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CASE NAME: **STATE OF ARIZONA v HON. COOPER/BASSETT**

CASE NUMBER: **CR-22-0227**

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IN THE ARIZONA SUPREME COURT

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

Petitioner/Plaintiff,

v.

THE HONORABLE KATHERINE COOPER, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,

Respondent Judge,

LONNE ALLEN BASSETT,

Real Party in Interest/
Defendant.

No. CR-22-0227-PR

Court of Appeals Division One
No. 1 CA-SA 22-0152

Maricopa County Superior Court
No. CR2004-005097

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, AND HUMAN RIGHTS FOR KIDS IN SUPPORT OF REAL PARTY IN INTEREST LONNIE ALLEN BASSETT

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INTEREST AND IDENTITY OF *AMICI CURIAE*

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of *amicus* briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

The Campaign for the Fair Sentencing of Youth is a national coalition and clearinghouse that leads, coordinates, develops, and supports efforts to implement fair and age-appropriate sentences for youth, with a focus on abolishing life without parole sentences for youth. The Campaign provides technical assistance on strategic communications, litigation, and advocacy to attorneys, advocates, organizers, and others working at the state and federal levels. The Campaign engages in public education and communications efforts to provide decision-makers and the broader public with the facts, stories, and research that will help them to fully understand the impacts of these sentences upon individuals, families, and communities.

Human Rights for Kids (HRFK) is a non-profit organization dedicated to the promotion and protection of the human rights of children. We incorporate research and public education, coalition building and grassroots mobilization, as well as policy advocacy and strategic litigation, to advance critical human rights on behalf of children. A central focus of our work is advocating in state legislatures and courts for comprehensive justice reform for children consistent with the U.N. Convention on the Rights of the Child.

STATEMENT OF THE ISSUES

Amici Curiae adopt the Issue Presented for Review by Real Party in Interest Lonnie Allen Bassett.

ARGUMENT

I. BASSETT'S SENTENCE WAS AN ILLEGAL MANDATORY JUVENILE LIFE WITHOUT PAROLE SENTENCE AND *MILLER*, *MONTGOMERY*, AND *JONES* REQUIRE RESENTENCING

A. A Mandatory Juvenile Life Without Parole Sentence Violates The Eighth Amendment, And Is Unconstitutional For The Transiently Immature

A defendant's youth "diminish[es] the penological justifications for imposing [a mandatory life without parole sentence]," making it unfairly disproportionate to the crime committed and unconstitutional under the Eighth Amendment's ban on cruel and unusual punishment. *Miller v. Alabama*, 567 U.S. 460, 472-73 (2012). *Miller* and *Montgomery* together barred all mandatory sentences of life without parole for children and required resentencing or parole consideration for the

thousands of individuals who received this sentence as children before the landmark rulings. *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). As further underscored by the Court, these distinctive attributes of youth are always mitigating. *Jones v. Mississippi*, 141 S. Ct. 1307, 1314 (2021) (citing *Miller*, 567 U.S. at 476). The Court held "that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption," noting that a life without parole sentence "could be a proportionate sentence for the latter kind of juvenile offender." *Montgomery*, 577 U.S. at 209. Any life sentence that fails to consider whether the sentenced individual demonstrates "irreparable corruption," *Roper v. Simmons*, 543 U.S. 551, 573 (2005), "permanent incorrigibility," *Montgomery*, 577 U.S. at 209, or "irretrievab[le] deprav[ity]," *Roper*, 543 U.S. at 570, and does not afford a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" is unconstitutional, *Graham v. Florida*, 560 U.S. 48, 75 (2010).

The Supreme Court's holding in *Graham*, which informed both *Miller* and *Montgomery*, rested largely on the incongruity of imposing a final and irrevocable penalty that afforded no opportunity for release on an adolescent who had capacity to change and grow. *See Graham*, 560 U.S. at 68. While the *Jones* Court held the Eighth Amendment does not require a finding that a child is "permanent[ly] incorrigib[le]" before sentencing them to life without parole, it explicitly upheld the

tenets of both prior cases – including that life without parole sentences should only be imposed "in cases where that sentence is appropriate in light of the defendant's age." *Jones*, 141 S. Ct. at 1318; *see also id.* at 1321 ("The Court's decision today carefully follows both *Miller* and *Montgomery*.") Moreover, the core holdings from *Miller* and *Montgomery,* which prohibit sentencing youth to life without parole for crimes that reflect only "transient immaturity" remain intact under *Jones*. "[*Jones*] does not overrule *Miller* or *Montgomery*" and it does not disturb *Miller*'s substantive holding that "a State may not impose a mandatory life-without-parole sentence" on an individual who committed a homicide offense when they were under the age of 18. *Id*. at 1321. The *Jones* Court held "[t]hat *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," *Id.* at 1315 n.2 (quoting *Montgomery*, 577 US at 211). Thus, *Jones* implicates only the procedure that attends a juvenile sentencing hearing, leaving untouched the substantive rules articulated by the Court's previous cases. Indeed, the Court reaffirmed such rulings, reciting the fundamental principle of *Montgomery*. Under this well-established precedent, all youth subject to life without parole sentences must now be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75). The sentencer in a

proceeding where the state's harshest penalties are possible must always weigh the "distinctive attributes of youth." *Id*. at 472; *Montgomery*, 577 U.S. at 210.

B. *Miller, Montgomery,* And *Jones* Recognize That States May Implement The Mandates Of *Miller* And *Montgomery* In A Variety Of Ways

Writing for the *Jones* majority, Justice Kavanaugh stated, "our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder." *Jones*, 141 S. Ct. at 1323. The Court clarified that states could "categorically prohibit life without parole for all offenders under 18," "require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole," or require an on-the-record explanation of "why a life-without-parole sentence is appropriate notwithstanding the defendant's youth." *Id.*

In fact, a number of jurisdictions have recognized that the Eighth Amendment is a floor and not a ceiling: states have embraced procedural protections in the spirit of *Miller* and *Montgomery,* including presumptions against imposing life without parole sentences on youth and placing the burden on the prosecution to justify these sentences. These protections have been reinforced by *Jones'* invitation for states to adopt sentencing procedures in response to *Miller* and *Montgomery*. The Connecticut Supreme Court, citing language in *Miller,* has stated that "the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence

without parole on a juvenile offender that must be overcome by evidence of unusual circumstances." *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015). The Iowa Supreme Court has also found that *Miller* established a presumption against juvenile life without parole. *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015). Notably, since its decision in *Seats*, the Iowa Supreme Court held that juvenile life without parole sentences are always unconstitutional pursuant to their state constitution. It found:

> [T]he enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation. . . . But a district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical experience would not attempt to make such a determination. No structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure this fundamental problem.

State v. Sweet, 879 N.W.2d 811, 836-37 (Iowa 2016).

Other state supreme courts have reached similar conclusions, endorsing a presumption against the imposition of that sentence that the State has the burden to overcome. The Wyoming Supreme Court, in analyzing a case of *de facto* life without parole, held that "the State bears the burden of overcoming" the presumption underpinning the "central premise" in *Miller*: that "juveniles are categorically less culpable than adults," and provided that only evidence establishing beyond a

reasonable doubt that the juvenile offender is irreparably corrupt will overcome such a presumption. *Davis v. State*, 415 P.3d 666, 681-82 (Wyo. 2018) (quoting *Commonwealth v. Batts*, 163 A.3d 410, 452 (Pa. 2017)); *see also State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (*en banc*) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances.").

In fact, a number of state supreme courts have retroactively applied *Miller* principles beyond juvenile life without parole, finding that consideration of youth-related factors is critical to ensuring an individualized sentencing. For example, Massachusetts has banned life without parole sentences for young people all together and places the burden on the State to disprove the mitigating effects of age in contexts other than life without parole sentences. Relying on U.S. Supreme Court precedent, the Massachusetts Supreme Judicial Court held that even the discretionary imposition of juvenile life without parole sentences violates the state constitution. *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 282-85 (Mass. 2013). The court held:

> Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.

Id. at 284 (citations omitted).

Similarly, in *People v. Poole*, the Michigan Supreme Court concluded that *Miller* and *Montgomery* served as the "foundation" for an 18-year-old defendant's challenge to his life with parole sentence for second-degree murder. 977 N.W.2d 530, 531 (Mich. 2022) (quoting *People v. Stovall*, No. 162425, 2022 WL 3007491, at *5 (Mich. July 28, 2022)). In the same vein, the Pennsylvania Supreme Court held, in *Commonwealth v. Machicote,* that "when a juvenile is exposed to a potential sentence of life without the possibility of parole the [sentencing] court must consider the *Miller* factors, on the record, prior to imposing a sentence." 206 A.3d 1110, 1120 (Pa. 2019), *abrogated by Commonwealth v. Felder*, 269 A.3d 1232, 1238 (Pa. 2022); *but see supra* Section I.A. "Failure to do so . . . renders the resulting sentence illegal — even in cases . . . where the defendant was not actually sentenced to life without parole." *Felder*, 269 A.3d at 1238. Finally, the Supreme Judicial Court of Massachusetts placed the burden on the State in a non-homicide case to "prove that the juvenile's personal characteristics make it necessary" to impose the requested sentence, which exceeded the sentence available under the state statute for juveniles convicted of homicide. *Commonwealth v. Perez*, 106 N.E.3d 620, 630 (Mass. 2018).

C. Arizona's Failure To Conduct A *Miller* Compliant Resentencing Makes It An Outlier Among Similarly Situated States

Arizona's failure to legislatively or judicially ensure that its juvenile sentencing practices comport with *Miller*, *Montgomery*, and *Jones* makes it an outlier among similarly situated states. While other jurisdictions have implemented a variety of practical protections such as presumptions against juvenile life without parole sentences and evidentiary prosecutorial burdens, Arizona has not. This Court should require resentencing to ensure that Arizona's sentencing practices promote fairness and uniformity and comply with U.S. Supreme Court precedent.

At the time *Miller* was decided in 2016, Arizona was among 42 states and the federal government that had individuals serving juvenile life without parole sentences.[1] Now, more than 10 years after *Miller*, Arizona is among a distinct minority of states that have failed to address its juvenile life without parole cases through *Miller*-compliant resentencing, statutory amendments, court ordered sentence modifications, or executive action.[2] While Arizona is only one of five states

[1] Data on file with the Campaign for the Fair Sentencing of Youth (CFSY).

[2] *See, e.g.*, *Ex parte Henderson*, 144 So. 3d 1262 (Ala. 2013); S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (amending Ark. Code §§ 5-4-104(b); 5-4-602(3); 5-10-101(c); 5-10-102(c); 16-93-612(e); 16-93-613; 16-93-614; 16-93-618, and enacting new sections); S.B. 394, Reg. Sess. (Cal. 2017) (amending Cal. Penal Code §§ 3051, 4801); S.B. 16-181, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (amending Colo. Rev. Stat. §§ 18-1.3-401(4)(b)(I); 17-22.5-104(2)(c)(I), (2)(d)(IV); 17-22.5-405(4); 24-4.1-302(2)(h); 24-4.1-302.5(1)(d)(IV); 24-4.1-303(12)(c) and enacting §§ 18-1.3-401(4)(c); 17-22.5-104(2)(d)(V); 17-22.5-403(2)(c); 17-22.5-

405(1.2); 16-13-1001; 16-13-1002); S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015) (amending Conn. Gen. Stat. §§ 54-125a; 46b-127, 46b-133c; 46b-133d; 53a-46a; 53a-54b; 53a-54d; 53a-54a and enacting new sections); Del. Code Ann. tit. 11, §§ 636(b); 4204A; 4209A; H.B. 7035, Reg. Sess. (Fla. 2014) (amending Fla. Stat. §§ 775.082; 316.3026; 373.430; 403.161; 648.571 and enacting §§ 921.1401; 921.1402); *United States v. Delgado*, 971 F.3d 144 (2d Cir. 2020); *Dennis v. State*, 796 S.E.2d 275 (Ga. 2017); H.B. 2116, 27th Leg. (Haw. 2014) (amending Haw. Rev. Stat. §§ 706-656(1); 706-657); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016); *Windom v. State*, 398 P.3d 150, 156-58 (Idaho 2017); *People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *Phon v. Commonwealth*, 545 S.W.3d 284 (Ky. 2018); H.B. 152, Reg. Sess. (La. 2013) (amending La. Rev. Stat. § 15:574.4 and enacting La. Code Crim. Proc. art. 878.1); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013); S.B. 494, Gen. Assemb. (Md. 2021) (amending Md. Code Ann. §§ 6-235; 8-110); S.B. 319, 97th Leg., Reg. Sess. (Mich. 2014) (enacting Mich. Comp. Laws §§ 769.25; 769.25a); *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016); S.B. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (repealing Mo. Rev. Stat. §§ 565.020; 565.030; 565.032; 565.040 and enacting §§ 558.047; 565.020; 565.030; 565.032; 565.033; 565.034; 565.040); *Parker v. State*, 119 So. 3d 987 (Miss. 2013); *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017); *State v. James*, 813 S.E.2d 195 (N.C. 2018); *State v. Mantich*, 842 N.W.2d 716 (Neb. 2014); *Petition of State*, 103 A.3d 227 (N.H. 2014); A.B. 267, 78th Reg. Sess. (Nev. 2015) (amending Nev. Rev. Stat. §§ 176.025; 213.107, and enacting new sections in chapters 213 & 176); S.B. 256, 133rd Gen. Assemb. (Ohio 2021) (amending Ohio Rev. Code §§ 2151.35, 2907.02, 2909.24, 2929.02, 2929.03, 2929.06, 2929.14, 2929.19, 2967.13, 2971.03, and 5149.101 and enacting §§ 2929.07 and 2967.132); *Luna v. State*, 387 P.3d 956 (Okla. Crim. App. 2016), *overruled by White v. State*, 499 P.3d 762 (Okla. Crim. App. 2021); S.B. 1008, 80th Legis. Assemb., Reg. Sess. (Or. 2019) (enacting new sections); *Marteeny v. Brown*, 517 P.3d 343 (Or. Ct. App. 2022) (upholding Governor's use of clemency power to provide retroactive relief); *Commonwealth v. Jones*, 135 A.3d 175 (Pa. 2016); *Aiken v. Byars,* 765 S.E.2d 572 (S.C. 2014); S.B. 2, 83rd Leg., 2d Special Sess. (Tex. 2013) (enacting Tex. Penal Code § 12.31; Tex. Code Crim. Proc. art. 37.071); S.B. 839, 81st Leg., Reg. Sess. (Tex. 2009) (enacting Tex. Gov't Code § 508.145(b)); H.B. 35, Reg. Sess. (Va. 2020) (amending Va. Stat. § 53.1-165.1); *State v. Bassett*, 428 P.3d 343 (Wash. 2018); *State v. Barbeau*, 883 N.W.2d 520 (Wis. Ct. App. 2016); H.B. 4210, 81 Leg., 2d Sess. (W. Va. 2014) (enacting W. Va. Code §§ 61-11-23, 62-12-13b); *State v. Mares*, 335 P.3d 487 (Wyo. 2014).

that have failed to address pre-*Miller* juvenile life without parole sentences,[3] Arizona's inaction has impacted the largest number of individuals.[4]

As Justice Kavanaugh emphasized in *Jones*, the overwhelming majority of states have long since acted to review cases falling within the scope of *Miller* and *Montgomery*. 141 S. Ct. at 1317 n.4. More than half of the states have banned juvenile life without parole sentences through legislation or in judicial practice. *States that Ban Life Without Parole for Children*, Campaign for the Fair Sent'g of Youth (Jan. 27, 2022), https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/. Of the 2831 active juvenile life without parole cases at the time of *Miller*, 2384 individuals have been resentenced, a reduction of eighty-four

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[3] Tennessee, Utah, North Dakota, and Indiana remain the only other states that have refused to take action to address their pre-*Miller* juvenile life without parole sentences, although Indiana has subsequently altered some sentences under an independent constitutional authority, and Utah and North Dakota have banned the sentence prospectively. *See Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (upholding discretionary JLWOP sentence); *Taylor v. State*, 86 N.E.3d 157, 164-677 (Ind. 2018) (revising JLWOP sentence to 80 years under constitutional authority to revise sentences under Ind. Const. art. 7, § 6); H.B. 1195, 65th Legis. Assemb., Reg. Sess. (N.D. 2017) (amending N.D. Cent. Code § 12.1-20-03 and enacting a new section in chapter 12.1-32) (banning JLWOP prospectively); *Garcia v. State*, 925 N.W.2d 442, 446 (N.D. 2019) (declining to apply statute retroactively); H.B. 405, Gen. Sess. (Utah 2016) (amending Utah Code §§ 76-3-203.6; 76-3-206; 76-3-207; 76-3-207.5; 76-3-207.7 and enacting § 76-3-209) (banning JLWOP prospectively); *State v. Houston*, 353 P.3d 55, 87 (Utah 2015) (denying resentencing in pre-*Miller* JLWOP case); *Lee v. Phillips*, No. W2019-01634-CCA-R3-HC, 2020 WL 4745484 (Tenn. Crim. App. Aug. 14, 2020).

[4] Data on file with CFSY reflects that at the time of *Miller,* Indiana had 6 JLWOP cases, Tennessee 13, Utah 2, North Dakota only 1. Arizona has 29 people serving JLWOP sentences.

percent.[5] Almost forty percent of those resentenced have been released from prison. *Sentencing Children to Life Without Parole: National Numbers*, Campaign for the Fair Sent'g of Youth (Sept. 16, 2022), https://cfsy.org/sentencing-children-to-life-without-parole-national-numbers/. Even states with large numbers of cases that posed significant logistical and resource-based challenges, such as Michigan and Pennsylvania, have employed mechanisms for resolving the vast majority of their cases.[6] Meanwhile, Arizona has not only failed to adequately address its juvenile-life-without-parole cases, it also remains one of merely eighteen states that continue to impose this sentence. *States that Ban Life Without Parole for Children*, *supra*.

Arizona's refusal to conduct resentencings ensures that juvenile life without parole sentences are not, in fact, reserved for the "rare" youth envisioned by *Miller*. *See Miller*, 567 U.S. at 479-80 (quoting *Roper*, 543 U.S. at 573). For reference, states that have conducted resentencings have retained life without parole sentences in fewer than 100 cases nationwide—approximately 4 percent of cases. *States that Ban Life Without Parole for Children*, *supra*. In Maricopa County alone, the 25

[5] Data on file with CFSY.
[6] Data on file with CFSY indicates that Michigan has completed nearly 300 of 356 resentencings and Pennsylvania has completed roughly 475 of 520.

individuals who have not been resentenced is greater than the entire pre-*Miller* juvenile life without parole population in twenty-one states.[7]

Further in contrast to Arizona, numerous states have statutorily codified the "*Miller* factors" to ensure that the attributes of youth are adequately considered before juvenile life without parole sentences are imposed.[8] Several states have incorporated these considerations into their state sentencing statutes, and many have remanded cases for resentencing where sentencing courts inadequately evaluated these factors.

Notably, Pennsylvania, where over 500 individuals—the largest population across the country—were serving juvenile life without parole sentences at the time *Montgomery* was decided, has adopted the *Miller* factors. 18 Pa. Stat. and Cons. Stat. Ann. § 1102.1(d).

Similarly, a number of state supreme courts have mandated that sentencing courts consider the factors articulated in *Miller* as well as other factors pertinent to

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[7] Data on file with CFSY. The Maricopa JLWOP population is greater than the pre-*Miller* populations of Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kentucky, Maryland, Minnesota, Montana, North Dakota, New Hampshire, Nevada, Ohio, Oregon, South Dakota, Tennessee, Utah, Wisconsin, West Virginia, and Wyoming.

[8] *See, e.g.*, Fla. Stat. Ann. § 921.1401(2); 730 Ill. Comp. Stat. Ann. 5/5-4.5-105(a); Mo. Ann. Stat. § 565.033(2); Neb. Rev. Stat. Ann. § 28-105.02(2); N.C. Gen. Stat. Ann. § 15A-1340.19B(c); Wash. Rev. Code Ann. § 10.95.030(3)(b); Mich. Comp. Laws Ann. § 769.25(6).

youth. For example, the New Jersey Supreme Court held that "sentencing judges should evaluate the *Miller* factors" when a juvenile is facing a lengthy term of imprisonment and "take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *State v. Zuber*, 152 A.3d 197, 214 (N.J. 2017) (quoting *Miller*, 567 U.S. at 480).

Finally, numerous state legislatures and courts have gone beyond the mandates of *Miller,* allowing or requiring courts to consider additional factors when sentencing juvenile defendants. For example, North Carolina legislation characterizes the "mitigating circumstances" that the defense may submit, which include eight factors akin to the *Miller* factors, and also "[a]ny other mitigating factor or circumstance." N.C. Gen. Stat. Ann. § 15A-1340.19B(c). Similarly, in *Ex parte Henderson,* the Alabama Supreme Court identified several additional factors that sentencing courts must consider, highlighting the importance of "providing the trial court with guidance on individualized sentencing for juveniles." 144 So.3d at 1284.

By maintaining life without parole sentences imposed prior to and without consideration of the *Miller* factors or factors related to youth and its impact on culpability, Arizona remains out of step with the rest of the country and noncompliant with the Supreme Court's requirements as set forth in *Miller*, *Montgomery*, and *Jones*. In the absence of remedial legislative action, resentencing

is required to ensure that the most severe sentences applicable to youth are not imposed on transiently immature youth for whom it is unconstitutional.

D. The Imposition Of Mandatory Life Without Parole Sentences Falls Disproportionately On Black And Brown Arizonians Further Rendering It Constitutionally Suspect

Although *Miller* and *Montgomery* made clear that the harshest punishments for youth should be reserved for the "rare," "uncommon" and irreparably corrupt child, the harshest punishments are levied disproportionately against youth of color. Nationally, in 2016, people of color comprised 67.5 percent of those serving life and virtual life sentences nationally—and nearly half (48.3 percent) were Black. Ashley Nellis, The Sent'g Project, *Still Life: America's Increasing Use of Life and Long-Term Sentences* 14 (2017), https://www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf.

One out of every 17 persons sentenced to life were children at the time of their offense, comprising 5.7 percent of those serving life sentences. *Id*. at 16. There are 7,346 individuals serving parole-eligible life sentences for crimes committed as children and an additional 2,089 serving sentences of 50 or more years. *Id*. at 17. These sentences are overwhelmingly imposed on youth of color (80.4 percent), primarily Black youth (55.1 percent). *Id.* Prior to *Graham* and *Miller*, courts sentenced Black juvenile offenders to life without parole *ten times* more often than white offenders. Letter from U.S. & Int'l Hum. Rts. Orgs. to the Comm. on the

Elimination of Racial Discrimination 3 (June 4, 2009), https://www.aclu.org/files/pdfs/humanrights/jlwop_cerd_cmte.pdf . A 2021 report found that among those for whom racial data is available, 62 percent of people serving juvenile life without parole sentences are Black. Joshua Rovner, The Sent'g Project, *Juvenile Life Without Parole: An Overview* 4 (2021), https://www.sentencingproject.org/app/uploads/2022/08/Juvenile-Life-Without-Parole.pdf.

Arizona data similarly reveals that while the state population is 32.3 percent Hispanic/Latino and 5.4 percent Black, *U.S. Census Bureau Quick Facts: Arizona*, Census.gov, https://www.census.gov/quickfacts/AZ (last visited Dec. 7, 2022), the state prison population is 39 percent Hispanic/Latino and 14 percent Black, Vera Inst. of Just., *Incarceration Trends in Arizona* 2 (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-arizona.pdf. According to data by the Arizona Justice Project, 30 individuals, including Bassett, were serving natural life sentences for crimes committed as juveniles. Of those 30, five, or 17 percent are Black, and 13 or 43 percent are of Hispanic or Latino descent.[9]

As demonstrated by Arizona's disproportionate imposition of mandatory life sentences, such pervasive racial disparities erode equal justice. The Eighth Amendment was designed to ward against discriminatory punishments. *See* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian*

[9] Data on file with Arizona Justice Project.

Eighth Amendment, 79 Brook. L. Rev. 1141, 1147-53 (2014) (one intent of the Eighth Amendment was to protect against punishments that were discriminately imposed); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

II. EVEN IF THIS COURT FINDS THAT BASSETT'S SENTENCE DID NOT CONSTITUTE A MANDATORY JUVENILE LIFE WITHOUT PAROLE SENTENCE, *MILLER'S* PRINCIPLES CONSTITUTE A SIGNIFICANT CHANGE IN THE LAW THAT MUST APPLY TO DISCRETIONARY LIFE WITHOUT PAROLE SENTENCES

The State argues that Bassett "failed to demonstrate that *Miller* is a significant change in the law as applied to his case" because his natural life sentence was not statutorily mandated and the court *falsely* believed it had the discretion to impose a lesser sentence. (State's Pet. for Review 11). However, as illustrated by the highest courts of other states, the State of Arizona's argument is based on an excessively narrow misreading of *Miller.*

A number of similarly situated state supreme courts have remanded cases for resentencing where discretionary sentences were imposed pre-*Miller*. In *Steilman v. Michael,* the Montana Supreme Court held that "the aspect that is cruel and unusual for juvenile offenders is the sentence of life without parole itself, not whether the scheme under which the sentence is imposed is mandatory." 407 P.3d at 318. The court reasoned that, "[l]ogically, the requirement to consider how 'children are different' cannot be limited to de jure life sentences when a lengthy sentence denominated in a number of years will effectively result in the juvenile offender's

imprisonment for life." *Id.* at 319. The Montana Supreme Court held that "*Miller's* substantive rule requires [the state's] sentencing judges to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors . . ., irrespective of whether the life sentence was discretionary." *Id*. at 318-19. A number of other state supreme courts have reached similar conclusions.[10]

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[10] *See, e.g.*, *Aiken*, 765 S.E.2d at 577 (holding that South Carolina courts must consider the following factors of youth when sentencing juveniles: "(1) the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate the risks and consequence'; (2) the 'family and home environment' that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the 'incompetencies associated with youth—for example [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys'; and (5) the "possibility of rehabilitation'" (alterations in original) (quoting *Miller*, 567 U.S. at 477-78)); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1041-44 (Conn. 2015) (holding that the rule announced in *Miller* was a watershed rule of criminal procedure because it implicated the fundamental fairness and accuracy of a juvenile sentencing proceeding and that the procedures set forth in *Miller* must be followed when considering when considering whether to sentence a juvenile offender to fifty years imprisonment without the possibility of parole); *State v. Keefe*, 478 P.3d 830, 840 (Mont. 2021) (holding that the District Court erred when it found that defendant was "irreparably corrupt" and "permanently incorrigible" after the sentencing hearing because it failed to consider *Miller* factors, including undisputed evidence of rehabilitation progress); *People v. Gutierrez*, 324 P.3d 245, 269-70 (Cal. 2014) (holding that "the emerging body of post-*Miller* case law" has held that a trial court must consider some variant of the *Miller* factors before imposing a life sentence without the possibility of parole); *People v. Holman*, 91 N.E.3d 849, 863 (Ill. 2017) (holding that when sentencing a juvenile defendant, "age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance" and that, because *Miller* is retroactive, all juveniles, whether they were sentenced after Illinois's statutory amendment became effective, or before that, should receive the

The South Carolina Supreme Court held that individuals subject to discretionary life without parole sentences are "entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment." *Aiken*, 765 S.E.2d at 577.[11]

The Ohio Supreme Court echoed a similar sentiment, remanding the defendant's case for resentencing on the grounds that his life without parole sentence, though imposed discretionarily pre-*Miller*, failed to comport with the procedural strictures of *Miller* and was thus unconstitutional. *State v. Long*, 8 N.E.3d 890, 898-99 (Ohio 2014). The court reasoned that because it was unclear how the court considered the defendant's youth, a resentencing was necessary. *Id*. Numerous other courts across the country have reached similar conclusions.[12]

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same treatment at sentencing); *Parker*, 119 So.3d at 998 ("We agree and vacate Parker's sentence and remand for hearing where the trial court, as the sentencing authority, is required to consider the *Miller* factors before determining sentence." (footnotes omitted)).

[11] *See also State v. Morgan*, 858 S.E.2d 647, 649 (S.C. Ct. App. 2021) (ordering resentencing under *Miller* and *Aiken* for defendant sentenced first to death and then to life without parole, reasoning that although "the record contains evidence that [the judge] considered [the defendant's] youth," that evidence, in combination with the mitigation considered at his death penalty proceeding, do not, taken together, "produce[] a hearing that complied with *Aiken*" and that it was "not possible for the court in 2006 to *fully* consider the factors identified in *Miller* and *Aiken*").

[12] *See also Malvo v. State*, 281 A.3d 758, 773 (Md. 2022) (holding that while "the court may well have been familiar with the *Roper* decision's interpretation of the Eighth Amendment. . . . [I]t would be quite another thing for a sentencing court to extrapolate from that case, forecast the future holdings of *Miller* and *Montgomery*, and then silently apply that foresight in a sentencing proceeding"); *Gutierrez*, 324

CONCLUSION

Wherefore, *Amici Curiae* respectfully requests that for the foregoing reasons this Honorable Court remand Mr. Bassett's case for resentencing.

RESPECTFULLY SUBMITTED this 9th day of December, 2022.

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P.3d at 249 (holding that a trial court must consider the distinctive attributes of youth and how those attributes diminished the penological justifications for imposing juvenile life without parole on a juvenile offender); *Riley*, 110 A.3d at 1206 (holding that the defendant was entitled to a new sentencing proceeding at which the court was to consider as mitigation defendant's age at the time he committed the offenses and the hallmarks of adolescence deemed constitutionally significant when a juvenile offender was subject to a potential life sentence); *Seats*, 865 N.W.2d at 547, 557-58 (holding that remand was required because, at the time of sentencing, the district court did not have the benefit of the decision setting forth the factors the court was required to use and the requirements the court needed under Iowa Const. art. I, § 17 to sentence a juvenile to life without the possibility of parole); *Zuber*, 152 A.3d at 201, 214 (holding that sentencing judges should evaluate the *Miller* factors when a juvenile facing a lengthy term of imprisonment that is the practical equivalent of life without parole is first sentenced, and take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison); *State v. Ramos*, 387 P.3d 650, 655 (Wash. 2017) (*en banc*) (holding that when a juvenile offender faces a possible life without parole sentence, the sentencing court must conduct an individualized hearing that takes into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison).

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