**ARIZONA SUPREME COURT**

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| STATE OF ARIZONA, ex rel. RACHEL H. MITCHELL, Maricopa County Attorney<br><br>Petitioner/Plaintiff,<br><br>vs.<br><br>THE HONORABLE KATHERINE COOPER, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,<br><br>Respondent Judge,<br><br>LONNIE ALLEN BASSETT,<br><br>Real Party in Interest/Defendant. | No. CR-22-0227-PR<br><br>Court of Appeals Division One<br>No. 1 CA-SA 22-0152<br><br>Maricopa County Superior Court<br>No. CR2004-005097<br><br>**REAL PARTY IN INTEREST SUPPLEMENTAL BRIEFING** |

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## LEGAL ARGUMENT

Respondent Judge correctly denied the State's request to withdraw its concession to a *Valencia* evidentiary hearing and their request to dismiss Mr. Bassett's Petition for Post-conviction Relief finding *Jones* did not alter Mr. Bassett's right to an evidentiary hearing if he was able to establish a colorable claim. Respondent Judge did not err when concluding Mr. Bassett had established colorable Rule 32 claims for Post-conviction Relief; that Mr. Bassett was sentenced under a mandatory sentencing scheme in violation of *Miller* which gives rise to an evidentiary *(Valencia)* hearing and that a significant change in the law was established entitling Mr. Bassett to an evidentiary hearing to determine if the sentencer complied with the constitutional mandates of *Miller.*

A mandatory life-without-parole sentence for a juvenile homicide offender is unconstitutional, violating our Eighth Amendment. *Miller v. Alabama,* 567 U.S. 460, 479 (2012); *see also Jones v. Mississippi*, 141 S.Ct. 1307, 1321 (2021). Such a sentence may only be imposed after an individualized sentencing hearing is held where the sentencer considers the offender's youth and its attendant circumstances. *Id.* at 483. *Jones* holds there are "no magic words required," a sentencer is not required to make a separate express or implied factual finding of permanent incorrigibility before imposing a life-without-parole sentence on a juvenile

homicide offender[1]. *Jones at* 1319. *Jones* did not overrule *Miller* or *Montgomery,* with Justice Kavanaugh writing the "decision today carefully follows both *Miller* and *Montgomery." Id.* at 1321-22. Nor did *Jones* disturb *Valencia. Valencia*, consistent with *Miller*, *Montgomery,* and *Jones* does not require a sentencer to make a particularized finding of permanent incorrigibility before imposing a life-without-parole sentence on a juvenile homicide offender. *Jones* at 1319; *Valencia* 241 Ariz. 206 (2016).

Thus, the "crux" of *Miller*, as clarified by *Jones* requires (1) the option of imposing a parole-eligible sentence upon a juvenile offender who is required to serve a life term, and (2) that the court consider youth in determining whether to impose a parole-eligible sentence. 567 U.S. at 483; *Jones* at 1314. The *Jones* Court reiterated "discretionary sentencing" was needed 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. Post-*Jones*, Arizona law permits a life-without-parole sentence for a juvenile homicide offender only after considering

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[1] Jones' original sentence had been reversed after *Miller* and he was resentenced with the option of a less severe sentence. The sentencer did not impose a lesser sentence. The U.S. Supreme Court considered whether a sentencer who imposes a life-without-parole sentence must additionally make a separate factual finding that the defendant is permanently incorrigible and whether that sentencer must provide an on-the-record explanation with implicit finding that the defendant is permanently incorrigible in order to impose a life-without-parole sentence. *Jones, 141 S. Ct.* at 1311-1314, 1318-1322.

"how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime of prison" and whether the crime reflects transient maturity. *Miller,* 132 S.Ct. at 2469; *Montgomery v. Louisiana,* 136 S.Ct. at 735; *see also State v. Valencia*, 214 at 206, 210 (2016). Respondent Judge carefully adhered to all state and federal law when concluding colorable claims were raised meriting an evidentiary hearing and denying the state's request to vacate the hearing and dismiss Mr. Bassett's Petition.

### 1. The Respondent Judge correctly found Mr. Bassett has presented a colorable claim in that he was sentenced under an unconstitutional mandatory sentencing scheme

Respondent Judge found Mr. Bassett presented a colorable claim as the sentencing laws under which he was sentenced did not allow for discretion entitling him to an evidentiary hearing pursuant to *Valencia*.

#### a. The state incorrectly argues Arizona's First-Degree murder sentencing scheme provided the sentencer with discretion because the court had two options from which to sentence

The state incorrectly asserts the sentencing scheme in place when Mr. Bassett was sentenced provided discretion to the sentencer to impose a sentence other than natural life. Maricopa County Attorney Reply Brief, p 2. The sentencing scheme cannot be deemed discretionary simply because a judge pronounced two sentences as the practical implication of either sentence the judge imposed was a natural life

sentence; no parole system existed at the time of sentencing. *Miller* required a sentencing judge to have actual discretion to impose a sentence that carried the possibility of parole. 567 U.S. at 474-76.

Under Mr. Bassett's sentencing scheme, parole was illusory with the only potential relief through executive clemency. The United States Supreme Court has found the unlikely possibility of an executive clemency grant to be an inadequate substitute for parole. *Graham v. Florida*, 560 U.S. 48, 70 (2010); *see also Lynch v. Arizona*, 578 U.S. 613, 615-16 (2016); *State v. Helm*, 463 U.S. 277, 303 (1983). The *Graham* Court analyzed a sentencing statute analogous to Arizona and concluded, contrary to the state's assertion, that the sentencing scheme which provided for executive clemency was not a constitutionally comparable substitute for parole. 560 U.S. at 70. Parole was not an option for Mr. Bassett[2].

The state continually fails to acknowledge the distinction between the two types of sentencing schemes and relies upon the decisions of *Wagner, Fell, and Cruz* to support its claim that sentencing for First-Degree murder at the time of Mr.

[2] The United States Supreme Court has acknowledged Arizona's mandatory sentencing scheme in cases such as Mr. Bassett. In *Miller*, the Supreme Court stated, "29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court." 567 U.S. at 482. Arizona was counted as one of the twenty-nine jurisdictions with mandatory life-without-parole sentences for such juvenile homicide offenders. *Id.* at 486, n.13.

Bassett's sentencing was not mandatory. *Wagner*[3], *Fell, and Cruz* predate both *Miller* and this Court's decision in the case of *Chaparro v. Shinn,* 248 Ariz. 138 (2020). In *Chaparro*, an analysis between parole and clemency was undertaken, finding "parole is not a form of executive clemency." *Chaparro v. Shinn*, 248 Ariz. 138, ¶¶15-16 (2020); *see also Solem v. Helm*, 463 U.S. 277, 300-01 (1983) ("As a matter of law, parole and commutation are different concepts … Parole is a regular part of the rehabilitative process … Commutation, on the other hand, is an *ad hoc* exercise of executive clemency.").

Following the rationale of *Chaparro*, the Court of Appeals recently confirmed Arizona's mandatory sentencing scheme in *State v. Wagner*, finding the sentencer lacked discretion to impose a life sentence with the possibility of parole[4].

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[3] In *State v. Wagner*, 194 Ariz. 310 (1999), sentence was imposed before the death penalty for juveniles was found unconstitutional, permitting the judge discretion to impose a death sentence or a lesser sentence. In *State v. Fell*, 210 Ariz. 554 (2005), the court concluded that the Sixth Amendment did not require a jury to find an aggravating circumstance before a natural life sentence can be imposed. *State v. Cruz,* 218 Ariz. 149 (2008), was a capital case where death was imposed, where a jury instruction was at issue. The court incorrectly stated that if given a life sentence, no state law would have prohibited release after serving twenty-five years.

[4] "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 Wagner's sentencing procedure complied with *Miller*." *Id.* at 25.

253 Ariz. 201, ¶21 (App. 2022); *see also State v. Dansdill*, 246 Ariz. 593, 603, ¶37, n. 10 (App. 2019).

The Office of the Attorney General claims the recent Ninth Circuit decision in *Jessup v. Shinn,* 31 F.4th 1262 (9th Cir. 2022), supports the contention that Arizona's natural life sentences were not mandatory and creates conflict with the Respondent Judge's decision. Office of Attorney General Amicus Brief, pp 14-15. *Jessup*, however, was a pre-*Valencia* decision that was subject to the limitations of a habeas review from a state court decision and the highly deferential standard of review. In *Jessup*, the court found Mr. Jessup had not demonstrated that the denial of a resentencing hearing was so unreasonable as to constitute an extreme malfunction for which federal habeas relief was available given the specific facts of his case. *Id.* at 1267. No explicit holdings regarding Arizona's sentencing scheme were issued in this case. *Id.* at 1266-67.

The Respondent Judge's decision was not in conflict with *Jessup.* Rather, her decision is consistent with a recent Ninth Circuit case that similarly concluded life-with-parole was not a sentence that was legally available at the time Mr. Bassett was sentenced. *See Crespin v. Ryan,* 46 F.4th 803, 806, n.1 (9th Cir. 2022) ("Because Arizona had abolished parole, *see State v. Vera*, 334 P.3d 754, 758–59 (Ariz. Ct. App. 2014), the only possibility of release for those sentenced … was

executive clemency, *see State v. Wagner*, 510 P.3d 1083, 1084 (Ariz. Ct. App. 2022).

Under Arizona law, parole was not available when Mr. Bassett was sentenced, clemency is not a constitutionally equivalent substitute. Therefore, a life-without-parole sentence was mandatory when Mr. Bassett was sentenced, and Respondent Judge did not abuse her discretion when finding Mr. Bassett's sentencing scheme was mandatory in violation of *Miller* but was consistent with Arizona case law.

b. The enactment of A.R.S. § 13-716 does not cure the unconstitutional nature of Arizona's mandatory sentencing scheme that was in effect when Mr. Bassett was sentenced

In amicus briefing, the Office of the Attorney General claims the enactment of A.R.S. § 13-716 cured the mandatory nature of the sentencing scheme under which Mr. Bassett was sentenced. The State asserts the complete abolition of parole was nothing more than "a lack of parole procedure" for a twenty-year period. Attorney General Amicus Brief, pp 9-10. However, this Court has recognized that Arizona abolished parole in 1994, not merely the parole procedure. *State v. Cruz*, 251 Ariz. 203, 206, ¶15 (2021). Parole was not legally available when Mr. Bassett was sentenced. *See Chaparro*, 248 Ariz. 138, 140-42, ¶¶3, 18 (2020). Despite an attempt to trivialize the eradication of any meaningful and realistic path to release,

subsequent legislation failed to cure the constitutional deficiencies of Arizona's sentencing scheme as it relates to mandatory juvenile homicide sentences of life without the possibility of parole.

A.R.S. § 13-716 did not make all juvenile homicide offenders eligible for parole as *Jones* mandates. Rather, A.R.S. § 13-716 applies only to those sentences where a juvenile was sentenced to life *with* the possibility of parole after serving twenty-five years. Thus, A.R.S. § 13-716 converts only the otherwise lawful sentences into *Miller*-compliant sentences, not otherwise unlawful ones. As such, Respondent Judge correctly interpreted and applied the holdings of *Miller* to Mr. Bassett's case when finding a colorable claim exists pursuant to Rule 32.1(g).

**2. The Respondent Judge correctly found Mr. Bassett is still legally entitled to a *Valencia* hearing to which the state previously stipulated despite the *Jones* ruling**

Mr. Bassett is entitled to and is guaranteed by law the right to a *Valencia* hearing as to Count 1, First-Degree Murder. 241 Ariz. 206 (2016). In February of 2018, the state conceded a *Valencia* hearing to be appropriate and stipulated to such[5]. In its amicus filing, the Office of the Attorney General asserts this Court should find *Valencia* Hearings are no longer constitutionally relevant considering the *Jones* decision. Attorney General Amicus Brief, p 17. This Court has already

[5] In the State's February 12, 2018, pleading in Response to Mr. Bassett's Successor Petition, the State agreed Mr. Bassett was entitled to a *Valencia* evidentiary hearing.

addressed the issue raised in *Valencia* when stating the need for such evidentiary and resentencing hearings could be obviated if legislation were enacted that would permit inmates serving natural life sentences for murders committed as juveniles to be considered for parole rather than resentencing them. *Valencia* at ¶18-19. No such legislation has been enacted nor has the state agreed to a resentencing these individuals.

a. A *Valencia* hearing is an appropriate and relevant post-conviction relief mechanism to determine which juvenile life-without-parole claims should proceed to a resentencing

The State is inappropriately melding the concepts of *Valencia* post-conviction issues with those of a resentencing as addressed in *Jones* when asserting an evidentiary hearing is no longer relevant. In *Valencia*, this Court found *Miller* to be a significant change in the law when considering the law that was in effect when Valencia was sentenced. Ariz. 206, ¶9, 15 ("*Miller,* as clarified by *Montgomery*, represents a 'clear break from the past' for purposes of Rule 32.1(g)."). This Court then determined that before an offender is entitled to a resentencing, an offender must also establish that *Miller* "if determined to apply … would probably overturn" the sentence." *Id.* at ¶17; *see also* Ariz. R. Crim. P. 32.1(g).

Because *Miller* held that imposing a sentence of life without parole on "a child whose crime reflects transient immaturity" violates the Eighth Amendment,

this Court concluded that, if a petitioner has made a colorable claim for relief based upon *Miller,* they are entitled to an evidentiary hearing on their Rule 32 petition. *Id.* at ¶18. The means to obtain a resentencing is achieved through success at a *Valencia* hearing.

*Valencia* therefore requires an evidentiary hearing be held before a resentencing may occur. Proof must be established by a preponderance of the evidence that the crime committed reflects transient immaturity to establish the juvenile life-without-parole sentence was unconstitutional as to the specific individual and therefore warrants a resentencing. *Id.* at 210, ¶ 18. Nothing in the *Jones* decision limits the post-conviction relief process, rather it clarified resentencing requirements.

b. A *Valencia* hearing is not in conflict with the *Jones* decision but is well-grounded in the rulings of *Miller* and *Montgomery*

The *Jones* decision does not render *Valencia* untenable and should remain applicable Arizona law. *Valencia* is well-grounded in the rulings of *Miller* and *Montgomery*, cases the Supreme Court explicitly stated, in *Jones*, that it was not overruling. *Jones* at 1321. *Jones* addressed issues associated with the resentencing of a juvenile who was sentenced to life-without-parole after being granted post-conviction relief. 141 S.Ct at 1313. The U.S. Supreme Court declined to impose additional requirements upon the sentencing process when it

held a sentencing court did not need to make specific findings of permanent incorrigibility before imposing a life-without-parole sentence upon a juvenile. *Jones* 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[.]"). A sentencing judge is not required to make a particular factual finding on the record before imposing a sentence of life-without-parole. *Id.* at 13111-14, 1318-19.

The *Jones* Court left to each State the ability to set forth their own procedures. *Jones* at 1315. "When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. *Id.* at fn 2; *see Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentence."); *see also Montgomery v. Louisiana,* 577 U.S. 190, 211 (2016).

Arizona's *Valencia* hearing is an appropriate attendant procedural mechanism to determine which cases merit a resentencing; those where a life-without-parole sentence was imposed upon "a child whose crime reflects

transient immaturity" in violation of the Eighth Amendment[6]. *Valencia* at ¶17. The *Valencia* hearing is harmonious with the Court's discussion in *Jones* at 1315, fn 2 (*quoting Montgomery,* 577 U.S. at 211 ("That *Miller* did not impose a formal fact finding 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.").

The *Jones'* interpretations of *Miller* and *Montgomery*, (1) that a sentencing judge is not obligated to make a finding of "permanent incorrigibility" before imposing a life sentence and (2) that a sentencing judge need not make specific findings when determining parole eligible sentences are harmonious with Arizona's *Valencia* holding. *See Wagner, 235 Ariz. at 201,* ¶20. Accordingly, the reasoning of *Valencia*, and the principles of *Miller* apply in this matter. Respondent Judge did not abuse discretion when finding Mr. Bassett raised a colorable claim under Rule 32.1(g). Respondent Judge correctly concluded that Mr. Bassett's claim entitled him to a *Valencia* evidentiary hearing to establish that the crime committed reflected transient immaturity, the juvenile life-without-

[6] *Jones* specifically stated it did not overrule *Montgomery* which found a juvenile life-without-parole sentence to be unconstitutional if the crime is the product of transient immaturity. 577 U.S at 207.

parole sentence was unconstitutional, and that Mr. Bassett merits a resentencing[7].

### 3. Respondent Judge correctly found a colorful claim existed that, if proven, establish the trial court failed to adequately consider Mr. Bassett's youth and attendant characteristics

A sentence runs afoul of the Eighth Amendment if it is disproportionate to the individual's culpability and fails to advance a legitimate penological goal when compared with a lesser sentence. *Graham v. Florida*, 560 U.S. 48, 67 (2010). While the sentencer is not required to make a separate factual finding of permanent incorrigibility before imposing a life-without-parole sentence on a juvenile homicide offender, *Jones at* 1319, the Supreme Court has stated a juvenile defendant must still receive an individualized sentencing hearing during which the sentencer considers the defendant's youth and its attendant circumstances. 567 U.S. at 483. "A sentence [must] follow a certain process – considering an offender's youth and attendant characteristics – before imposing a life-without-parole sentence." *Jones supra,* 141 S.Ct. at 1311-1314, 1316, 1318-1321 (*quoting Miller*, 132 S.Ct. at 2478).

The Office of the Maricopa County Attorney attempts to minimize the requirement of an individualized sentencing hearing, claiming Mr. Bassett's

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[7] The Court is required to set a hearing on all claims "that present a material issue of fact or law" and are not otherwise precluded. A.R.S. § 13-4236. "The purpose of the evidentiary hearing in the Rule 32 context is to allow the court to receive evidence, make factual determinations, and resolve material issues of fact." *State v. Gutierrez*, 229 Ariz. 573, 479 (2012).

sentencing hearing met that threshold, asserting Mr. Bassett simply wants "more." Maricopa County Attorney Reply Brief, pp 6, 10-11. Mr. Bassett is not crying for "more," but asserting his sentencing hearing comport with constitutional guarantees; the sentencer was not provided with meaningful information to allow this to occur.

Although the *Jessup* Court limited its findings to Jessup's specific case, the analysis relied upon by the court to determine whether an individualized sentencing occurred offers guidance. 31 F.4th 1262, *10. The information provided to Jessup's sentencer starkly contrasts with that which was provided in Mr. Bassett's case supporting Respondent Judge's conclusion that a colorable claim exists meriting an evidentiary hearing.

Testimony from a psychologist who studied Jessup and emphasized his age and age-related characteristics was heard which included a presentation of Jessup's emotional age and a twenty-four-page, single-spaced report that compared the psychologist's findings of Jessup to those of other youthful offenders. 31 F.4th 1262, *5. The court received a description of Jessup's maturity level, impulse control abilities, and an explanation as to why his maturity was stunted. *Id.* Jessup's lawyers addressed the sentencing court, stressing the characteristics of *his* youth and discussed his ability and potential to reform, all reinforced by the psychologist's opinion. *Id.* at *5, 6.

Unlike the vast presentation of information regarding Jessup's age and attendant characteristics, Mr. Bassett's sentencing hearing lacked any sort of psychological evaluation, forensic risk assessment to reoffend and the potential for rehabilitation considering Mr. Basset's age, or testimony regarding the same. The record is bereft of testimony from any mental health expert or forensic psychologist regarding Mr. Bassett's psychological age and related characteristic. Generalized statements about youth were provided to the court and counsel quoted three paragraphs from *Roper v. Simmons,* 543 U.S. 551 (2005) that generically discussed juvenile characteristics but offered nothing specific to Mr. Bassett's attendant characteristics. Cognitive maturity testing was not done nor was a comprehensive mental health evaluation provided with information for an individualized assessment of Mr. Bassett's age and hallmark features. *See Jones*, 141 at 1316. The evidence the state asserts was presented to the court was argument offered by the prosecution without any examination by expert of Mr. Bassett.

All such evidence should be heard at a *Valencia* hearing in an as-applied challenge the constitutionality of Mr. Bassett's life-without-parole sentence.

Respondent Judge correctly concluded an evidentiary hearing is warranted after considering the actual record from the sentencing hearing and the information presented to the court to determine if an individualized sentencing hearing that

considered age and attendant circumstances was constitutionally sufficient when lacking critical information about Mr. Bassett himself.

**RESPECTFULLY SUBMITTED** on this 21st day of November 2022.

By: /s/ Amy Bain
Amy E. Bain
*Bain & Lauritano, PLC*