ARIZONA SUPREME COURT

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

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I. ISSUE PRESENTED FOR REVIEW.

Whether Respondent Judge abused her discretion and erred as a matter of law when she found (1) Bassett's natural life sentence mandatory under *Miller v. Alabama*, 567 U.S. 460, 483 (2012), contrary to previous holdings and unsupported by the record, and (2) Bassett was entitled to an evidentiary hearing pursuant to *State v. Valencia*, 241 Ariz. 206 (2016), because the court imposed a natural life sentence without giving Bassett's youth and attendant characteristics "the weight required by *Miller*" and his sentencing hearing did not include information necessary for "adequate consideration" of his youth and attendant characteristics, when *Miller*, *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and *Valencia* have no such requirement.

II. REASONS THIS COURT SHOULD GRANT REVIEW.

This Court should grant review because Respondent Judge exceeded her authority in finding Bassett entitled to a Rule 32 hearing to determine whether his sentencing proceeding satisfied *Miller*, because that claim was finally adjudicated on the merits, and thus, precluded. Respondent Judge also abused her discretion because her ruling is irreconcilable with *Miller*, as narrowly construed by *Jones v. Mississippi*, 141 S. Ct. 1307, 1316 (2021) and this Court in *State v. Soto-Fong*, 250 Ariz. 1, ¶¶19-23 (2020), which both clarified *Miller* mandates only "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." This is precisely the type of sentencing Bassett already received. *Nothing* in *Miller*'s narrow holding entitles Bassett to an evidentiary hearing on collateral review to prove that his "crimes did not reflect irreparable corruption but instead transient immaturity," *Valencia*, 241 Ariz. at 210, ¶18, or to an evidentiary hearing to present more information for, what

Bassett and Respondent Judge deem, "adequate consideration of his youth and attendant characteristics" and "the weight required by *Miller*."

Review is imperative because Respondent Judge incorrectly decided important issues of law, which are recurring with frequency in the court of appeals and superior courts. (*See* Addendum A.) Only this Court can clarify that *Valencia* was based on an expanded interpretation of *Miller* and *Montgomery* that has since been abrogated by *Jones*. This Court should make explicit, what is already implicit in both *Jones* and *Soto-Fong*, that *Valencia*'s interpretation of the Supreme Court's precedents cannot be reconciled with *Jones* and *Soto-Fong*.

III. FACTUAL AND PROCEDURAL BACKGROUND.

A. Bassett's Crimes

On June 16, 2004, 16-year-old Bassett was riding in the backseat of a car driven by Frances Tapia. (App2, 8, 101-104, 114, 144-45, 163-64, 207.) Joseph Pedroza, Tapia's boyfriend, was in the front passenger seat and Chad Colyer was sitting next to Bassett in the backseat. As Tapia was driving, Bassett pulled out a shotgun and fatally shot Pedroza in the head. After Pedroza was shot, Colyer jumped out of the car. After Tapia watched Bassett shoot her boyfriend, Bassett shot Tapia. The shot ripped through Tapia's shoulder but did not kill her. As she screamed, Bassett repositioned himself and shot her a second time, killing her. Bassett was friends with both victims. After the vehicle hit a light pole, Bassett jumped out of

the car and walked away but circled back to retrieve the shotgun. Bassett was apprehended the following day and indicted for the two murders.

B. Trial and Sentencing Proceedings.

In 2005, after an 8-day trial, a jury rejected Bassett's self-defense claim and found him guilty of two counts of first-degree murder. (App2, 11, 102.) The State's notice of intent to seek the death penalty was struck after *Roper v. Simmons*, 543 U.S. 551 (2005) was decided.

Before sentencing, the State noted "the range of sentencing" for the murders was "life without the possibility of parole for 25 years or natural life" and requested consecutive natural life sentences. (App102, 104-06, 109.) The State acknowledged Bassett's age—16 and a half years old at the time of the murders—was a mitigating factor pursuant to A.R.S. § 13-703(G)(5), and cited *State v. Clabourne*, 194 Ariz. 379 (1999), which, "[i]n addition to chronological age," required consideration of Bassett's "1) level of intelligence, 2) maturity, 3) participation in the murder, and 4) criminal history and past experience with law enforcement." (App106.)

The State also argued the following should be considered in determining how much weight to give Bassett's age as a mitigating factor: 1) Bassett was extremely intelligent, 2) the State was unaware of anyone describing him as immature or impulsive, 3) he was a full-time student, worked for Mr. Alexander at Phillips Plastics in the summer, and was mature enough to handle his own money, 4) he was

a ladies man who was sexually active but kept condoms in his room showing maturity, 5) he was the sole participant in the murders, and 6) he had three juvenile court referrals for violation of an injunction, drug possession, and a curfew charge, and (7) his mother was present during his police interview. (App106-09.) Additionally, Bassett had a reputation for carrying a gun and was nicknamed "Little Scrapper" for fighting. (*Id.*) The State also quoted a report from Bassett's Drug Diversion Program, which detailing Bassett's history. (*Id.*)

Bassett offered the following mitigation: his dysfunctional family, including abandonment by his parents and kidnapping and abuse by his father, his reputation as an ethical, hard worker, his attempts at self-improvement while incarcerated, his mental health, including his Post Traumatic Stress Disorder (PTSD) diagnosis, his age of 16 years old at the time of the offenses, his capacity to conform his conduct to the law, his prospects for rehabilitation, and his remorse. (App32-41.)

Bassett explained that he was raised by his mother's friends, the Alexanders, because his mother did not want him; although she kept custody of his older brother. (App33.) Just before his second birthday, Bassett's father kidnapped him and his brother. (App33, 43-57.) They were located a month later in Iowa, where his father was arrested and charged with two counts of custodial interference. (*Id.*) The Alexanders resumed responsibility for Bassett. (App34.)

Two years before the murders, Jewish Family and Children's Services

diagnosed Bassett with PTSD and he began receiving therapy and medication. (App34-35, 70-74.) The psychiatric evaluation detailed his father's abuse, exposure to domestic violence, and his treatment plan. (App70-74.) But Bassett stopped taking his medication soon after, claiming it made him more aggressive. (App34-35.) Bassett argued his PTSD, hypervigilance, and "exaggerated startle response" caused him to overreact the night of the murders. (App40.)

Bassett argued that at age 16 he did not possess the "impulse control of an adult." (App38.) Bassett cited *Roper*, 543 U.S. 55, which noted the "profound differences between adults and juveniles and the ramifications those difference[s] makes when addressing juvenile crime," and detailed the three general differences between juveniles and adults lack of maturity, susceptibility to negative influences and peer pressure, and a juvenile's character is not well formed. (App38-39.)

At sentencing, the court advised it read the presentence report, the memoranda filed by the State, Bassett, and the Crime Victims Legal Assistance Project, and the letters attached to the presentence report. (App130-31.) The State argued Bassett would be a death-eligible, except for *Roper*. (App143, 148.) The State argued the following aggravating factors supported natural life sentences for each murder: a double homicide; the murder of Tapia was especially cruel because she endured mental and physical anguish watching Bassett kill Pedroza and then trying to "ward off the blow" that hit her shoulder before Bassett fired a second time and killed her;

use of a deadly weapon; grave risk of death to Colyer; and lack of remorse for Tapia's death. (App144-49, 162-63.) The State pointed out that Bassett told police "Oh well, I thought I missed her," before pumping the shot gun a third time and shooting Tapia. (App145.) The State argued Bassett showed no remorse for killing Tapia, calling her "that girl." (*Id.*) The State recognized Bassett's age was mitigating but argued natural life sentences were appropriate. (App143, 148.)

Mr. Alexander told the court that Bassett was a 16-year-old kid who was preyed upon by Pedroza and others like him. (App149-51.) Bassett's girlfriend told the court, he made a bad decision that night and was only 16 years old and scared. (App153.) Defense counsel emphasized Bassett "was a child at 16 years old" and argued the Supreme Court eliminated the death penalty for juveniles because "they took notice of numerous scientific studies" showing "portions of the brain that control impulsivity and foresight and appreciation of consequences don't really form fully until the early 20's." (App154.)

Counsel argued Bassett's juvenile referrals were "immature juvenile acts" that resulted from his poor impulse control and his PTSD compounded his impulsivity. (App155-56.) Counsel also emphasized *Roper*'s determination that juveniles are more susceptible to negative influences, like what occurred with Bassett and Pedroza. (App157.) Lastly, quoting *Roper*, counsel argued a juvenile's character is not fully formed at age 16 and "the signature qualities of youth"—immaturity,

impetuousness, and recklessness—"are transient." (*Id.*) Counsel requested a sentence of life with the possibility of parole after 25 years so Bassett could "outgrow[] his character flaws" and be released. (App157-58.) Bassett allocuted, apologizing to the victims' families and thanking his family for their support. (App158-62.)

The court again advised it considered everything presented. (App163.) The court emphasized, "[t]here is no presumptive sentence for first degree murder when the death penalty is not allowed" and he approached sentencing "with an open mind." (*Id.*) After reading all the materials and reflecting on all the evidence, the court found Bassett a danger to the public that "cannot be addressed with anything less than a natural life sentence." (App166.) The court found a natural life sentence appropriate for Tapia's murder and a consecutive sentence of life with the possibility of parole after 25 years appropriate for Pedroza's murder. (App166-67, 171.)

C. PCR Proceedings

On June 20, 2013, Bassett filed a *pro per* PCR notice asserting a *Miller* claim. (App176.) The court dismissed the PCR notice as untimely and successive, and found even assuming *Miller* constituted a significant change in the law, *Miller* did not apply to Bassett's case because his natural life sentence was not statutorily mandated—the court "had the discretion to order life with the possibility of parole but chose not," considering Bassett's age as mitigation and giving it "considerable

weight." (App178-79.)

Bassett filed a motion for rehearing, with support of Amicus. Regarding his natural life sentence, the court reasoned, even if *Miller* applied retroactively, his sentencer considered his age in sentencing and satisfied *Miller*. (App181-82.) After briefing and oral argument[1] on *Miller*'s applicability to his parole/release-eligible sentence on Count 2, the court denied Bassett's claim on the condition that the Department of Corrections set a specific date for Bassett's parole eligibility once A.R.S. § 13-716 became effective. (App183-92.)

On review, Bassett argued H.B. 2593 entitled him to a full resentencing. (App9.) The court of appeals disagreed and found Bassett's arguments were considered and rejected in *State v. Vera*, 235 Ariz. 571, ¶¶21, 22, 26 &nn.6-7 (App. 2014.) (App9 (citing *Montgomery*, 136 S. Ct. at 736).) Bassett's motion for reconsideration and petition for review were denied. (App194.)

On September 13, 2017, Bassett filed another successive PCR petition arguing *Miller* and *Montgomery* constituted a significant change in the law pursuant to Rule 32.1(g) entitling him to relief and resentencing. (App198-212.) Relying on *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) and *Valencia*, 241 Ariz. 206, Bassett argued *Miller* "as expanded by *Montgomery*" instructs sentencing courts how to consider a

[1] Before oral argument, H.B. 2593 was passed, "establishing parole eligibility for juveniles sentenced to life imprisonment." (App8.)

juvenile defender's age and whether a juvenile's crime reflects "permanent incorrigibility." (App209-10.) Bassett argued although his sentencer gave his age considerable weight, "[n]owhere in [his] sentencing record is there a finding that his crime 'reflects irreparable corruption,'" nor did it "address whether his crime 'reflects transient immaturity.'" (App210.) Bassett asserted the record must be developed to determine whether the sentencer "considered whether Bassett's crime in Count One showed irreparable corruption and whether the crime reflects transient immaturity." (*Id.*)

In response, the State conceded Bassett was "entitled to an evidentiary hearing pursuant to *State v. Valencia*, 241 Ariz. 206 (2016), and Rule 32.8 of the Arizona Rules of Criminal Procedure." (App214.) Bassett's case then pended a *Valencia* hearing or was stayed based on *Mathena v. Malvo*, at the State's request, and then *Jones v. Mississippi*, at Bassett's request. (App221.)

On April 22, 2021, the United States Supreme Court held "*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, and *Montgomery* only made *Miller* retroactive and "did not purport to add to *Miller*'s requirements." *Jones*, 141 S. Ct. at 1314-16, 1321. And before *Jones*, this Court preemptively affirmed *Miller*'s narrow holding in *Soto-Fong*, 250 Ariz. at ¶¶19-23. Based on *Jones* and *Soto-Fong*, the State moved to vacate the evidentiary hearing

and dismiss Bassett's PCR petition, arguing *Jones* implicitly overruled *Valencia*. (App223-246.)

After oral argument, Respondent Judge denied the State's motion and subsequently denied the State's motion for reconsideration and stay request. (App223-357; Attachments A and B.) The State petitioned for special action review of these rulings and requested a stay. (App358-409.) The court of appeals declined jurisdiction and denied the stay request as moot. (Attachment C.)

IV. REVIEW IS NECESSARY TO CLARIFY THIS COURT'S PRECEDENT AND CORRECT RESPONDENT JUDGE'S FLAWED INTERPRETATION OF ARIZONA LAW.

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

1. Preclusion and law of the case prohibited Respondent Judge from revisiting this conclusion.

Respondent Judge exceeded her authority in finding Bassett's natural life sentence mandatory under *Miller*, when that claim was finally adjudicated on the merits in 2013, against Bassett's position, and thus, precluded under Arizona Rule of Criminal Procedure 32.2(a)(2), (b). Rule 32 provides for preclusion "to prevent endless or nearly endless reviews of the same case in the same trial court." *Stewart v. Smith*, 202 Ariz. 446, 450, ¶11 (2002).

The 2013 postconviction court expressly found 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 had the discretion

to order life with the possibility of parole but chose not to." (App179.) Bassett did not petition for review of this finding. (App8 at ¶3.) Further, Bassett did not argue his natural life sentence was mandatory in his 2017 PCR petition, likely because the 2013 PCR court already expressly found it was not. (App208-212.)

Because there was no change in the law after *Miller*, affecting the 2013 postconviction court's express finding that Bassett's natural life sentence was not mandatory, Respondent Judge was without authority to revisit, much less overturn, that previous determination. *Montgomery*, 577 U.S. 190, says nothing about the legal characterization of Bassett's sentence and did not provide a basis for Respondent Judge to revisit the 2013 conclusion. Nor does *Valencia*. Contrary to Respondent Judge's implication, *Valencia* did not find petitioners' natural life sentences mandatory. (Attachment A at 5.) Rather, *Valencia* specifically found petitioners' natural life sentences, imposed in 1995 and 1996 and indistinguishable from Bassett's natural life sentence, "were *not* mandatory." 241 Ariz. at 208, ¶11 (emphasis added). Thus, Rule 32.2 and law of the case prohibited Respondent Judge from revisiting and finding, contrary to its 2013 decision, that Bassett's natural life sentence was mandatory under *Miller*.

2. Respondent Judge's characterization of Bassett's natural life sentence as mandatory was erroneous.

Notwithstanding preclusion and law of the case, Respondent Judge's finding that Bassett's natural life sentence was mandatory under *Miller* was erroneous for

several reasons. First, it exalts form over substance and ignores the reasoning underlying *Miller*. *Miller* prohibited "mandatory" life without parole sentences for juveniles because they preclude consideration of a juvenile's "chronological age and its hallmark features." 567 U.S. at 477. *Miller* found that mandatory sentences make youth irrelevant to sentencing. *Id*. at 479. And *Jones* later confirmed that the "key assumption in both *Miller* and *Montgomery* was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." 141 S. Ct. at 1318.

Unlike the *Miller* defendants, Bassett's age and youth were *not* irrelevant to his sentencing but were considered at length. Unsurprisingly, the court of appeals, like the postconviction court in 2013, has held on numerous occasions that Arizona law governing sentencing for juvenile offenders convicted of first-degree murder was *not* mandatory under *Miller*. (*See* Addendum B.)

As both the *Valencia* concurrence and prosecutor here recognized, Arizona's sentencing scheme *required* Bassett's sentencer to consider his age. 241 Ariz. at 210-11, ¶23 (citing § 13-701(E)(1)). (App106.) And, in considering a juvenile's age, Arizona law required consideration of a "defendant's level of maturity, judgment and involvement in the crime," *State v. Greenway*, 170 Ariz. 155, 170 (1991), and, as noted by the prosecutor here, a defendant's "1) level of intelligence,

2) maturity, 3) participation in the murder, and 4) criminal history and past experience with law enforcement." (App106 (citing *Clabourne*, 194 Ariz. 379).)

Furthermore, it is undeniable that Bassett's sentencer considered information about his age and youth and its effect on his crimes as contemplated by *Miller*, because Bassett's mitigation was presented through the lens of *Roper*, 543 U.S. 55. *Miller*'s decision "flows straightforwardly from" the precedents and principles of "*Roper*, *Graham*, and their individualized sentencing cases [where] youth matters for purposes of meting out the law's most serious punishments." 567 U.S at 483. Bassett cited *Roper* extensively, and emphasized the "profound differences between adults and juveniles and the ramifications those difference[s] makes when addressing juvenile crime," including juveniles' poor impulse control, susceptibility to negative influences, and that a juvenile's character is not fully formed. (App38-39, 154-57.)

Second, Respondent Judge's characterization of Bassett's natural life sentence as mandatory ignores everyone's belief that the court had discretion in sentencing. Here, the State noted "the range of sentencing for each count is life without the possibility of parole for 25 years or natural life." (App102.) Bassett likewise believed the trial court had discretion to sentence him to life with the possibility of parole after 25 years. (App40, 158.) And the court stated, "[t]here was no presumptive sentence for first degree murder when the death penalty is not allowed"

and he would "approach [sentencing] with an open mind." (App166.) Moreover, Bassett's sentences themselves demonstrate that the trial court believed it had discretion to sentence Bassett to a sentence less than natural life.

Finally, 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).[2] Consistent with prior Arizona case law, the Ninth Circuit recently held that unlike the sentencing schemes in *Miller*, Arizona did not require sentencers to impose a life without parole sentence "*automatically*, with no individualized sentencing considerations whatsoever." *Id.* at 1267. In *Jessup*, the Ninth Circuit found no *Miller* violation for an Arizona juvenile offender who received a life-without-parole sentence around the same time as Bassett because Arizona followed the procedure required by *Miller* in sentencing Jessup—"an individualized sentencing hearing" where the sentencer takes into account an offender's "youth and the characteristics of young people." *Id*. at 1266. And in August 2022, the Ninth Circuit affirmed *Jessup* in *Rue v. Roberts*, 2022WL3572946 and *Aguilar v. Ryan*, 2022WL3573068, two Arizona then-juvenile defendants' cases, finding their natural life sentences were not mandatory, that *Jones* affirmed *Miller*'s narrow holding, and their sentencings complied with the rule announced in *Jones*.

[2] Though *Jessup* was noticed as supplemental authority below, Respondent Judge ignored it completely. The State recognizes Ninth Circuit case law is not binding on this Court but believes *Jessup* is persuasive and correctly decided.

3. Respondent Judge's finding that Bassett's natural life sentence is *Miller*-violative cannot be reconciled with A.R.S. § 13-703 or precedent construing that statute.

Respondent Judge's finding that Bassett's natural life sentence was mandatory also ignores the distinguishable statutes at issue in *Miller* and disregards the language of § 13-703 and this Court's interpretation of that statute, all of which was argued in the State's motion to vacate the evidentiary hearing. *Miller* consolidated the cases of Jackson, tried and convicted of capital murder in Arkansas, and Miller, convicted as an adult in Alabama. 567 U.S. at 466-69. Under Arkansas law, a defendant convicted of "capital murder … *shall* be sentenced to death or life imprisonment without parole." *Id*. (emphasis added)). Similarly, Miller's crime carried a "*mandatory* minimum punishment of life without parole" in Alabama. *Id*. (emphasis added). Consequently, *Miller* found the defendants' life without the possibility of parole sentences were mandatory because a life without parole sentence was *automatically* imposed, depriving the sentencer of "any discretion to impose a different punishment." *Id*. at 465.

Unlike the statutes at issue in *Miller*, A.R.S. § 13-703(A), governing Bassett's sentences, defined life as natural life or life without eligibility for release "until the completion of the service of twenty-five calendar years." Arizona courts, including this Court, viewed the alternative life sentences in § 13-703 as natural life and life *with the possibility of parole*. *See State v. Wagner,* 194 Ariz. 310, 313 ¶11 (1999)

("Arizona's statute…states with clarity that the punishment for committing first degree murder is either death, natural life, or life in prison with the possibility of parole."). *See also State v. Fell*, 210 Ariz. 554, 557, ¶11 (2005) ("The range of punishment []is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of release.'") (quoting *State v. Ring*, 200 Ariz. 267, 279 ¶42 (2001)); *State v. Cruz*, 218 Ariz. 149, 160, ¶42 (2008) ("[T]hree possible sentences…death, natural life, and life with the possibility of parole after twenty-five years."). Indeed, in this very case, Bassett was sentenced to "natural life" for Count 1 and to "life with the possibility of ***parole*** after 25 years" for Count 2. (App166-67, 171 (emphasis added).)

Furthermore, this Court interpreted § 13-703 as providing discretion in sentencing. The Court reasoned that while some statutes, *i.e.*, §§ 13-701 and 13-710, "provide that a specific sentence 'shall' be imposed for various felonies," "§ 13-703 contains no similar language" and provides the "court *with the discretion to sentence an offender within a range*—from life to natural life—for non-capital first degree murder." *Fell*, 210 Ariz. at 558, ¶14 (emphasis added). Here, the parties and court believed the court had discretion, and the court exercised that discretion when it found a natural life sentence appropriate for Tapia's murder and life with the possibility of *parole* after 25 years sentence appropriate for Pedroza's murder.

The abolition of parole in 1994 in an entirely different title (Title 41) did not

alter the court's discretion, or belief of discretion, to impose a parole-eligible sentence. *See* A.R.S. § 41-1604.09. As *Jessup* recognized, this "misunderstanding by the sentencing judge and everyone else involved in [Jessup]'s case was apparently common" and the "Arizona reporter is full of cases in which the sentencing judge mistakenly thought that he or she had discretion to allow parole." *Jessup*, 31 F. 4th at 1267 n.1. Indeed, it is not surprising that sentencing courts, including Bassett's sentencer, and counsel believed, albeit mistakenly, that parole was available because § 13-703 used the term parole, defining a natural life sentence where the defendant "is not eligible for commutation, *parole*..." and this Court interpreted § 13-703 as providing the alternative life sentence of life with the possibility of *parole*,

Moreover, Bassett's sentencer *did* have the option of imposing a parole-eligible sentence by imposing a release-eligible sentence that would later become parole-eligible due to the Legislature's passage of A.R.S. § 13-716 in 2014. If the sentencing judge here had sentenced Bassett to life with the possibility of parole after 25 years for Count 1, that sentence would have been enforced due to § 13-716, a state statute implementing parole for such juvenile sentences. *See Jessup*, 31 F.4th at 1268 (("Arizona's more recent statutory changes and caselaw make it nearly certain that, had the sentencing judge allowed release or parole after 25 years, Petitioner would, in fact, be eligible for parole.") (citing A.R.S. § 13-716; *State v. Vera*, 235 Ariz. 571 (App. 2014); *Chaparro v. Shinn*, 248 Ariz. 138 (2020); and

A.R.S. § 13-718(A))). *See also State v. Robinson*, 509 P.3d 1023, at ¶57 (May 24, 2022) ("juvenile offenders are eligible for parole").

In fact, that is precisely what happened with Bassett's sentence for Count 2. The postconviction court ordered that upon A.R.S. § 13-716 "becoming effective under Arizona law, the Arizona Department of Corrections shall set a specific date for [Bassett's] parole eligibility" for Count 2, and the court of appeals upheld that order, citing *Vera*, 235 Ariz. 571. (App9 at ¶¶4-6, App192.) Therefore, as evidenced in this very case, whether parole procedures were available is a different question from whether a sentencer has discretion, and believes it has discretion, to impose a parole-eligible sentence in the first place under the sentencing provisions in Title 13.

Even if parole was not immediately available this does not mean that the alternative life sentences were identical or that imposing one of them was "mandatory." It simply means that when Bassett was sentenced, parole procedures were unavailable under Title 41; but this has since been remedied so that juveniles who received the release-eligible sentencing option—just like Bassett's sentence for Count 2—are now eligible for parole. (App9 at ¶¶4-6, App192; *See also* Addenda C and D.) Because Bassett's sentencer had a choice between two options, neither option may properly be characterized as "mandatory." At least 28 similarly-situated defendants received a lesser sentence, proving empirically that a natural life sentence was not "mandatory." (*See* Addenda C (listing 11) and D (listing 17).)

The State has not seen one case during this time period where a sentencing court indicated parole was not available. Nor did Respondent Judge or the defense point to such a case. Instead, as noted in Addendum C and recognized by *Jessup*, several other Arizona defendants received parole-eligible sentences at the time Bassett was sentenced, *including Bassett on Count 2*, which demonstrates the common belief that this lesser sentence was available.

4. Respondent Judge's rulings completely disregard Bassett's individualized sentencing hearing.

Finally, the record confirms Bassett's sentencing hearing was not an empty exercise and complied with *Miller*. The trial court did not impose a natural life sentence for Count 1 automatically, by default, because the law dictated such a sentence, or because it was the only sentencing option available, unlike what happened in *Miller*. Instead, the trial court made a meaningful choice between two sentences that included an individualized determination of Bassett's youth and attendant characteristics and determined a natural life sentence appropriate for Tapia's murder and a life with the possibility of parole after 25 years' sentence appropriate for Pedroza's murder.

Miller reasoned that mandatory life without parole sentences were unconstitutional because they precluded "consideration of his chronological age and its hallmark features—among them": "immaturity, impetuosity, and failure to appreciate risks and consequences"; family and home environment that surrounds

him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; "the circumstances of the homicide offense, including the extent of his participation in the conduct"; "familial and peer pressures"; possible conviction of a lesser offense; "inability to deal with police officers"; and the "possibility of rehabilitation." 567 U.S. at 477-78. These are not factors and *Miller* does not require any particular weight or consideration.

Here, the trial court clearly heard evidence and information about Bassett's age, the hallmark features of his youth, and how children are different than adults as contemplated by *Miller*. The court repeatedly heard Bassett was 16 years old when he committed these murders and about how children are different than adults, including their impulsivity and impetuosity. The State recognized Bassett's age was a mitigating factor under A.R.S. § 13-703(G)(5) and that consideration of his age required consideration of his level of intelligence, maturity, participation in the murder, criminal history, and past experience with law enforcement. (App106.)

Bassett argued that he "was a child at 16 years old when he committed the crimes," and did not possess the "impulse control of an adult." (App38, 154-56.) Bassett quoted extensively from *Roper*, 543 U.S. 55, including three general differences between juveniles and adults: 1) juveniles' lack of maturity and underdeveloped sense of responsibility resulting in impetuous and ill-considered actions, 2) juveniles are more vulnerable and susceptible to negative influences and

peer pressure, and 3) because a juvenile's character is not well formed "the signature qualities of youth"—impetuousness and recklessness—"are transient" and will subside as the juvenile matures. (App38-39 (quoting *Johnson*, 509 U.S. 350).)

Bassett presented information about his maturity, his remorse, and his potential for rehabilitation. He argued that although his steady employment reflected maturity, he did not possess the maturity to handle the freedom he was given, and his juvenile referrals, which were "immature juvenile acts," demonstrated this. (App154-56.) His steady employment, advanced school classes, and self-improvement after incarceration, however, demonstrated his potential for rehabilitation. (App34, 40, 61-68.) Bassett asked for the opportunity to "outgrow[] his character flaws." (App157-58.) Bassett argued he was remorseful and apologized to the victims in allocution. (App40, 158-62.)

Bassett asserted victim Pedroza was a negative influence on him and emphasized that *Roper* determined juveniles are more susceptible to negative influences than adults. (App149-57.) The State countered that the Alexanders were a positive influence on Bassett and the jury rejected his self-defense claim. (App108.)

The court heard about Bassett's past conduct and contact with police, including Bassett's request for his mother before he was questioned by police. (App108-09.) Bassett presented information about his dysfunctional family

background, including his mother's abandonment and his father kidnapping him and his brother. (App33-34, 43-57.) Countering that, the Alexanders gave him a home, food, a job, and supported him throughout trial and sentencing. (App33-34, 149-51.)

Bassett presented information about his mental health, including his psychiatric evaluation, PTSD diagnosis, and failed treatment plan just two years before the murders. (App34-35, 70-81.) Counsel argued that Bassett's PTSD, hypervigilance, and "exaggerated startle response," resulted from his childhood background and likely caused him to overreact on the night of the shootings. (App40, 38-44.) Counsel further argued Bassett's PTSD compounded his impulsivity. (App156.)

Before sentencing, the trial court advised it heard the evidence presented at trial, read the presentence report, the memoranda filed by the State, Bassett, and the victims, and the letters attached to the presentence report, and heard the evidence and argument at the sentencing hearing. (App130-31.) The court found aggravating the emotional harm to the victims, the physical cruelty to Tapia, the serious physical injury, use of a deadly weapon, and multiple homicides, Bassett's juvenile referrals, the grave risk of death to Colyer, the extra ammunition Bassett brought in the car, and the danger his conduct presents to the public. (App163-64.) The court gave Bassett's age "considerable weight" in mitigation but tempered it with Bassett's

intelligence and responsible employment history. (App164-65.) The court also considered Bassett's juvenile justice system contacts as a factor in his maturity because he was given the opportunity to seek help and did not, as well as Bassett's PTSD diagnosis and that he stopped taking his medications, Bassett's family support, and his statement of remorse. (App164-65.) Before sentencing Bassett to natural life for Tapia's murder, and a lesser sentence for Pedroza's murder, the court found Bassett's conduct regarding Tapia evidenced a "hardened heart" and "a personality trait that is extremely dangerous to the public." (App166.) Accordingly, contrary to Respondent Judge's findings, Bassett's discretionary sentencing was "constitutionally sufficient" and satisfied *Miller*.

B. This Court should also grant review to correct Respondent Judge's erroneous ruling that Bassett is entitled to an evidentiary hearing "pursuant to *Valencia*" for "adequate consideration" of, or to give the "required weight" to, Bassett's youth and attendant characteristics because neither *Miller* nor *Valencia* contain such a requirement.

Respondent Judge also erroneously found Bassett was entitled to an evidentiary hearing pursuant to *Valencia* because Bassett's sentencer did not give "Bassett's youth and attendant characteristics the weight required by *Miller*" or "adequately consider Bassett's youth and attendant characteristics" before imposing a natural life sentence. (Attachment A at 4-5.) These findings are clearly untenable and legally incorrect, and therefore constitute an abuse of discretion because they are not supported by *Valencia* or *Miller*.

Nothing in *Valencia* entitles Bassett to an evidentiary hearing for "adequate consideration" of his youth and attendant characteristics. Rather, *Valencia* held the petitioners were entitled to an evidentiary hearing on collateral review to prove that their "crimes did not reflect irreparable corruption but instead transient immaturity." *Valencia*, 241 Ariz. at 210, ¶18—which is the relief Bassett sought in his successive 2017 PCR petition. (App208-212, 218-19.)

But *Jones* abrogated *Valencia* when it clarified *Miller*'s narrow holding mandated "'*only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." Bassett already received the type of individualized sentencing contemplated by *Miller* as narrowly construed by *Jones*. Nothing in *Miller*'s narrow holding entitles Bassett to an evidentiary hearing on collateral review to prove that his "crimes did not reflect irreparable corruption but instead transient immaturity." *Valencia*, 241 Ariz. at 210, ¶18; *see also United States v. Briones*, 18 F.4th 1170, 1176 (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 imprisonment without parole].").

If there is any doubt about *Jones*'s impact on Arizona and *Valencia*, *Soto-Fong*, 250 Ariz. at ¶¶19-23, preemptively confirmed *Jones*. *Soto-Fong* held a sentencer must only "consider 'an offender's youth and attendant characteristics'

before sentencing a juvenile to life without the possible of parole," and agreed with Justice Bolick's concurrence in *Valencia* and Justice Scalia's dissent in *Montgomery* that *Miller*'s holding was narrow and "merely mandated that trial courts '*follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty.'" *Id*.

Respondent Judge's finding that *Jones* did not alter Bassett's right to an evidentiary hearing because *Jones* specifically stated that its holding did not disturb *Miller* or *Montgomery* incorrectly reads *Jones* and *Valencia*'s interpretation of *Miller* and *Montgomery*. (Attachment A at 3-4.) *Valencia* was indisputably based on "*Miller*, as clarified by *Montgomery*," 241 Ariz. at 209, ¶15, adopting a broad interpretation of *Montgomery* and expansion of *Miller* that *Jones* ultimately rejected by clarifying *Miller*'s narrow holding.

Significantly, *Valencia* interpreted *Montgomery* as clarifying *Miller* and requiring that "'[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.'" *Id*. (quoting *Montgomery*, 136 S. Ct. at 734 (internal quotation marks omitted) and citing *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (summarily granted review, vacated, and remanded (GVR) for reconsideration in light of *Montgomery*)). Relying on *Montgomery*'s language that prisoners "must be given the opportunity to show their

crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored," as well as Justice Sotomayor's *Tatum* concurrence, *Valencia* held that the petitioners were entitled to an evidentiary hearing because they made colorable claims for relief based on *Miller*. 241 Ariz. at 209, ¶16. But *Jones* overruled that broad interpretation of *Montgomery* and expansion of *Miller*.

The *Jones* dissent seemingly recognized that *Jones* overruled *Tatum*, and conversely *Valencia* which relied on *Tatum*, when it noted that all petitioner Brett Jones sought was what the Court ordered in *Tatum*, 137 S. Ct. at 13, "'that a sentencer decide whether the juvenile offender before it is a child whose crimes reflect transient immaturity or is one of those rare children whose crimes reflect irreparable corruption.'" *Id*. at 1331 (Sotomayor, J., dissenting) (quoting Sotomayor, J., concurring in GVR in *Tatum*.). Additionally, the dissent's recognition in *Jones* that the majority reprised "Justice Scalia's dissenting view in *Montgomery* that *Miller* requires only a 'youth-protective procedure.' 577 U.S. at 225," *id.* at 1328 (Sotomayor, J., dissenting), confirms *Miller*'s narrow holding as construed by *Soto-Fong* and its agreement with Justice Scalia's dissent in *Montgomery* that *Miller*'s holding was narrow. 250 Ariz. at ¶¶22-23.

Furthermore, nothing in *Miller* requires a particular "weight" be given to, or dictates "adequate consideration" of, a juvenile's youth and attendant characteristics.

Nor does *Miller* prescribe what, or how much, information must be presented when sentencing a juvenile offender. *Jones* confirmed that *Miller* does not require a court make formal or specific findings, use magic words, or make an "on-the-record sentencing explanation." *Jones*, 141 S. Ct. at 1319-21. Unless the record affirmatively establishes otherwise, which it clearly does not here, the sentencing court "will be deemed to have considered the relevant criteria, such as mitigating circumstances enumerated in the sentencing rules" and presented to the court. *Id.*

In sum, Bassett is not entitled to an evidentiary hearing under Rule 32.1(g) pursuant to *Valencia* or *Miller* simply because more could have been presented at sentencing. Nothing in either *Valencia* or *Miller* provide for that. Nor does *Montgomery*, which merely made *Miller* retroactive.

V. CONCLUSION.

This Court should grant review and clarify that *Jones* abrogated *Valencia*'s holding, that *Miller*'s holding is narrow, and that Respondent Judge exceeded her authority and abused her discretion because neither *Miller*, *Montgomery*, or *Valencia* require a particular weight or consideration of a juvenile defendant's youth and attendant characteristics. Bassett received a constitutionally individualized sentencing that complied with *Miller* and is not entitled to hearing to present what he, or Respondent Judge, deem "necessary" for "adequate consideration."

Respectfully Submitted September 9, 2022.

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