wagner*, 253 Ariz. 201, ¶¶ 23–24 (App. 2022).

However, the *Jessup* court did not actually make any explicit holdings regarding Arizona's sentencing scheme. *See* 31 F.4th at 1266–68. To the contrary, the Ninth Circuit—without the benefit of *Wagner*—held only that Jessup had not demonstrated that the state court's decision denying him a resentencing hearing was *unreasonable* under the particular circumstances of the case. *Id.* at 1267. The purpose of federal habeas corpus cases like *Jessup* is to "guard against extreme

malfunctions in the state criminal justice systems, not [to] substitute for ordinary error correction through appeal" and post-conviction review in the state courts. *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (cleaned up). The standard for granting habeas relief is purposefully difficult to meet: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. Thus, in denying relief to *Jessup*, the Ninth Circuit did not hold that the interpretation adopted by the Respondent Judge was incorrect. It concluded only that the state court decision on Jessup's post-conviction petition was not so unreasonable to amount to "the extreme malfunction for which federal habeas relief is the remedy." *Burt v. Titlow*, 571 U.S. 12, 20 (2013).

Moreover, a more recent published Ninth Circuit decision rendered after *Wagner* properly concluded that life without parole was *not* a legally available sentence at the time of Mr. Bassett's sentencing. *See Crespin v. Ryan*, 46 F.4th 803, 806 n.1 (9th Cir. 2022) (citing. *Vera*, 235 Ariz. 571 (App. 2014), and *Wagner*, 253 Ariz. 201 (App. 2022)). Accordingly, the Ninth Circuit has not created conflicting law requiring this Court's intervention.

III. THE RESPONDENT JUDGE CORRECTLY CONCLUDED THAT *JONES* DOES NOT AFFECT THE UNCONSTITUTIONALITY OF MR. BASSETT'S NATURAL LIFE SENTENCE UNDER *MILLER*.

In *Jones*, the Court held that a judge is not required to make a particular factual finding on the record before imposing a life-without-parole sentence. 141 S. Ct. at 1311, 1313–14, 1318–19. The Court stressed that its decision "carefully follows" and was not overruling either *Miller* or *Montgomery*. *Id.* at 1321–22. *Jones* affirmed, and did not alter, the central holding of *Miller* that the Eighth Amendment "prohibits *mandatory* life-without-parole sentences for murderers under 18." *Id.* at 1312 (emphasis in original). That rule was not at issue in *Jones* because the defendant's original LWOP sentence had been reversed after *Miller*, and the judge at resentencing had discretion to impose a less harsh sentence. As explained above, this was not the case at the time of Mr. Bassett's 2006 sentencing hearing.

The *Jones* Court clarified that its decision did not overrule *Montgomery* and "'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.'" *Id.* at 1315 n.2 (quoting *Montgomery*, 577 U.S. at 211). The *Jones* Court endorsed *Montgomery*'s description of the procedure required under *Miller*:

> A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole *from those who may not*.

Id. at 1317–18 (emphasis added) (quoting *Montgomery*, 577 U.S. at 210).

The *Jones* Court presupposed that these procedures "would [themselves] help make life-without-parole sentences 'relatively rare' for murderers under 18." *Id.* (quoting *Miller*, 567 U.S. at 484 n.10). In *Miller*, the Court stated that:

> [G]iven all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*.

567 U.S. at 479–80 (emphasis added) (internal quotations omitted). The *Jones* Court assumed that *Miller*'s promise had come true, and that "when given the choice, sentencers impose life without parole on children relatively rarely." 141 S. Ct. at 1318 (quoting *Miller*, 567 U.S. at 484 n.10).

Unfortunately, in Arizona, *Miller*'s promise has not proven true. Unlike many other states, neither the courts nor the legislature have taken action to reduce the prevalence of natural life sentences for juvenile offenders. While many states legislatively eliminated LWOP sentences for juvenile offenders following *Miller* and *Montgomery*, Arizona did not. Arizona is now one of only 19 states that continue to impose LWOP sentences on juveniles. *See* The Campaign for the Fair Sentencing of Youth, *States that Ban Life without Parole for Children* (updated April 12, 2021).[3]

Moreover, the Court assumed in *Jones* that "[b]y now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible,

[3] https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/

have received new discretionary sentences under *Miller*." *Jones*, 141 S. Ct. at 1317 n.4. While this may be true in general,[4] it is emphatically not the case in Arizona. In Maricopa County, where the vast majority of natural life sentences in Arizona were imposed, not a *single* juvenile offender sentenced to natural life has yet received a resentencing hearing since *Miller*.

Finally, the Court concluded its analysis in *Jones* by stating that the Court's decision was "far from the last word on whether Jones will receive relief from his sentence" because the Court's decision allows Jones to present his "moral and policy arguments for why he should not be forced to spend the rest of his life in prison" to "the state officials authorized to act on them." *Jones*, 141 S. Ct. at 1323. Unfortunately, no such opportunity exists for Mr. Bassett. In Arizona, a natural life sentence prevents an individual from ever seeking review of his sentence or presenting evidence of his rehabilitation through any form of executive clemency. Once again, the language of *Jones* makes clear that the Court did not contemplate or implicitly rule that a sentencing scheme like Arizona's complies with the Court's clear directive in *Miller* that children's capacity for rehabilitation must be

[4] *See* The Center for the Fair Sentencing of Youth, *National trends in sentencing children to life without parole* (February 2021), *available at* https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf ("A majority of the 2,800 individuals serving juvenile life without parole (JLWOP) following *Miller* and *Montgomery* have been resentenced in court or had their sentence amended via legislation.").

considered. *See* 567 U.S. at 478–79 ("A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.") (cleaned up).

Respectfully submitted this 18th day of October, 2022.

By: /s/ Karen S. Smith

Karen S. Smith
Randal McDonald
4001 N. 3rd Street, Suite 401
Phoenix, AZ 85012

Attorneys for Amicus Curiae
Arizona Justice Project