ARIZONA SUPREME COURT

STATE OF ARIZONA ex rel. RACHEL H. MITCHELL, Maricopa County Attorney Petitioner, 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.	No. CR-22-0227-PR No. 1 CA-SA 22-0152 Maricopa County Superior Court No. CR2004-005097 **STATE'S RESPONSE TO BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, AND HUMAN RIGHTS FOR KIDS**

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I. INTRODUCTION

Instead of assisting this Court with the issue before it, Amici Curiae Juvenile Law Center, Campaign for the Fair Sentencing of Youth, and Human Rights for Kids (JLC) advocates for changes to Arizona's sentencing laws for juveniles. In support of its proposals, JLC cites other states' statutory changes, arguing *Miller* and *Montgomery* were the catalyst for these changes. But this is neither the forum for such advocacy, nor the proper purpose of an amicus.

Furthermore, JLC's misplaced advocacy ignores Arizona law that has been in place for decades, which requires trial courts to consider not only a juvenile's age but mitigating factors of their youth, including their maturity level, intelligence, judgment, participation in the crime, and criminal history and experience with law enforcement. It is undeniable that Arizona law largely mirrors *Miller v. Alabama*, 567 U.S. 460 (2012)'s hallmark features.

Moreover, because Arizona law already provides the discretion required by *Miller*, it is undisputable that the trial court's sentence of natural life for Bassett's murder of Tapia and the consecutive sentence of life with the possibility of parole after 25 years for Bassett's murder of Pedroza complied with *Miller*, as narrowly construed by *Jones v. Mississippi*, 141 S Ct. 1307, 1311-21 (2021). In fact, JLC's misplaced advocacy completely ignores the discretionary, individualized sentencing that Bassett already received. Bassett is not entitled to an evidentiary hearing to

present more and is certainly not entitled to resentencing for Tapia's murder or a presumption against life without parole, as requested by JLC.

II. ARGUMENT

A. Bassett's natural life sentence was not mandatory.

JLC cursorily asserts that Bassett's sentence was an illegal mandatory life without parole sentence. (Brief 2.) This assertion fails because Bassett's sentencing proceeding, which JLC completely ignores, demonstrates that the trial court undeniably exercised the discretion *Miller* requires in determining that a natural life sentence was appropriate for Bassett's murder of Tapia and a consecutive sentence of life with the possibility of parole after 25 years was appropriate for Bassett's murder of Pedroza.

Indeed, it defies logic to conclude that Bassett's natural life sentence was mandatory. Before sentencing Bassett, the trial court clearly heard and considered Bassett's age, as well as his maturity level, his PTSD diagnosis and its impact on his judgment, his sole participation in the crime, the circumstances of the homicide offenses, his family background, his criminal history and interaction with law enforcement, Pedroza's negative influence on him, and his possibility for rehabilitation—all through the lens of *Roper v. Simmons*, 543 U.S. 55 (2005) and accompanied by defense counsel's arguments that child are different than adults. After explaining its considerations for the sentences, the court imposed two different

sentences for each of Bassett's murder convictions. Thus, Bassett's natural life sentence was not mandatory.

B. Bassett's natural life sentence, imposed discretionarily and after an individualized sentencing proceeding, complies with *Miller* and no more is required.

Contrary to JLC, the "core holdings" of *Miller* and *Montgomery*, as clarified by *Jones*, do not impose a transient immaturity requirement in sentencing a juvenile offender. (Brief at 2-4.) Nor did *Jones* hold that States are not "free to sentence a child whose crime reflects transient immaturity to life without parole." (Brief at 4, citing *Jones*, 141 S. Ct. 1315 n.2.) The quote in footnote 2 is dictum from *Montgomery* that was not cited by *Jones* for that proposition. JLC incorrectly imputes that language to *Jones*.

Jones's clarification of the holdings in *Miller* and *Montgomery* further demonstrates that *Jones* did not hold or affirm any such language from *Montgomery*. *Jones* clarified that *Miller* held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders" and that *Montgomery* only made *Miller* retroactive and *did not add* to *Miller*'s requirements. 141 S. Ct. at 1311-21 (quoting *Miller*, 567 U.S. at 479.) To effectuate its holding, *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." *Jones*, 141 S. Ct. at 1311-21. While this directive is

repeated throughout *Jones*, *Jones* says nothing about any consideration or determination of transient immaturity.

This Court confirmed *Miller*'s narrow holding, and implicitly rejected *Montgomery*'s dictum, in *State v. Soto-Fong*, 250 Ariz. 1, ¶¶19-23 (2020)—a case which Bassett and *all* amici supporting Bassett simply refuse to acknowledge. *Nothing* in *Miller*'s holding, as narrowly construed by both *Jones* and *Soto-Fong*, entitles Bassett to an evidentiary hearing, much less a resentencing, for a determination of whether his crimes reflected transient immaturity.

In *Soto-Fong*, this Court confirmed *Miller*'s holding, that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id*. at 7, ¶19 (quoting *Miller*, 567 U.S. at 479.) It also confirmed *Miller*'s requirement for discretionary sentencing where "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* (quoting *Miller*, 567 U.S. at 489.)

This Court agreed with Justice Scalia's dissent in *Montgomery*, that "*Miller* did not enact a categorical ban" on life without parole sentences and that *Miller*'s holding was narrow—"merely mandat[ing] that trial courts '*follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty.'" *Id*. at ¶¶22, 23 (citing *Montgomery*, 136 S. Ct. at

743 (Scalia, J., dissenting) and quoting *Miller*, 567 U.S. at 483). Citing Justice Bolick's concurrence in *State v. Valencia*, 241 Ariz. 211, 208, ¶26 (2016), this Court further agreed with Justice Scalia's criticism of *Montgomery*'s "majority for its reliance on dicta from *Miller* to rewrite its holding." ("Searching in vain to find such a substantive rule in *Miller*, the Court instead created one in *Montgomery*, reasoning that the unannounced rule that courts make a finding of 'irreparable corruption' before sentencing a juvenile offender to life imprisonment without parole was implicit in the earlier case.") (internal citation omitted)). This is detrimental to JLC's argument that *Montgomery*'s dictum survived *Jones*.

Additionally, the Ninth Circuit Court of Appeals' rejection of petitioner Briones's argument, that "*Jones* left in place *Montgomery*'s dictum that LWOP is 'an unconstitutional penalty for ... juvenile offenders whose crimes reflect the transient immaturity of youth' *i.e.*, 'for all but ... those whose crimes reflect permanent incorrigibility," confirms that *Montgomery*'s expansion of *Miller*, which JLC attempts to perpetuate, is now defunct dictum. *See United States v. Briones*, 18 F.4th 1170, 1176 (9th Cir. 2021).

The only mention of "transient immaturity" in *Miller* is the Court's description of its prediction: "we *think* appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," especially "because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between

'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" 567 U.S. at 479. (emphasis added.) But this prediction, which formed the basis for *Montgomery*'s rewrite of *Miller* and which *Jones* rejected, is dicta, not a holding.

In fact, it strains credulity to believe that *Jones* was affirming *Montgomery*'s dictum with a quote from *Montgomery*, buried in footnote 2, which was not cited for that proposition. *See Jones*, 141 S. Ct. at 1314-15 n.2. This Court should reject JLC's attempt to perpetuate *Montgomery*'s dictum, just as *Jones*, *Briones*, and this Court did in *Soto-Fong*.

C. *Miller*, *Montgomery*, and *Jones* do not require resentencing for Bassett's murder of Tapia because Arizona already complied with *Miller* and has for decades.

JLC acknowledges that after *Jones*, a finding of irreparable corruption is not required to sentence a juvenile to life without the possibility of parole. (Brief at 3-4.) JLC nonetheless asks this Court to expand Arizona sentencing procedures and impose a presumption against life without parole sentences for juveniles. (Brief at 5-8.) This Court should not consider this request because amici "are not permitted to raise new issues and their briefs may not create, extend, or enlarge issues beyond those argued by the parties." *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 84 (1981); *accord City of Tempe v. Prudential Ins. Co. of America*, 109 Ariz. 429, 432 (1973). Because this argument was not raised below or by either party, this

Court should decline to consider JLC's request and should base its "opinion solely on legal issues advanced by the parties themselves." *Ruiz v. Hull*, 191 Ariz. 441, 446 (1998). Furthermore, it is not necessary because Arizona law complies with *Miller*.

JLC next argues that "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." (Brief at 9-15.) But JLC fails to identify *how* Arizona's sentencing scheme does not comport with *Miller*. This is likely because Arizona, for decades, has provided the same procedural sentencing protections mandated by *Miller*, and thus, JLC cannot identify any failings in Arizona's sentencing scheme.

At the time of Bassett's sentencing, and long before that, Arizona required trial courts to consider age as a mitigating factor. *See* A.R.S. § 13-701(E)(1), A.R.S. § 13–703(G)(5). As early as 1982, citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court recognized that an offender's young age was a "substantial and relevant factor … of great weight.'" *State v. Valencia*, 132 Ariz. 248, 250 (1982).

The Court also recognized that when "addressing the issue of young age, we look at defendant's level of maturity, judgment and involvement in the crime." *State v. Greenway*, 170 Ariz. 155, 170 (1991) (Citing *State v. Walton*, 159 Ariz. 571, 589(1989); *State v. Gerlaugh*, 144 Ariz. 449, 461 (1985); *State v. Gillies (Gillies II)*, 142 Ariz. 564, 571 (1984)). *See also State v. Velazquez*, 216 Ariz. 300, 314, 166 P.3d

91, 105 (2007) (in assessing age as a mitigating factor, "we consider not only the defendant's chronological age, but also 'his level of intelligence, maturity, past experience, and level of participation in the killings'"—*i.e.*, did the defendant commit the murder on his own) (quoting *State v. Poyson,* 198 Ariz. 70, 80 ¶37 (2000)).

"When the judge considers age in mitigation, he weighs evidence of experience and maturity." *Walton*, 159 Ariz. at 589 (citing *State v. Gillies (Gillies I),* 135 Ariz. 500, 513 (1983)). Additionally, "the extent and duration of a defendant's participation in a murder can evidence maturity." *Id.* (Citing *Gillies II*, 142 Ariz. at 571.) In *State v. Roscoe*, 145 Ariz. 212, 225 (1984), this Court reasoned that age "cannot be considered in a vacuum." The defendant's "criminal character and history must also be considered." *Id*. (Citing *State v. Williams*, 134 Ariz. 411, 413-14, (1982) and *State v. Johnson*, 131 Ariz. 299, 305 (1982)).

In *State v. Clabourne*, 194 Ariz. 379, 386, ¶28 (1999), cited by the prosecutor at sentencing in this case, this Court held that "[i]n addition to chronological age," the court was required to consider a defendant's "(1) level of intelligence, (2) maturity, (3) participation in the murder, and (4) criminal history and past experience with law enforcement." (Citing *State v. Jackson*, 186 Ariz. 20, 30-31 (1996)). In fact, in *Jackson*, 186 Ariz. at 30, this Court concluded:

> It is well settled that the age of the defendant at the time of the commission of the murder can be a substantial and relevant mitigating

> circumstance. *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982); *see Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982); A.R.S. § 13–703(G)(5). The younger the defendant, the greater the weight age has as mitigation. *See State v. Gerlaugh*, 144 Ariz. 449, 461, 698 P.2d 694, 705 (1985). However, chronological age is not the end point of the analysis, but the beginning. *See State v. Gillies (Gillies I)*, 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (defendant's age alone will not always require leniency). In addition to youth, we consider defendant's level of intelligence, maturity, involvement in the crime, and past experience. *State v. Bolton*, 182 Ariz. 290, 314, 896 P.2d 830, 854 (1995) (citing cases).

Therefore, Arizona's sentencing scheme already complied with *Miller* and Arizona does not need to adopt additional procedures "in the spirit of *Miller* and *Montgomery*," as suggested by JLC. (Brief at 5.) Nor does it need to codify *Miller*'s mandate, as suggested by JLC. (Brief at 9-15.) Further, statutory changes, like what occurred in other states which JLC suggests Arizona pursue, is not only outside the scope of the issue before this Court, but an issue for the state legislature, not this Court.

Comparing Arizona to other states, JLC complains that like Arizona several states have "refused to take action to address their pre-*Miller* juvenile life without parole sentences." (Brief at 11 n.3 citing Tennessee, Utah, North Dakota, and Indiana.) But JLC's complaint is based on a false premise because those states were cited in *Miller* as states that "make life without parole discretionary for juveniles," and thus, do not fall within the scope of *Miller*. *See Miller*, 567 U.S. at 483 n.10. Thus, JLC's true complaint is that these states have not taken action that *JLC believes*

they should take—something beyond *Miller*—not what *Miller* requires. This Court should decline JLC's invitation to expand Arizona's sentencing procedures because, again, they already comply with *Miller*.

D. *Miller* does not constitute a significant change in the law applicable to Bassett that would probably overturn his natural life sentence under Rule 32.1(g).

JLC argues that even if Bassett's natural life sentence was discretionary, *Miller* nonetheless constitutes a significant change in the law requiring resentencing because Bassett's sentencing "failed to comport with the procedural strictures of *Miller* and was thus unconstitutional." (Brief at 17-19.) This argument is without merit because, as previously discussed, Arizona law mirrored the sentencing procedure mandated by *Miller* and was already applied at Bassett's sentencing. *Miller* does not require more.

Furthermore, JLC's argument, that even if Bassett's natural life sentence was discretionarily imposed *Miller*'s principles still constitute a significant change in the law that applies to Bassett, fails because it misconstrues Arizona postconviction law. (Brief at 17.) Rule 32.1(g) of the Arizona Rules of Criminal Procedure "permits post-conviction relief if '[t]here has been a significant change in the law that if determined *to apply to defendant's case* would probably overturn the defendant's conviction or sentence.'" *See State v. Shrum*, 220 Ariz. 115, 118, ¶13 (2009) (citing Ariz. R. Crim. Proc. 32.1(g) (emphasis added)). Again, *Miller* was not a significant

change in the law applicable to Bassett's natural life sentence because it was not mandatorily imposed as prohibited by *Miller*. *See Miller*, 567 U.S. at 479 (holding "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.") Thus, Bassett is not entitled to relief under Rule 32.1(g), regardless of how broadly JLC tries to interpret *Miller*.

Similarly, JLC's repeated assertion that Bassett is entitled to *resentencing* cannot be considered by this Court because it exceeds the scope of the postconviction issue raised by the parties and Respondent Judge's ruling. Moreover, nothing in *Miller* or *Montgomery* entitles Bassett to resentencing or to a particular sentence, as JLC implies.

E. The issue of racial disproportionality is not before this Court.

JLC's argument that Arizona disproportionally imposes mandatory life without parole sentences on black and brown Arizonans should not be considered by this Court. (Brief at 15-17.) First, as set forth above, Arizona did not mandatorily impose life without parole sentences. Second, that issue is not before this Court and amici "are not permitted to raise new issues and their briefs may not create, extend, or enlarge issues beyond those argued by the parties." *Town of Chino Valley*, 131 Ariz. at 84. This Court should decline to consider JLC's new argument/issue, which is irrelevant to the issue before it, and base its "opinion solely on legal issues

advanced by the parties themselves." *Ruiz*, 191 Ariz. at 446.

III. CONCLUSION

JLC's suggestions to adopt more procedural protections for juveniles not only exceeds the scope of the issue before this Court but is an issue for the state legislature. Because Arizona law, which largely mirrors *Miller*'s hallmark features, already complied with *Miller*, Bassett's discretionary, individualized sentencing was constitutional, and *Miller* does not require more. Nothing in JLC's brief changes this.

Respectfully Submitted December 30, 2022.

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Respondent Judge,

LONNIE ALLEN BASSETT,

Real Party in Interest.

No. CR-22-0227-PR

No. 1 CA-SA 22-0152

Maricopa County Superior Court No. CR2004-005097

CERTIFICATE OF COMPLIANCE FOR STATE'S RESPONSE TO BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, AND HUMAN RIGHTS FOR KIDS

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's November 1, 2022 order, ordering that responses to amicus briefs may not exceed 20 pages in length, the undersigned deputy certifies that the State's Response to the brief of Amici Curiae Juvenile Law Center, et al is 12 pages in length, and pursuant to Rule 31.21(g)(2), Arizona Rules of Criminal Procedure, certifies that the brief has an average of no more than 280 words per page, including footnotes and quotations, is proportionately spaced, uses 14 point Times New Roman typeface, is double spaced, and has margins of at least one inch on the top, bottom, and sides.

Respectfully Submitted December 30, 2022.

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A copy of Petitioner, State of Arizona's, Response to brief of Amici Curiae Juvenile Law Center, et al was electronically filed on December 30, 2022, using the AZTurboCourt e-filing system, and a copy was sent by email to:

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