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.

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

BY: /s/ *Julie A. Done*
/s/ Julie A. Done
Deputy County Attorney

APPENDICES

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ADDENDA

Addendum A **Other cases currently pending in this Court, the Court of Appeals, or the superior courts involving the same or similar issues of law.**

1. ***State v. Arias***, 1 CA-CR 22-0064 PRPC (*Tatum* 5 defendant), on September 1, 2022, the court of appeals granted review and relief on Arias's PCR petition for review from the superior court's order, granting the State's motion and vacating his resentencing based on *Jones* and *Soto-Fong* in 2021, finding *State v. Wagner*, 510 P.3d 1083 (Ariz. App. 2022) controls. The State intends to petition for review from the court of appeals decision.

2. ***State v. Bosquez***, 1 CA-CR 22-0360 PRPC currently pending a PCR petition for review (response not yet filed) after the postconviction court granted the State's motion to vacate the *Valencia* hearing and dismiss his PCR petition based on *Jones* and *Soto-Fong* and summarily denied Bosquez's motion for rehearing, which was denied after *State v. Wagner*, 510 P.3d 1083 (Ariz. App. 2022) was decided.

3. ***State v. Bustos***, CR2005-005248, further briefing on Bustos's successive PCR petition was completed after *Jones* and *Wagner* were decided (after the case was stayed for several months) and the case is currently pending in superior court.

4. ***State v. Cabanas***, 1 CA-CR 21-0534 PRPC, on June 21, 2022, court of appeals granted review and relief in a memorandum decision, based on *Wagner*, reversing the superior court's ruling that granted the State's motion to vacate the *Valencia* hearing and dismiss his PCR petition based on *Jones* and *Soto-Fong*. The State's petition for review in CR-22-0185-PR is currently pending in this Court.

5. ***State v. Conley*****,** 1 CA-CR 22-0266 PRPC, currently pending a PCR petition for review (fully briefed) after the superior court granted the State's motion to vacate the *Valencia* hearing and dismiss his PCR petition based on *Jones* and *Soto-Fong*.

6. ***State v. DeShaw*****,** CR-21-0398-PR (*Tatum* 5 defendant), currently pending petition for review in this Court (consolidated with *State v. Purcell*) on procedural review issue of whether he can appeal from the superior court's order vacating his resentencing based on *Jones* and *Soto-Fong*.

7. ***State v. McLeod***, CR1996-090611, the State intends to file a petition for special action from the superior court's ruling, that a "finding that the crime was the result of irreparable corruption as opposed to transient immaturity" is mandated under 2012 United States Supreme Court law, because the ruling is both a misinterpretation and misapplication of the law.

8. ***State v. Najar*****,** CR-21-0084-PR (*Tatum* 5 defendant), currently pending petition for review in this Court on same procedural review issue raised in *DeShaw/Purcell* after the superior court vacated his resentencing based on *Jones* and *Soto-Fong*.

9. ***State v. Odom*****,** 1 CA-CR 21-0537 PRPC, currently pending a PCR petition for review (fully briefed) after superior court granted the State's motion to vacate the *Valencia* hearing and dismiss his PCR petition based on *Jones* and *Soto-Fong*.

10. ***State v. Pierce*****,** 1 CA-CR 22-0247 PRPC, currently pending a PCR petition for review (fully briefed) after the superior court granted the State's motion to vacate the *Valencia* hearing and dismiss his PCR petition based on *Jones*.

11. ***State v. Purcell*****,** CR-21-0398-PR (*Tatum* 5 defendant), currently pending petition for review in this Court (consolidated with *State v. DeShaw*) on procedural review issue of whether he can appeal from the superior court's order vacating his resentencing based on *Jones* and *Soto-Fong*.

12. ***State v. Rutledge***, 1 CA-CR 22-0169 PRPC, currently pending a PCR petition for review (was stayed until July 26, 2022) after the superior court granted the State's motion to vacate the *Valencia* hearing and dismiss his PCR petition based on *Jones*.

13. ***State v. Tatum***, CR-22-0104-PR (*Tatum* 5 defendant), currently pending a petition for review in this Court on same procedural issue raised in *DeShaw/Purcell* after the superior court vacated his resentencing based on *Jones* and *Soto-Fong*.

14. ***State v. Wagner***, CR-22-0156-PR, currently pending the State's petition for review in this Court from the court of appeals' opinion in *State v. Wagner*, 510 P.3d 1083 (Ariz. App. 2022), which reversed the superior court's ruling that granted the State's motion to vacate the *Valencia* hearing and dismiss his PCR petition based on *Jones*.

Addendum B **Selected court of appeals' decisions finding Arizona juvenile natural life sentences not mandatory under *Miller*** (emphasis underlined).

1. ***State v. Conley***, 1 CA-CR 12-0569-PR, 2013 WL 5676080, at *1, ¶2 (App. Oct. 17, 2013) "*Miller* did not ban the imposition of sentences to life without the possibility of parole for juveniles. Rather, *Miller* held mandatory sentences of life-without-parole for juvenile offenders violated the Eighth Amendment. *Id*. at 2464. Because Conley's sentence to natural life was not mandatory, he has failed to state a colorable claim for relief."

2. ***State v. Rojas***, 1 CA-CR 13-0605 PRPC, 2015 WL 632135, at *1, ¶4 (App. Feb. 12, 2015) "*Miller* prohibits mandatory life sentences without the possibility of parole for juvenile offenders. *Id*. at 2460. Rojas's sentences to natural life were not mandatory. The trial court knew it had the option to sentence Rojas to natural life or life with a possibility of parole after twenty-five years' imprisonment. *See* Ariz.Rev.Stat. ("A.R.S.") § 13–703(A) (1999). Further, in its determination of which sentence to impose, the trial court acknowledged Rojas's "miserable childhood," and found that his age at the time he committed the murders and his lack of prior felony convictions were mitigating factors. Therefore, the court took into account "how children are different" and Rojas's sentences to natural life complied with *Miller*.

3. ***State v. Rue***, 2 CA-CR 2014-0458-PR, 2015 WL 707022, at *1, ¶6 (App. Feb. 12, 2015) "Rue and amicus curiae contend Arizona's first-degree murder sentencing scheme as a whole is unconstitutional when applied to juvenile defendants and there was no constitutional sentencing option available to the trial court. Indeed, in *State v. Vera*, we determined that because parole had been eliminated and the only possibility of release would be by pardon or commutation, a sentence of life with the possibility of release "was, in effect," a mandatory life sentence "in violation of the rule announced in *Miller*." 235 Ariz. 571, ¶17, 334 P.3d 754 (App.2014). But we further concluded in *Vera* that the legislature's 2014 enactment of A.R.S. § 13–716 remedied any claim that a life sentence without the possibility of release for a minimum number of calendar years was unconstitutional. *Id*. ¶27. That statute provides that a juvenile "who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years" is eligible for parole upon completion of the minimum sentence. § 13-716. Thus, any unconstitutional effect of the original sentencing scheme has been remedied."

4. ***State v. Jessup***, 1 CA-CR 13-0616 PRPC, 2015 WL 1605349, at *1, ¶4 (App. Apr. 9, 2015) "*Miller* prohibits *mandatory* life sentences without the possibility of parole for juvenile offenders. *Id*. at 2460. Jessup's sentence to natural life was not mandatory. The superior court noted at sentencing that it had the option to sentence Jessup either to natural life or life with a possibility of release after 25 years' imprisonment. *See* Ariz.Rev.Stat. § 13–703(A) (1999)."

5. ***State v. Bustos***, 1 CA-CR 13-0765 PRPC, 2015 WL 3623640, at *2, ¶7 (App. June 9, 2015) "This court recently determined in *State v. Vera* that, because parole had been eliminated and the only possibility of release would be by pardon or commutation, a sentence of life with the possibility of release "was, in effect," a mandatory life sentence "in violation of the rule announced in *Miller*." 235 Ariz. 571, 576, ¶ 7, 334 P.3d 754, 759 (App.2014). But, in *Vera*, this court further held that the Legislature's enactment of Arizona Revised Statutes ("A.R.S.") section 13–716 (2014), remedied any claim that a life sentence without the possibility of release for a minimum number of calendar years was unconstitutional. 235 Ariz. at 761, ¶27, 334 P.3d at 578. The statute provides that a juvenile "who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years" is eligible for parole upon completion of the minimum sentence. A.R.S. § 13–716. Thus, any unconstitutional effect of the original sentencing scheme has been remedied."

6. ***State v. Wagner***, 1 CA-CR 13-0606 PRPC, 2015 WL 1395226, ¶4 (2015) "Even assuming arguendo *Miller* is retroactive, we deny relief. *Miller* prohibits mandatory life sentences without the possibility of parole for juvenile offenders. *Id*. at ——, 132 S.Ct. at 2460. Wagner's natural life sentence was not mandatory. The superior court noted at sentencing that it had the option to sentence Wagner to natural life or life with a possibility of parole after 25 years' imprisonment. Ariz.Rev.Stat. ("A.R.S.") § 13–703(A) (1994)."

Addendum C **Cases where sentences of life with or without the possibility of parole after a period of years were imposed** (cited below).

1. ***State v. Marshall***, No. 1 CA–CR 14–0501 PRPC, 2016 WL 4045368, at *1, ¶2 (Ariz. App. July 28, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after twenty-five years" imposed for a first-degree murder committed in 1998).

2. ***State v. Beltran***, No. 1 CA–CR 14–0494 PRPC, 2016 WL 3463308, at *1, ¶2 (Ariz. App. June 21, 2016) (mem.) (sentence of "life in prison with the possibility of parole after twenty-five years" imposed for a first-degree murder originally sentenced in 1999).

3. ***State v. Hooks***, No. 1 CA–CR 14–0500 PRPC, 2016 WL 4394530, at *1, ¶2 (Ariz. App. Aug. 18, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after 25 years" imposed for a first-degree murder committed in 1999).

4. ***State v. Nouan***, No. 1 CA–CR 14–0503 PRPC, 2016 WL 4761928, at *1, ¶2 (Ariz. App. Sept. 13, 2016) (mem.) (sentence of "life imprisonment with the possibility of parole after 25 years" imposed for a first-degree murder; Nouan was convicted of murder in 1999); *cf. Nouan v. Ryan*, CV–17–02743–PHX–GMS–ESW, 2018 WL 7570286, at *1 (D. Ariz. Oct. 19, 2018)).

5. ***State v. Agboghidi***, 1 CA–CR 15–0123 PRPC, 2017 WL 4247961, at *1, ¶2 (Ariz. App. Sept. 26, 2017) (mem.) (sentence of "life with the possibility of parole after 25 years" imposed for a first-degree murder committed in 2004).

6. ***State v. Lee***, No. 1 CA–CR 14–0496 PRPC, 2016 WL 3854436, at *1, ¶2 (Ariz. App. July 12, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after twenty-five years" imposed for a first-degree murder committed in 2004).

7. ***State v. Jara***, 2 CA–CR 2016–0149–PR, 2016 WL 3188911, at *1, ¶¶1-2 (Ariz. App. June 7, 2016) (mem.) (two "life terms of imprisonment with the possibility of parole after twenty-five years" imposed in 2007).

8. ***State v. Coleman***, No. 1 CA–CR 14–0495 PRPC, 2016 WL 3944541, at *1, ¶2 (Ariz. App. July 19, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after 25 years" imposed for a first-degree murder committed in 2009).

9. ***State v. Vera***, 334 P.3d 754, 755, ¶2 (Ariz. App. 2014) (sentence of "life without parole for twenty-five (25) years" imposed for a first-degree murder committed in 1995);

10. ***State v. Bautista***, 1 CA–CR 14–0497 PRPC, 2016 WL 3959954, at *1, ¶2 (Ariz. App. July 21, 2016) (mem.) (sentence imposed in 1998: "life imprisonment for first degree murder without the possibility of parole for 25 years" committed in 1998).

11. ***State v. Randles***, 334 P.3d 730, 731, ¶3 (Ariz. App. 2014), as amended (Sept. 22, 2014) (sentence of "life in prison without the possibility of parole until he served a minimum term of 25 years" imposed for a first-degree murder committed in 2011).

Addendum D **Cases where sentences of life with or without the possibility of release after a period of years were imposed.**

1. ***State v. Finley***, No. 1 CA–CR 14–0499 PRPC, 2016 WL 4046945, at *1, ¶2 (Ariz. App. July 28, 2016) (mem.) (sentence imposed in 1994 of "life in prison with the possibility of release after 25 years" for first-degree murder).

2. ***State v. Torres***, No. 2 CA–CR 2015–0052–PR, 2015 WL 2452297, at *1, ¶2 (Ariz. App. May 20, 2015) (mem.) (sentence of "life in prison with no eligibility for release for twenty-five years" imposed for first-degree murder committed in 1994); *cf. State v. Torres*, 2 CA–CR 2009–0302–PR, 2010 WL 715994, at *1, ¶ 2 (App. Mar. 1, 2010).

3. ***State v. Cox***, 2 CA–CR 2014–0035–PR, 2014 WL 4816081, at *1, ¶2 (Ariz. App. Sept. 29, 2014) (mem.) (sentence of life "without the possibility of release for twenty-five years" imposed for first-degree murder convicted in 1994).

4. ***State v. Cassa***, No. 2 CA–CR 2015–0237–PR, 2015 WL 5178560, at *1, ¶2 (Ariz. App. Sept. 3, 2015) (mem.) (sentence of "life imprisonment without the possibility of release for twenty-five years" imposed for first-degree murder originally sentenced in 1995).

5. ***State v. Valle***, No. 1 CA–CR 15–0539 PRPC, 2017 WL 4638252, at *1, ¶2 (Ariz. App. Oct. 17, 2017) (mem.) (sentence of life "with the possibility of release after 25 years" imposed for first-degree murder committed in 1995).

6. ***State v. Martinez***, No. 2 CA–CR 2017–0290–PR, 2017 WL 5153566, at *1, ¶2 (Ariz. App. Nov. 7, 2017) (mem.) (sentence imposed in 1997 of "life imprisonment without the possibility of release on any basis for twenty-five years" for first-degree murder).

7. ***State v. Hopper***, No. 2 CA–CR 2014–0029–PR, 2014 WL 5422143, at *1, ¶2 (Ariz. App. Oct. 24, 2014) (mem.) (sentence of "life imprisonment with no possibility of release until completion of twenty-five years" imposed in 1998 for first-degree murder pursuant to plea agreement).

8. ***State v. Cruz***, 2 CA–CR 2014–0102–PR, 2014 WL 5038151, at *1, ¶2 (Ariz. App. Oct. 8, 2014) (sentence of "life without the possibility of release on any basis for twenty-five years" imposed for a first-degree murder originally committed in 2000); *cf*. datasearch https://corrections.az.gov/public-resources/inmate-datasearch (last accessed on July 14, 2021, searching for

"Ralph David Cruz").

9. ***State v. Mendez***, No. 2 CA–CR 2016–0091–PR, 2016 WL 2855660, at *1, ¶2 (Ariz. App. May 16, 2016) (mem.) (sentence of "life in prison without the possibility of release for twenty-five years" imposed for first-degree murder committed in 2000); *cf. Mendez v. Ryan*, CV–17–00287–DJH–MHB, 2017 WL 5514192, at *1 (D. Ariz. Oct. 18, 2017), report and recommendation adopted, CV–17–00287–PHX–DJH, 2017 WL 5496194 (D. Ariz. Nov. 16, 2017).

10. ***State v. Cruz***, No. 2 CA–CR 2014–0160–PR, 2014 WL 6607491, at *1, ¶2 (Ariz. App. Nov. 20, 2014) (mem.) (sentence of "life in prison without the possibility of release for twenty-five years" imposed for a first-degree murder committed in 2004).

11. **THIS CASE:** ***State v. Bassett***, 2 CA–CR 2016–0151–PR, 2016 WL 3211766, at *1, ¶2 (Ariz. App. June 9, 2016) (mem.) (sentence of life "without the possibility of release for twenty-five years" imposed for one of two first-degree murder convictions committed before 2005); *cf. State v. Bassett*, 161 P.3d 1264, 1265, ¶ 3 (App. 2007) (noting the trial took place in 2005)). Of note, sentencing minute entry reflects sentence of "natural life without the possibility of parole" imposed for the murder in Count 1 and "natural life with the possibility of parole after 25 years" imposed for the murder in Count 2.

12. ***State v. Hutchinson***, No. 2 CA–CR 2016–0150–PR, 2016 WL 4409284, at *1, ¶2 (Ariz. App. Aug. 16, 2016) (mem.) (sentence imposed in 2008 of "life term without the possibility of release for twenty-five years" for first-degree murder).

13. ***State v. Otero***, No. 1 CA–CR 15–0639 PRPC, 2017 WL 2376331, at *1, ¶2 (Ariz. App. June 1, 2017) (mem.) (sentence imposed in 2008 of "life in prison with the possibility of 'release' after 25 years" for first-degree murder).

14. ***State v. Paulson***, No. 2 CA–CR 2011–0278, 2012 WL 5363109, at *1, ¶1 (Ariz. App. Oct. 31, 2012) (mem.) (sentence of "life imprisonment with the possibility of release in twenty-five years" imposed for first-degree murder committed in 2008).

15. ***State v. McDaniel***, No. 1 CA–CR 14–0559 PRPC, 2016 WL 4089144, at *1, ¶2 (Ariz. App. Aug. 2, 2016) (mem.) (sentence of "life imprisonment with a possibility of release after thirty-five years" imposed for first-degree murder as a dangerous crime against children committed in 2008).

16. ***State v. Cannon***, 1 CA–CR 14–0498 PRPC, 2016 WL 3884902, at *1, ¶2 (Ariz. App. July 14, 2016) (mem.) (sentence imposed in 2010 of "life with the possibility of release after twenty-five years" for first-degree murder).

17. ***State v. Legliu***, No. 1 CA–CR 11–0043, 2013 WL 269048, at *2, ¶12 (Ariz. App. Jan. 24, 2013) (mem.) (concurrent sentences of "life without the possibility of release for twenty-five years" imposed for first-degree murder committed in 2006 and originally sentenced in 2010).

ATTACHMENT A

Clerk of the Superior Court
*** Electronically Filed ***
04/29/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 04/25/2022

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Concholar
Deputy

STATE OF ARIZONA

JESSI WADE
JULIE ANN DONE

v.

LONNIE ALLEN BASSETT (001)

AMY E BAIN

COURT ADMIN-CRIMINAL-PCR
JUDGE COOPER

RULING RE: STATE'S MOTION TO VACATE EVIDENTAIRY HEARING AND DISMISS PETITION

Pending before the Court is the State's fully-briefed Motion to Vacate Evidentiary Hearing and Dismiss Lonnie Bassett's Petition for Post-conviction Relief. The Court has reviewed the briefs and considered counsels' oral argument.

Background

In 2004, the State charged Bassett, then 16 years old, with two counts of first-degree murder. He was 16 years old.

On December 19, 2005, a jury found him guilty of both counts.

On January 27, 2006, the trial court sentenced Bassett to a prison term of natural life on Count 1 and a consecutive life sentence with the possibility of "parole" after serving 25 years on Count 2.[1] The Court of Appeals affirmed both convictions and sentences.

On June 20, 2013, Bassett filed a successive Notice of Post-Conviction Relief, claiming a substantive change in the law, based on *Miller v. Alabama*, 132 S.Ct. 2455 (2012), entitled him to relief. *Miller* holds that mandatory life-without-parole (LWP) sentences for juveniles are unconstitutional and, therefore, an LWP sentence cannot be imposed unless the judge first considers the offender's "youth and attendant characteristics." *Id.* at 2478. The PCR court dismissed the action finding it untimely, successive, and that the sentencing judge gave Bassett's age considerable weight as a mitigating factor.[2]

The PCR court denied Bassett's Rule 32.9(A) motion for rehearing. The Court of Appeals denied a Petition for Review and Motion for Reconsideration, and the Arizona Supreme Court denied a Petition for Review.

On September 13, 2017, Bassett filed the pending PCR petition seeking a resentencing following *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016); *Tatum v. Arizona*, 137 S.Ct. 11, 12 (2016): and *State v. Valencia*, 241 Ariz. 206 (2016). In *Montgomery*, the Supreme Court held that *Miller* announced substantive rule of law distinguishing between children whose crimes reflect "transient immaturity" from those that reflect "irreparable corruption." In *Tatum*, the U.S. Supreme Court remanded two Arizona cases for resentencing pursuant to *Miller* and *Montgomery*. In *Valencia*, the Arizona Supreme Court held that juvenile defendants sentenced for life pre-*Miller* were entitled to an evidentiary hearing to determine whether their crimes reflected "transient immaturity" and, therefore, required a resentencing.[3]

On February 12, 2018, the State responded and conceded that Bassett was "entitled to an evidentiary hearing pursuant to *Valencia* and Rule 32.8, Ariz. C. Proc." (2/21/2018 PCR

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[1]The word "parole" in the Sentencing Order is inaccurate. Arizona abolished parole in 1993 for all offenses. It appears that the court meant to order imprisonment for life with the possibility of "release" after 25 years.

[2] The PCR court also stated erroneously that the sentencing court "had the discretion to order life with the possibility of parole but chose not to" and, therefore, "defendant has failed to demonstrate that *Miller* is a significant change in the law as applied to his case. (7/15/2013 ME) The sentencing court did not have discretion to order life with parole because the State abolished parole in 1993.

[3] The *Valencia* Court stated:

> Healer and Valencia are entitled to evidentiary hearings on their Rule 32.1(g) petitions because they have made colorable claims for relief based on Miller….At these hearings, they will have an opportunity to establish by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity…only if they meet this burden will they establish that their natural life sentences are unconstitutional, thus entitled them to resentencing. 241 Ariz. at 210.

Response). The Court set a Rule 32 Evidentiary Hearing. Per the parties' request, the Court stayed the hearing pending the outcome of two more U.S. Supreme Court cases, *Mathena v. Malvo*[4] and *Jones v. Mississippi,* 141 S. Ct. 1307 (2021).

In April, 2021, the U.S. Supreme Court decided *Jones, supra.* Mr. Jones had been resentenced following *Miller*. The Supreme Court held that 1) *Miller* and *Montgomery* do not require the sentencing court to make an express or implied finding that a juvenile is permanently incorrigible before imposing a LWP sentence; and 2) Jones' resentencing complied with *Miller* and *Montgomery.*

After *Jones,* the State took the position that Bassett is not entitled to an evidentiary hearing and filed the Motion to Vacate the Evidentiary Hearing and Dismiss Bassett's Petition.

Legal Standard for Evidentiary Hearing

In considering a petition for post-conviction relief, the Court is required to set a hearing on all claims "that present a material issue of fact or law" and are not otherwise are precluded. A.R.S. §13-4236. "The purpose of an evidentiary hearing in the Rule 32 context is to allow the court to receive evidence, make factual determinations, and resolve material issues of fact." *State v. Gutierrez*, 229 Ariz. 573, 579 (2012).

The Arizona Supreme Court has defined a colorable claim as one that has the "appearance of validity," such that "if the allegations are true, would they change the verdict?" *State v. Adamson,* 136 Ariz. 250, 265 (1983). A defendant is entitled to an evidentiary hearing when he presents facts "which, if true, would probably have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, 220 (2016). A defendant "need not provide detailed evidence, but must provide specific factual allegations that, if true, would entitle him to relief." *State v. Donald,* 198 Ariz. 406, 414 (App.2000).

***Jones* Does Not Alter Bassett's Right to an Evidentiary Hearing**

The first issue is whether *Jones* deprives Bassett of the agreed-upon evidentiary hearing. The Court finds that Bassett is still entitled to an evidentiary hearing to determine whether his sentencing proceeding met *Miller* requirements.

Jones did not change that. *Jones* holds that there are no magic words required – that the sentencer is not required to make a separate express or implied factual finding of permanent incorrigibility before imposing an LWP sentence on a juvenile homicide offender. *Jones* does

[4] *Mathena* was dismissed by stipulation.

not overrule *Miller* or *Montgomery*. In fact, *w*riting for the Court, Justice Kavanaugh specifically states that *Jones* affirms and "does not disturb" *Miller* or *Montgomery*.[5] Moreover, *Jones* does not mention let alone overturn *Valencia.* "[L]ower courts are bound by [Arizona Supreme Court] decisions and [the Arizona Supreme] Court alone is responsible for modifying that precedent." *Sell v. Gama*, 231 Ariz. 323, 330 ¶ 31, (Ariz. 2013). Finally, *Valencia* and *Jones* reach the same conclusion – that neither *Miller* nor *Montgomery* require the court to make particularized findings regarding regarding permanent incorrigibility before imposing a LWP sentence. Thus, post-*Jones*, it is still the law that a court may impose LWP in a jurisdiction (like Arizona) that does not allow for parole only after "tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" (*Miller*, 132 S. Ct. at 2469) and whether the crime reflects transient immaturity (*Montgomery*, 136 S. Ct. at 735; *Valencia*, 214 at 210). And, a defendant establishing a colorable claim under *Miller* is entitled to an evidentiary hearing. *Valencia*, 241 Ariz. at 210.

The Petition Presents a Colorable Claim

The second issue is whether the Petition asserts a colorable claim based on a significant change in the law pursuant to Rule 32.1(g). The Court finds that it does. The Petition alleges facts that, if proven, establish that the court imposed a LWP sentence without giving Bassett's youth and attendant characteristics the weight required by *Miller*. Defendant is entitled to an evidentiary hearing to determine if the sentencing court complied with constitutional mandates when imposing a natural life sentence on Count 1.

A colorable claim exists because Bassett was sentenced under a mandatory natural life sentencing scheme that *Miller* and *Jones* found to be unconstitutional. The Supreme Court found the sentencing scheme to be unconstitutional in *Jones* and *Miller* because the law did not allow the sentencing judge to consider life with the possibility of parole as an alternative to a sentence of natural life. Similarly, in 1993, the Arizona Legislature abolished parole for all offenses committed on or after January 1, 1994. It replaced the parole system with death, imprisonment for natural life, imprisonment for life without the possibility of release on any basis for a period of 25 years. A.R.S. §§ 13-703, 13-703.01 (2006).

The State contends that the natural life sentence on Count 1 was not mandatory because the court had options. It could have ordered life with possible release after 25 years as it did on

[5] "The Court's decision today carefully follows both *Miller* and *Montgomery*. The dissent nonetheless claims that we are somehow implicitly overruling those decisions. We respectfully but firmly disagree: Today's decision does not overrule *Miller* or *Montgomery*. *Miller* held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding. *Montgomery* later held that *Miller* applies retroactively o collateral review. Today's decision likewise does not disturb that holding." 141 S. Ct. at 1321.

Count 2. However, life with possible *release* is not *parole*. The United States Supreme Court has recognized the distinction. In *Miller*, the U.S. Supreme Court counted Arizona as one of 29 jurisdictions with mandatory LWP sentences for juvenile homicide offenders, despite the court's ability to order life with possible *release*. In other decisions, the Supreme Court found that release after 25 years is a form of executive clemency (*Lynch v. Arizona*, 136 S. Ct. 1818, 1819 (2016) (*per curiam)), and* that executive clemency (or commutation) is not a constitutionally adequate substitute for the possibility of parole (*Solem v. Helm*, 103 S. Ct. 3001, 3024 (1983)).

The Arizona Supreme Court has recognized the difference as well. Like Bassett, the Valencia defendants received natural life sentences. While the *Valencia* court observed that the sentencer had the option of life with possible release after 25 years, it found that the natural life sentences "did amount to sentences of life without the possibility of parole" because "in 1993 Arizona eliminated parole for all offenders, including juveniles, who committed offenses after January 1, 1994, and replaced it with a system of 'earned release credits," which do not "apply to natural life sentences." 241 Ariz. at 208.

Here, the sentencing court could not have legally imposed a sentence that included the possibility of parole. The sentencing laws under which Mr. Bassett was sentenced did not allow for the discretion – i.e. a sentence with the possibility of parole – that *Miller* requires for a constitutionally sound sentencing. As a result, pursuant to *Valencia*, Bassett is entitled to an evidentiary hearing to determine whether his sentence on Count 1 met the constitutional requirements set forth in *Miller* and *Montgomery*.

A colorable claim also exists because the Petition alleges facts that, if proven, establish that the trial court failed to adequately consider Bassett's youth and attendant characteristics because the court lacked critical information. While the court is not constitutionally required to make a particularize factual finding or other record that a juvenile offender is permanently incorrigible, the court must follow "a certain process – considering an offender's youth and attendant characteristics – before imposing a life-without-parole sentence." *Jones*, 141 S. Ct. at 1321. The Petition asserts that the sentencing hearing did not include information necessary for the court to adequately consider Bassett's youth and characteristics, such as 1) a psychological evaluation and/or forensic regarding his risk to reoffend and potential for rehabilitation given his age; 2) a report and/or testimony by a mental health expert, forensic social worker, or forensic psychiatrist regarding Bassett's psychological age and characteristics; 3) cognitive testing results to evaluate academic maturity; and 4) a comprehensive mental health evaluation by a child mental health professional to provide the court with information for an individualized assessment of age and "its hallmark features." *Jones,* 141 at 1316.

The Court has considered the record of the sentencing and the information before the court at that time. While the court considered Bassett's age in 2006, an evidentiary hearing is warranted to determine whether that consideration was constitutionally sufficient.

Conclusion

For these reasons, IT IS ORDERED denying the Motion to Vacate Evidentiary Hearing and to Dismiss Petition.

IT IS FURTHER ORDERED finding that Petitioner has stated a colorable claim for relief under Rule 32.1(g) and granting the request for an evidentiary hearing.

IT IS FURTHER ORDERED setting a Status Conference on May 2, 2022, at 9:00am to reset the Evidentiary Hearing on the PCR Petition. Counsel shall confer before the hearing regarding the length and proposed time frames for the hearing.

Join on your computer or mobile app
Click here to join the meeting

Or call in (audio only)
+1 917-781-4590,,860084431# United States, New York City
Phone Conference ID: 860 084 431#

All persons are strongly urged to appear by video instead of audio alone. For questions, please call Judge Cooper's division at 602.506.8311, or email Judicial Assistant Jennifer Madrid at Jennifer.Madrid@jbazmc.maricopa.gov.

ATTACHMENT B

Clerk of the Superior Court
*** Electronically Filed ***
05/27/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 05/26/2022

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
A. Chee
Deputy

STATE OF ARIZONA JESSI WADE

v.

LONNIE ALLEN BASSETT (001) AMY E BAIN

JUDGE COOPER

RULING RE: MOTION FOR RECONSIDERATION

The Court has reviewed the State's Motion for Reconsideration of the Denial of State's Motion to Vacate the Evidentiary Hearing and Dismiss Lonnie Bassett's Successive Petition for Post-conviction Relief filed May 17, 2022.

IT IS ORDERED denying the Motion for Reconsideration.

ATTACHMENT C

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DIVISION ONE
FILED: 08/10/2022
AMY M. WOOD,
CLERK
BY: KLE

STATE OF ARIZONA ex rel. RACHEL H. MITCHELL, Maricopa County Attorney,	Court of Appeals Division One No. 1 CA-SA 22-0152
Petitioner,	Maricopa County Superior Court No. CR2004-005097
v.	
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.	

ORDER DECLINING SPECIAL ACTION JURISDICTION

The court, Presiding Judge Samuel A. Thumma, Judge Cynthia J. Bailey and Vice Chief Judge David B. Gass, has considered the petition for special action filed by Petitioner. After consideration,

IT IS ORDERED, in the exercise of its discretion, the court declines to accept jurisdiction of the special action.

IT IS FURTHER ORDERED vacating this court's previous order in its entirety and denying the Request for Stay as moot.

/S/
SAMUEL A. THUMMA, Presiding Judge

A copy of the foregoing
was sent to:

Julie A Done
Jessi C Wade
Amy E Bain
Hon Katherine Cooper

APPENDIX 1

215 Ariz. 600
Court of Appeals of Arizona,
Division 1, Department C.

STATE of Arizona, Appellee,
v.
Lonnie Allen BASSETT, Appellant.

No. 1 CA–CR 06–0088.
|
July 24, 2007.
|
Review Denied Nov. 29, 2007.

Synopsis

Background: Defendant was convicted by a jury in the Superior Court, Maricopa County, No. CR2004-005097-001 DT, Brian R. Hauser, J., two counts of first degree murder and was sentenced to life imprisonment. Defendant appealed.

Holding: The Court of Appeals, Portley, J., held that trial court was not required to hold an evidentiary hearing to determine whether it was necessary for defendant to wear a stun belt during murder trial.

Affirmed.

Donn Kessler, J., filed a dissenting opinion.

West Headnotes (1)

[1] **Criminal Law** Hearing

Trial court was not required to hold an evidentiary hearing to determine whether it was necessary for defendant to wear a stun belt during murder trial; defendant did not object to the necessity of the stun belt at trial, but rather apprised the court of his discomfort in having to wear the stun belt.

1 Cases that cite this headnote

Attorneys and Law Firms

****1264** Terry Goddard, Attorney General, by Randall M. Howe, Chief Counsel, Criminal Appeals Section and Joseph T. Maziarz, Assistant Attorney General, Phoenix, Attorneys for Appellee.

James J. Haas, Maricopa County Public Defender by Terry J. Adams, Deputy Public Defender, Phoenix, Attorneys for Appellant.

***600 OPINION**

PORTLEY, Judge.

¶ 1 We are asked to decide whether the trial court committed reversible error when it failed to hold an evidentiary hearing to determine whether it was necessary to use a stun belt on Defendant Lonnie Bassett. Because we find under the facts of this case that the trial court did not err, we affirm his ***601** ****1265** two first degree murder convictions and resulting life sentences.

FACTUAL BACKGROUND

¶ 2 Defendant was riding in the backseat of a car when he pulled out a shotgun and fatally shot the female driver and her front seat passenger. He jumped out after the car crashed into a light pole, walked away, returned and retrieved the shotgun. He was apprehended the following day. He was subsequently indicted for the two murders, tried, found guilty, and duly sentenced.

¶ 3 During the eight-day jury trial, there were two instances when the court was apprised that Defendant was wearing a stun belt.[1] The first was December 1, 2005, the third day of trial, when counsel complained that the belt was "way too big for [Defendant]." The judge, after learning that it was the first time the belt had been placed on Defendant, and it was the deputy sheriff's "procedure," indicated that he would talk with the deputy during the lunch recess.[2]

¶ 4 The second instance occurred at the end of the sixth trial day, December 8, 2005. Counsel stated that:

> The electronic shock belt that my client is wearing is placing him in distress. It's getting worse and worse as the

afternoon goes on. Since about 2:30, he's said, "This hurts. I can't sit here any longer." I'm asking him to hold on here. He is not a whiner and complainer. It is impacting his right to participate in his defense.

In this case the jury is watching him at every turn when things happen, and they are going to get the false impression that he's reacting to some evidence, when really what he is reacting to is the discomfort of the shock belt that he's wearing. And, judge, I think it's impacting my client's Sixth Amendment right to a fair trial and his ability to assist his attorney in the defense.

THE COURT: Do[es] [the State] wish to respond to that?

MS. GALLAGHER: Judge, it's the same argument I've heard from every defendant whoever had to wear a stun belt. I listened to it for three-and-a-half months from [other inmates], and I have no response. That's the jail's business.

THE COURT: I am not going to take any action with respect to that.

MR. CANBY: Judge, I'll have to raise it if it gets to the point where he can't sit in the court, which he is very close to. I have to say he was a good sport today.

THE COURT: Ms. Gallagher is correct. Your client is not the first defendant who has appeared in this court on similar charges wearing such an item, but he is the first to complain about it.

MR. CANBY: I believe it's particularly uncomfortable for him, your Honor.

THE COURT: He may be unduly sensitive. I don't know. We may have to have a doctor examine him.

MR. CANBY: We're going to have to.

¶ 5 The court's minute entry indicates that the discussion occurred between 4:42 p.m. and 5:10 p.m., and noted that the court would leave the issue of security measures to the sheriff's office. There was no further discussion of the stun belt or other restraining device during the trial.

¶ 6 We have jurisdiction over this appeal pursuant to Arizona Revised Statutes ("A.R.S.") sections 12–120.21(A)(1) (2003), 13–4031 and 13–4033 (2001).

DISCUSSION

¶ 7 Defendant, citing *United States v. Durham,* 287 F.3d 1297 (11th Cir.2002), contends that the trial court committed reversible error when it failed to hold an evidentiary hearing to determine whether the stun belt was a security necessity.

****1266 *602** ¶ 8 Arizona courts have long held that a person being tried for a criminal offense "was entitled to appear free from all manner of shackles or bonds ... unless there was evident danger of his escape." *Parker v. Territory,* 5 Ariz. 283, 287, 52 P. 361, 363 (1898) (quoting *People v. Harrington,* 42 Cal. 165, 167 (1871)). Our supreme court has adhered to the "common law rule," *id.* at 287–88, 52 P. 361, 52 P. at 363, unless the record supported the trial judge's exercise of discretion to shackle the defendant. *See State v. Stewart,* 139 Ariz. 50, 54, 676 P.2d 1108, 1112 (1984); *State v. Starks,* 122 Ariz. 531, 534, 596 P.2d 366, 369 (1979).

¶ 9 In fact, in *State v. Gomez*, our supreme court, following *Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), recently reiterated the rule that a convicted defendant should not be visibly shackled even during the sentencing phase of trial absent justification on the record that there were "indisputably good reasons for shackling." 211 Ariz. 494, 503, ¶ 46, 123 P.3d 1131, 1140 (2005) (internal quotations omitted). In *Gomez*, the shackles were visible and there was no record of any special need for shackling other than the jail policy that required "shackling of all defendants in prison garb." *Id.* at 504, ¶¶ 47–48, 123 P.3d at 1141. The supreme court vacated the sentence and remanded the case for a new sentencing proceeding. *Id.* at 504–05, ¶ 51, 123 P.3d at 1141–42.

¶ 10 We have noted that the same rules apply for restraining devices that are hidden from the view of the jury. In *State v. Mills,* the trial court precluded the use of handcuffs or shackles during trial, but did not preclude other restraints. 196 Ariz. 269, 272, ¶ 13, 995 P.2d 705, 708 (App.1999). As a result, and without objection, the defendant was restrained by a leg brace underneath his clothes. On appeal, we found that the defendant had waived the issue by failing to object, and stated that if the defendant was restrained by a device that could not be seen, the "unseen 'restraint could not have affected the presumption of innocence.' " *Id.* at 272–73, 995 P.2d at 708–09 (citation omitted); *see also Johnson,* 858 N.E.2d at 1179, ¶ 244 (stating that the failure to object waives the issue). More importantly, we noted that if the defendant

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had "made a proper objection at trial ... the state would have been required to establish 'some reason' for the restraint in the courtroom." *Mills,* 196 Ariz. at 273, ¶ 15, 995 P.2d at 709. The trial court would then be required to use its discretion to determine whether a restraint was necessary. *See State v. Bracy,* 145 Ariz. 520, 532, 703 P.2d 464, 476 (1985), *cert. denied,* 474 U.S. 1110, 106 S.Ct. 898, 88 L.Ed.2d 932 (1986).

¶ 11 Here, Defendant did not raise any legal objection at the outset to the use of any restraint underneath his clothes, including the stun belt. Only later did he advise the court on two distinct and separate occasions that he was placed in the belt and that it was causing some discomfort. The first time occurred just before lunch on the third day of trial when he complained that the stun belt was uncomfortable because it was too big. The second time occurred at the end of the sixth day of trial when Defendant complained that the belt had caused him some physical distress and was uncomfortable. He noted that the jury could have seen him moving to get comfortable and could have misunderstood his movements. There is, however, nothing in the record to support the fact that Defendant was visibly shifting in his seat that afternoon or that the jury perceived the movement, nor did Defendant move to have the jurors polled as to whether they had seen the device or his displays of discomfort.

¶ 12 Because Defendant did not object to the use of the stun belt and only raised the issue of comfort, we find that the trial court did not err by not holding an evidentiary hearing to determine whether the use of the stun belt underneath his clothes was appropriate.

¶ 13 Moreover, we find that *Durham* is inapposite. Durham was a serial bank robber with a history of escape attempts from federal custody. *Durham,* 287 F.3d at 1301. He filed a pretrial motion on the last business day before the trial began to preclude the district court from ordering that he wear a stun belt during trial. *Id.* at 1309–10 (Tjoflat, J. concurring). He argued that the use of the stun belt interfered with his rights ***603** ****1267** to confer with counsel, to participate in his own defense, and might prejudice him before the jury because the jury might think he was violent and only controlled by extraordinary means. *Id.* at 1301–02. Moreover, he requested an evidentiary hearing to determine whether the stun belt was designed to administer 50,000 volts of electricity, how it might be triggered, its error rate, the deputy's training to use the belt and whether any shock would cause long-term physical damage. *Id.*

¶ 14 The federal district court heard argument from Durham's attorney, which included the claims about the effects of the stun belt, that his client "would be 'more concerned about receiving a jolt than he is about thinking about the testimony and giving me aid and assistance in the defense of this case [,]' " and "the less compelling argument that the device interfered with Durham's comfort" because it pinched his back when he leaned forward. *Id.* at 1302. The government responded, and advised the court about the defendant's attempted escapes and the need to protect the security of those in the courtroom. *Id.*

¶ 15 The court did not hold an evidentiary hearing, but "asked several questions to the deputy marshal [who] had responsibility for courtroom security," after which it denied the motion. *Id.* The circuit court noted that the trial court ruled

> [without] any factual findings to justify its denial of Durham's motion. The court found no facts regarding the operation of the stun belt or the potential for accidental discharge. The court did not explain why less severe security methods—such as shackles alone—would have been inadequate to restrain Durham. The court also provided no guidance to Durham on what behavior would prompt the deputy to activate the stun belt.

287 F.3d at 1303.

¶ 16 Based on those facts, the circuit court articulated its concerns about the use of a stun belt. First, after recognizing that stun belts are worn underneath clothing and are not readily visible to the jury, the court noted that "if the stun belt protrudes from the defendant's back to a noticeable degree, it is at least possible that it may be viewed by a jury [and][i]f seen, the belt 'may be even more prejudicial than handcuffs or leg irons because it implies that unique force is necessary to control the defendant.' " *Id.* at 1304. The court continued and stated that

> We are more concerned about the possibility that a stun belt could disrupt a different set of a defendant's constitutionally guaranteed rights.... The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movement during trial—including those movements necessary for effective communication with counsel.

Id.

¶ 17 The circuit court then noted that "[a]nother problem with this device is the adverse impact it can have on a defendant's Sixth Amendment and due process rights to be present at trial

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and to participate in his defense." *Id.* at 1305–06. The court was concerned that a stun belt might create anxiety by forcing the defendant to worry more about the belt and preventing it from being activated than to fully participate in his defense at trial. Or, as the court stated in a footnote, "[m]andatory use of a stun belt implicates [the right to be present at trial], because despite the defendant's physical presence in the courtroom, fear of discharge may eviscerate the defendant's ability to take an active role in his own defense." 287 F.3d at 1306 n. 7.

¶ 18 The final concern noted was that "stun belts have the potential to be highly detrimental to the dignified administration of criminal justice." *Id.* at 1306. The court noted that "[s]hackles are a minor threat to the dignity of the courtroom when compared with the discharge of a stun belt, which could cause the defendant to lose control of his limbs, collapse to the floor, and defecate on himself." *Id.* It then held that

> [A] decision to use a stun belt must be subjected to at least the same "close judicial scrutiny" required for the imposition of other physical restraints. Due to the novelty of this technology, a court contemplating its use will likely need to make factual ***604 **1268** findings about the operation of the stun belt, addressing issues such as the criteria for triggering the belt and the possibility of accidental discharge. A court will also need to assess whether an essential state interest is served by compelling a particular defendant to wear such a device, and must consider less restrictive methods of restraint. Furthermore, the court's rationale must be placed on the record to enable us to determine if the use of the stun belt was an abuse of the court's discretion.

Id. at 1306–07 (quotation marks, citations and footnotes omitted).

¶ 19 The circuit court, after finding that the government's attempts to demonstrate harmless error were insufficient, held that "the defendant's ability to participate meaningfully throughout his trial was hampered by the use of the stun belt. The government has not demonstrated that Durham's defense was not harmed by such an impediment to Durham's ability to participate in the proceedings." *Id.* at 1309. The court then vacated his bank robbery and related convictions and remanded the case for further proceedings. *Id.*[3]

¶ 20 Here, as noted above, Defendant never filed a pretrial motion objecting to the restraint or otherwise objected to the use of any restraint. Second, there is no indication in the record that Defendant wore the stun belt other than the two times referred to in the record. Third, other than the issue of comfort, only at the end of the sixth day of trial did Defendant speculate that the belt might impair his constitutional rights when counsel stated that "I'll have to raise [the Sixth Amendment claim] if it gets to the point where he can't sit in the court...." Defendant, however, never raised the issue again. Consequently, based on the facts in this case, Durham is inapposite.

CONCLUSION

¶ 21 Based on the foregoing, we conclude that the trial court did not err by not holding a *Durham*-type evidentiary hearing. Accordingly, we affirm the Defendant's convictions and sentences.

CONCURRING: PATRICK IRVINE, Judge.

KESSLER, Judge, dissenting.

¶ 22 I respectfully dissent. Defendant adequately raised his objection to the use of the stun belt. Defendant stated the belt was "impacting his right to participate in his defense," that "the jury is watching him at every turn when things happen," and therefore "it's impacting my client's Sixth Amendment right to a fair trial and his ability to assist his attorney in the defense." These statements clearly communicated two distinct constitutional challenges to the use of the stun belt: that the jury may have been unduly aware of the restraint during the trial, and that it restricted Defendant's ability to participate in his own defense. They put the court on notice of potential constitutional error such that the court had the opportunity to provide a remedy if necessary, and therefore it was a sufficient objection. *See State v. Fulminante,* 193 Ariz. 485, 503, ¶ 64, 975 P.2d 75, 93 (1999).

¶ 23 Despite this, the superior court made no ruling or findings of fact on these issues, and this Court is therefore deprived of any record with which it may meaningfully assess whether there was in fact constitutional error as alleged. Additionally, the State has made no showing whatsoever that the use of the belt did not prejudice Defendant. Defendant's conviction and sentence should not be affirmed based on this record. *See State v. Lee,* 189 Ariz. 608, 617, 944 P.2d 1222, 1231 (1997) (when defendant objects to use of restraint during trial, record should support trial court's decision); *State v.*

Bible, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (error is deemed harmless on appeal when state shows beyond a reasonable doubt that error did not impact verdict). I would therefore reverse Defendant's conviction and remand for a new trial.

All Citations

215 Ariz. 600, 161 P.3d 1264, 509 Ariz. Adv. Rep. 3

Footnotes

1 Generally, a stun belt goes under clothing and can be "secured around a prisoner's waist[,]" *Gonzalez v. Pliler,* 341 F.3d 897, 899 (9th Cir.2003), or around the leg. *See State v. Johnson,* 112 Ohio St.3d 210, 858 N.E.2d 1144, 1178, ¶ 241 (2006). It is "a method of prisoner restraint, used as an alternative to shackles." *Pliler,* 341 F.3d at 899.

2 The judge did not make a record of its conversation with the deputy sheriff, if any, or the results of any conversation.

3 On remand, the court had a hearing, made its factual findings and determined that the use of a stun belt had been warranted. *See United States v. Durham,* 219 F.Supp.2d 1234 (N.D.Fla.2002).

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APPENDIX 2

2016 WL 3211766
Only the Westlaw citation is currently available.
This Decision Does Not Create Legal Precedent
And May Not Be Cited Except As Authorized
By Applicable Rules. Not For Publication *See*
Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.
Court of Appeals of Arizona, Division 2.

The STATE of Arizona, Respondent,

v.

Lonnie Allen BASSETT, Petitioner.

No. 2 CA–CR 2016–0151–PR
|
Filed June 9, 2016
|
Review Denied January 10, 2017

Petition for Review from the Superior Court in Maricopa County, No. CR2004005097001DT, The Honorable Bruce R. Cohen, Judge. **REVIEW GRANTED; RELIEF DENIED**

Attorneys and Law Firms

William G. Montgomery, Maricopa County Attorney, By Diane Meloche, Deputy County Attorney, Phoenix, Counsel for Respondent.

James J. Haas, Maricopa County Public Defender, By Tennie B. Martin and Mikel Steinfeld, Deputy County Defenders, Phoenix, Counsel for Petitioner.

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

MEMORANDUM DECISION

HOWARD, Presiding Judge:

***1** ¶ 1 Petitioner Lonnie Bassett seeks review of the trial court's order denying him post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, deny relief.

¶ 2 After a jury trial, Bassett was convicted of two counts of first-degree murder committed when he was sixteen-years old. The trial court sentenced him to a natural-life prison term on the first count, to be followed by a life term without the possibility of release for twenty-five years on the second. This court affirmed his convictions and sentences on appeal. *State v. Bassett*, No. 1 CA–CR 06–0088 (memorandum decision filed Jul. 24, 2007).

¶ 3 In June 2013, Bassett filed a notice of post-conviction relief in which he alleged the Supreme Court's decision in *Miller v. Alabama*, —— U.S. ——, 132 S. Ct. 2455 (2012), was a significant change in the law that entitled him to relief from his natural-life sentence.[1] The trial court summarily dismissed that notice. Bassett sought rehearing, asking that counsel be appointed. The court, first addressing Bassett's natural life sentence, determined that even if *Miller* applied retroactively, its requirements had been met because the sentencing court adequately considered Bassett's age "as part of the sentencing determination." As to Bassett's second life sentence, however, the court noted that, "there is an argument to be made that there is no system for release in Arizona at this time and that commutation or pardon is not the functional equivalent." The court further commented, however, that it could not address Bassett's arguments related to that issue without first deciding whether *Miller* was retroactively applicable. Thus, the court "deferr[ed] determination" of the motion for rehearing and appointed counsel, ordering the parties to file briefs "on the issue of retroactive applicability of *Miller* and whether there is a presently cognizable claim for relief."

¶ 4 After the parties filed the ordered briefs but before the trial court held oral argument on these issues, our legislature passed H.B. 2593, which enacted A.R.S. § 13–716 and amended A.R.S. § 41–1604.09(I), establishing parole eligibility for juveniles sentenced to life imprisonment. *See* 2014 Ariz. Sess. Laws, ch. 156, §§ 2, 3; House Fact Sheet, H.B. 2593, 51st Leg., 2nd Reg. Sess. (Ariz. 2014). Following oral argument, the trial court denied relief "with the condition that upon ... § 13–716[2] and § 41–1604.09(I) becoming effective under Arizona law, the Arizona Department of Corrections shall set a specific date for [Bassett's] parole eligibility."[3] In support of its ruling, the court stated its conclusions that *Miller* applied retroactively;[4] that "HB 2593," which enacted § 13–716 and amended § 41–1604.09(I), "resolves the residual issues" of whether Bassett's "sentence violated the letter and spirit of *Miller*"; and that Bassett "is not yet eligible for release" from the sentence imposed. This petition for review followed.

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***2** ¶ 5 On review, Bassett contends the trial court abused its discretion in denying his "request for a new sentencing, at which time [he] would have been able to raise substantive arguments regarding HB 2593." According to Bassett, had the court granted his request, he would have argued the statute was not intended to apply retroactively, that its retroactive application would violate separation of powers and ex post facto principles, and that *Miller* requires a new sentencing proceeding.[5] He asks that we "vacate the trial court's judgment, as it relates to the automatic resentencing by HB 2593, and remand this matter for a full resentencing."

¶ 6 We review a denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Bassett has not identified any such abuse here. As the state suggests in its response, these same arguments, including the argument that resentencing is required, were considered and rejected in *State v. Vera*, 235 Ariz. 571, ¶¶ 21, 22, 26 & nn. 6–7, 334 P.3d 754, 759–61 & nn. 6–7 (App. 2014),[6] *cert. denied*, —— U.S. ——, 136 S. Ct. 121 (2015). *See also Montgomery v. Louisiana*, —— U.S. ——, ——, 136 S. Ct. 718, 736 (2016) (suggesting "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them"). The superior court is bound to follow our decision in *Vera*, *see State v. Patterson*, 222 Ariz. 574, ¶ 20, 218 P.3d 1031, 1037 (App. 2009), and Bassett has failed to persuade us any purpose would be served by remanding the case for a hearing. *See* Ariz. R. Crim. P. 32.6(c) (summary disposition appropriate when "no purpose would be served by any further proceedings").

¶ 7 Although we grant review, we deny relief.

All Citations

Not Reported in Pac. Rptr., 2016 WL 3211766

Footnotes

1 In *Miller*, the Supreme Court held that Alabama and Arkansas statutes violated the Eighth Amendment by mandating sentences of life imprisonment without parole for juvenile homicide offenders. —— U.S. at ——, 132 S. Ct. at 2475.

2 Effective July 24, 2014, § 13–716 provides as follows:

> Notwithstanding any other law, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years of age is eligible for parole on completion of service of the minimum sentence, regardless of whether the offense was committed on or after January 1, 1994. If granted parole, the person shall remain on parole for the remainder of the person's life except that the person's parole may be revoked pursuant to § 31–415.

3 At the present time, it appears that compliance with the trial court's order is impossible, as Bassett's life term with the possibility of release is consecutive to his natural-life sentence. But Bassett does not urge this as a potential basis for relief. Additionally, Bassett does not argue on review that the trial court erred in rejecting his *Miller* claim as to his sentence of natural life. Indeed, he does not mention that sentence in his petition for review. Accordingly, we do not address those issues. *See State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

4 The Supreme Court has since clarified that, as the trial court concluded, *Miller* "announced a substantive rule of constitutional law" to be applied retroactively to all cases. *Montgomery v. Louisiana*, —— U.S. ——, ——, 136 S. Ct. 718, 736 (2016); *see also State v. Valencia*, 735 Ariz. Adv. Rep. 8, ¶ 17 (Ariz. Ct. App. Mar. 28, 2016) (concluding *Montgomery* "constitutes a significant change in Arizona law that is retroactively applicable").

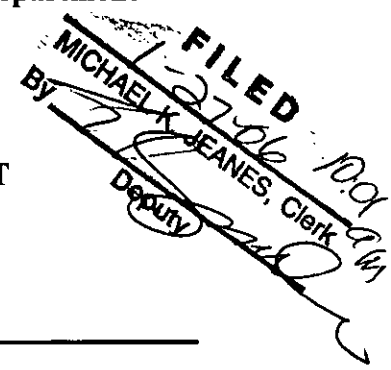
5 The state does not dispute that Bassett raised his request to address such issues during oral argument in the trial court.

6 Nor are we persuaded that the decision by another department of this court in *State v. Randles*, 235 Ariz. 547, 334 P.2d 730 (App. 2014), provides Bassett with a basis for relief. In *Randles*, the court referred to § 13–716 as "appl[ying] retroactively." *Id.* ¶ 10. To the extent that statement conflicts with our holding in *Vera*, we conclude that *Vera* properly characterizes § 13–716 as a remedial statute that affects future events and is not a retroactive statute. 235 Ariz. 571, ¶ 21, 334 P.3d at 759. And, in any event, whether the statute is classified as retroactive or remedial does not change whether Bassett is entitled to be resentenced.

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APPENDIX 3

The Superior Court of Arizona in Maricopa County – Adult Probation Department
Chief Probation Officer Barbara A. Broderick



PRESENTENCE INVESTIGATION

State of Arizona v. **Lonnie Allen Bassett, CR2004-005097-001-DT**

Superior Court Criminal Division **G**

Sentencing Date: **January 27, 2006**

Sentencing Judge:	**Brian Hauser**	Prosecutor:	**Jeannette Gallagher, DCA**
PSI Officer:	**Jennifer Oltman**	Defense Counsel:	**John Canby, DPD**

PRESENT OFFENSE:

On December 19, 2005, the defendant was found guilty by jury trial of the following charges:

Count I: First Degree Murder (victim Frances Tapia), a dangerous offense.
Count II: First Degree Murder (victim Joseph Pedroza), a dangerous offense.

DEFENDANT'S STATEMENT:

On January 6, 2006, the defendant was contacted at the Fourth Avenue Jail and he refused to participate in the presentence process.

STATEMENT OF VICTIMS:

Trina Trumbell, victim Frances Tapia's mother, met with this officer, along with two representatives for the Voice of Crime Victims, Shawn Cox and William Montgomery. Ms. Trumbell also plans to make a statement in person at the time of sentencing. Ms. Trumbell began the conversation discussing her daughter and the goals she had established. Just before Frances' death, she was planning to return to college, as she had previously graduated near the top of her class in high school. Frances was looking forward to studying Criminal Justice with hopes of becoming a Judge. Frances was "a good kid. My best friend." Frances left behind three siblings and two children, who all fell behind in their schooling as a result of the present offense. Frances had helped her mother with caring for her younger siblings. Ms. Trumbell is raising Frances' youngest child, while Frances' older daughter resides with Frances' aunt. Ms. Trumbell described the love Frances felt for her children, the youngest was her mother's "shadow. She did anything to just be with her Mom." Ms. Trumbell still struggles to find answers for Frances' children. Ms. Trumbell reports Frances and Joseph had maintained a friendship since childhood. Frances and Joseph had just started dating at the time of their deaths.

Ms. Trumbell described the actions of the present offense. She described how Frances witnessed the death of Joseph; she then attempted to defend herself from a gunshot wound, when a second shot was fired that took her life. Ms. Trumbell reports, "he knew the first shot didn't kill her so he took a second shot. Frances must have been suffering as she waited to be killed. She was just sitting in fear." During the course of the trial, Ms. Trumbell describes the

defendant's lack of emotion, he appeared to laugh, he failed to show remorse for his actions, or an appreciation for the victim's family's loss. Ms. Trumbell hopes the Court will consider the following statements when imposing a sentence in this matter. She asks that the defendant will never be released to the community, as he will "kill again." If released, she feels this will place the community in danger. In addition, she hopes there will be a focus placed on Frances, she was shot twice. In closing, Ms. Trumbell describes her pain as "unbearable." Ms. Trumball is requesting $268.18 in restitution for the costs incurred to be present during the trial.

Mr. Montgomery, from the Voice of Crime Victims, plans to submit a sentencing memorandum to the Court.

Antonio Tapia, Frances Tapia's father, plans to be present at sentencing and has submitted a letter, which has been reviewed, and is attached for the Court's review. In addition, Mr. Tapia is requesting restitution in the amount of $744.00 for lost wages and $2,005.95 for funeral costs not reimbursed by the Maricopa County Victim Services.

Members of Joseph Pedroza's family will make comments regarding sentencing in this matter on January 27, 2006. In addition, Ruth Stevens, Joseph Pedroza's sister, is requesting restitution in the amount of $14,516.00. This is to cover the loss of her vehicle, funeral costs, and the personal property in her vehicle at the time of the murders. Ms. Stevens describes the real victims in this case are the three children left behind without a parent, Ms. Tapia's daughters and Mr. Pedroza's son.

STATEMENT OF INTERESTED PARTIES:

Deputy County Attorney Jeannette Gallagher plans to submit a sentencing memorandum to the Court. The ranges of sentences in this matter are natural life without the possibility of parole or life in prison with the eligibility for parole after twenty-five calendar years. Sentences can run consecutive or concurrent with one another.

Defense Attorney John Canby plans to present a sentencing memorandum to the Court.

Phoenix Police Officer Kulesa has since retired from the Phoenix Police Department and is unavailable for comments in this matter.

The Maricopa County Victim Services Office requests restitution in the amount of $5,000.00 to cover the expenses for Frances Tapia.

DISCUSSION AND EVALUATION:

The taking of one's life represents the most egregious crime a person can commit. A review of the police report indicates the defendant was responsible for murdering Frances Tapia and Joseph Pedroza, and may have done so over $60.00. The defendant and victims were friends; the defendant should be reminded that three children have now been left behind without

a parent. Further, it appears there was absolutely no reason for the death of Frances Tapia. If what the defendant said in the police report was true, Joseph was threatening the defendant's life, the threat ended after he shot Joseph. While listening to the sorrowful statements made on behalf of the victims and the finding of guilt by a jury trial, this officer believes the defendant should never be allowed a return to the community, despite his youthful age and limited criminal history. Mr. Bassett's actions in this matter are abhorrent and justify the most severe sentence as punishable by law.

These factors were considered in making a sentencing recommendation:

- The loss of Frances Tapia's life.
- The loss of Joseph Pedroza's life.
- The statements provided by Frances Tapia's family members.
- The defendant's violent actions in the present offense.
- The sentencing guidelines in this case.
- The statements provided by interested parties.

RECOMMENDATION:

Count I:

It is respectfully recommended that the defendant be committed to the Department of Corrections for his natural life without the possibility for parole.

Pay through the Clerk of the Maricopa County Superior Court:
Restitution per the attached ledger sheet.
A $20.00 time payment fee.
Pay a probation surcharge in the amount of $5.00.

The defendant has served 588 day(s) of presentence incarceration.

It is further recommended that the sentence imposed in Count I run consecutively to Count II.

Count II:

It is respectfully recommended that the defendant be committed to the Department of Corrections for his natural life without the possibility for parole.

Pay through the Clerk of the Maricopa County Superior Court:
Restitution per the attached ledger sheet.
A $20.00 time payment fee.

The defendant has served 588 day(s) of presentence incarceration.

It is further recommended that the sentence imposed in Count II run consecutively to Count I.

Reviewed by:

Judge: _____

Date: 1-26-06

Respectfully submitted by:

_____

Jennifer Oltman, Adult Probation Officer
(602) 506-3984/ January 06, 2006
mailto:joltman@apd.maricopa.gov
Sally Maurizi, Supervisor
Office (602) 506-3580, (602) 619-2321

Donna
01 + mor

MEMO

TO: Pre-Sentence Reporter
Adult Probation Department

FROM: Jeannette Gallagher JPG
Deputy County Attorney

RE: State v. Lonny Bassett
CR 2004 – 005097 – 001 DT

DATE: December 20, 2005

The Defendant was found guilty of two counts of 1st Degree Murder, Dangerous, following a jury trial that began on November 29, 2005. The range of sentence is life without parole for 25 years up to natural life for each count.

Attached is a copy of the police report on the murders. Also attached are reports concerning prior contacts the Defendant has had with law enforcement. I will be submitting a sentencing memorandum to Judge Hauser concerning my recommendation on sentencing. Both victims' families were very involved with the prosecution and wish to have their input considered. The have been advised that a probation officer will be contacting them.

Thank you & please let me know if you have any questions or if you need for me to provide anything else.

RECEIVED
DEC 21 2005

(#1)

This case has drained me emotionally. No body desirves to be murdered the way Frances and Joe were. My daughter Frances was in the prime of her life. She was finishing school and was in a new relation chip with Joe Pedrosa. My Granddaughters still ask for their mother and miss her very much. My daughter never wanted her kids to be apart. Know Nina lives with her dad and Frances Mom Irma Trumbull. And Athena lives with her Aunt Virgina Trumbull. It Breaks my heart to when I think that my granddaughter's will have to grow up without thier mother's love. Eventhough they prayl that love them. There's no way to replace a mother's love. I pray errryday that God will provide for them emotionally and physicly. In the Bible it says that only God can give life or take it. Lonnie Bassett took it upon him self to play God. I think that he should be locked up for the rest of his life

Thank You
Mr. A. Lopez

JP MEATS
5131 W LATHAM
PHOENIX AZ 85043
(602) 353-8502

#3

Date	Time Missed	Pay rate
7/6/04	4 hrs	24.00
8/10/04	4 hrs	24.00
9/10/04	4 hrs	24.00
10/18/04	4 hrs	24.00
12/2/04	4 hrs	24.00
1/27/05	4 hrs	24.00
1/28/05	4 hrs	24.00
3/31/05	4 hrs	24.00
5/19/05	4 hrs	24.00
6/14/05	4 hrs	24.00
7/15/05	5 hrs	30.00
9/23/05	5 hrs	30.00
10/11/05	4 hrs	24.00
11/18/05	4 hrs	24.00
11/30/05	6 hrs	36.00
12/1/05	6 hrs	36.00
12/6/05	6 hrs	36.00
12/7/05	6 hrs	36.00
12/8/05	6 hrs	36.00
12/9/05	6 hrs	36.00
12/13/05	6 hrs	36.00
12/14/05	6 hrs	36.00
12/15/05	6 hrs	36.00
12/19/05	6 hrs	36.00
12/20/05	6 hrs	36.00
25 days	124 hrs	$744.00

Phone Number [illegible] #3

Address 7537 N. 41st Ave. City Phoenix State AZ Zip Code 85051

The words you and your refer to the Purchaser and the Co-Purchaser, if any, signing this Agreement. The words we, us and our refer to the Funeral Provider or [illegible] whose name and address appear above. For good and valuable consideration, which each party acknowledges receiving, you agree to buy the goods and services described [illegible] as to prepare and care for the body of the decedent named in this Agreement and to conduct the funeral and services and incur the charges listed in said [illegible]. We have the right to collect the total amounts due under this Agreement from any person who signs this Agreement as Purchaser or Co-Purchaser. (N/A *indicates items of service and/or merchandise that are not provided.*)

Charges are only for those items that you selected or that are required. If we are required by law or by a cemetery or crematory to use any items, we will explain the reasons in writing below. If you selected a funeral that may require embalming, such as a funeral with viewing, you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why [illegible]

SECTION I - SERVICES AND MERCHANDISE

FUNERAL DIRECTOR AND STAFF SERVICES

[illegible] Professional Service Fee	$	1,395.00
[illegible] Cremation	$	n/a
[illegible] Burial	$	n/a
[illegible] Remains	$	n/a
[illegible] Remains	$	n/a
	$	n/a

CARE AND PREPARATION OF REMAINS

Embalming	$	445.00
Refrigeration [illegible] days @	$	n/a
Other Preparation of Remains:		
Dressing and Cosmetology of Deceased	$	125.00
	$	n/a
	$	n/a
	$	n/a
	$	n/a

USE OF FACILITIES AND RELATED SERVICES

Visitation	$	210.00
Funeral Ceremony	$	425.00
Memorial Service	$	n/a
Graveside Service	$	n/a
Other (specify):		
	$	n/a
	$	n/a
	$	n/a

TRANSPORTATION

Transferring Remains to Funeral Home	$	245.00
Funeral Vehicle/Hearse	$	225.00
Family Vehicle/Limousine @	$	n/a
Flower Vehicle @	$	n/a
Service Vehicle 1 @ 125.00	$	125.00
Other (specify):		
	$	n/a
	$	n/a
	$	n/a
	$	n/a

OTHER GOODS AND SERVICES

Memorial Booklet	$	45.00
Service Folders/Prayer Cards	$	35.00
Acknowledgement Cards	$	20.00
Memorial Package	$	n/a
	$	n/a
Flowers	$	574.95
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a
	$	n/a

MERCHANDISE

Casket or Alternative Container:
- Manufacturer/Supplier: Batesville
- Model Name/Number: Antique Blue Going Home
- Material
  - Species of Wood: _____
  - Type of Metal: Steel
  - Weight/Gauge: 18ga.
- Interior: Blue/Crepe
- Exterior Color: Blue/Silver — $ 2,695.00

Outer Burial Container:
- Manufacturer/Supplier: _____
- Model Name/Number: _____
- Material: _____ — $ n/a

Urn:
- Manufacturer/Supplier: _____
- Model Name/Number: _____
- Material: _____ — $ n/a

	$	n/a
	$	n/a
	$	n/a

TOTAL SECTION I $ 6,564.95

SECTION II - CHARGES TO BE INCURRED BY US ON YOUR BEHALF *(Certain charges may be estimated -"e" means estimated.)* We charge you for our services in obtaining those items marked with an "X".

Cemetery	$	n/a	
Crematory	$	n/a	
Clergy	$	125.00	
Musicians or Singers	$	n/a	
Certified Copies	$	160.00	
Newspaper Notices	$	n/a	
Newspaper Notice	$	156.00	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	
	$	n/a	

TOTAL SECTION II $ 441.00

TOTAL SECTION I CHARGES $ 6,564.95

TOTAL SECTION II CHARGES $ 441.00

TOTAL SECTION I AND SECTION II CHARGES $ 7,005.95

PURCHASER'S INITIALS AND DATE

WITNESS' INITIALS AND DATE 6/18/04

Notice to Purchaser. This establishment offers for sale caskets and outer burial containers which may be purchased and used, at your option, in connection with the funeral service

CITY HALL GARAGE
PHOENIX AZ
CENTRAL PARKING SYSTEM
602 495 6777

Rcpt#155431
12/07/05 17:01 L# 4 A# 7 Txn#726129
12/07/05 09:50 In 12/07/05 17:01 Out
Tkt# 163073
CASH PAID $ 6.00-
THANK YOU!!!
PLEASE DRIVE WITH CARE
DON'T DRINK AND DRIVE

CHANGE OF VENUE1

12/07/05 000003
#7373 12:19PM 0005

MC Special	$5.89
LRG DRINK	$1.79
Soda	$1.19
** TO GO ****	
FrshJce/BevItem	$1.99
** TO GO ****	
Snacks/Chips/Gum	$1.19
** TO GO ****	
MDSE ST	$12.05
TAX	$0.98
TOGO	
Cred Crd	**$13.03**

THANK YOU COME AGAIN
TO CORNER STORE 162
VALERO.COM/MARKETING

004466928-001

DATE 12/06/05
TIME 9:18 PM
AUTH# 89[illegible]77

VISA
ACCOUNT NUMBER
XXXX XXXX XXXX
VIRGINIA M TRUMBUL

PUMP	PRODUCT	PPG
01	UNLD	$2.179

GALLONS	TOTAL
26.163	$57.01

6701 W OLIVE
PEORIA, AZ

TACO BELL
& PIZZA HUT
EXPRESS

12/07/05 000001
#3966 12:22PM 001

CrTaco	$0.89
NoLett	
LrTaco	$0.89
NoSrCrm	
NoLett	
SuBfGord	$1.69
TP 32.	$1.49
MDSE	$4.96
TAX	$0.40
TOGO	
Cred Crd	**$5.36**

CHANGE OF VENUE1

12/08/05 000000
#7[illegible] 12:24PM 008

Sandwich	$3.69
Snacks/Chips/Gum	$1.19
LRG DRINK	$1.79
Cookie Bagel	$0.99
Cookie Bagel	$0.99
MDSE ST	$8.65
TAX	$0.70
HERE	
***TOTAL	**$9.35**
CASH	$20.00
CHANGE	$10.65

CHANGE OF VENUE1

12/08/05 000003
#7548 12:33PM 005

LrgSoup	$2.69
** TO GO ****	
MDSE ST	$2.69
TAX	$0.22
TOGO	
CASH	**$2.91**

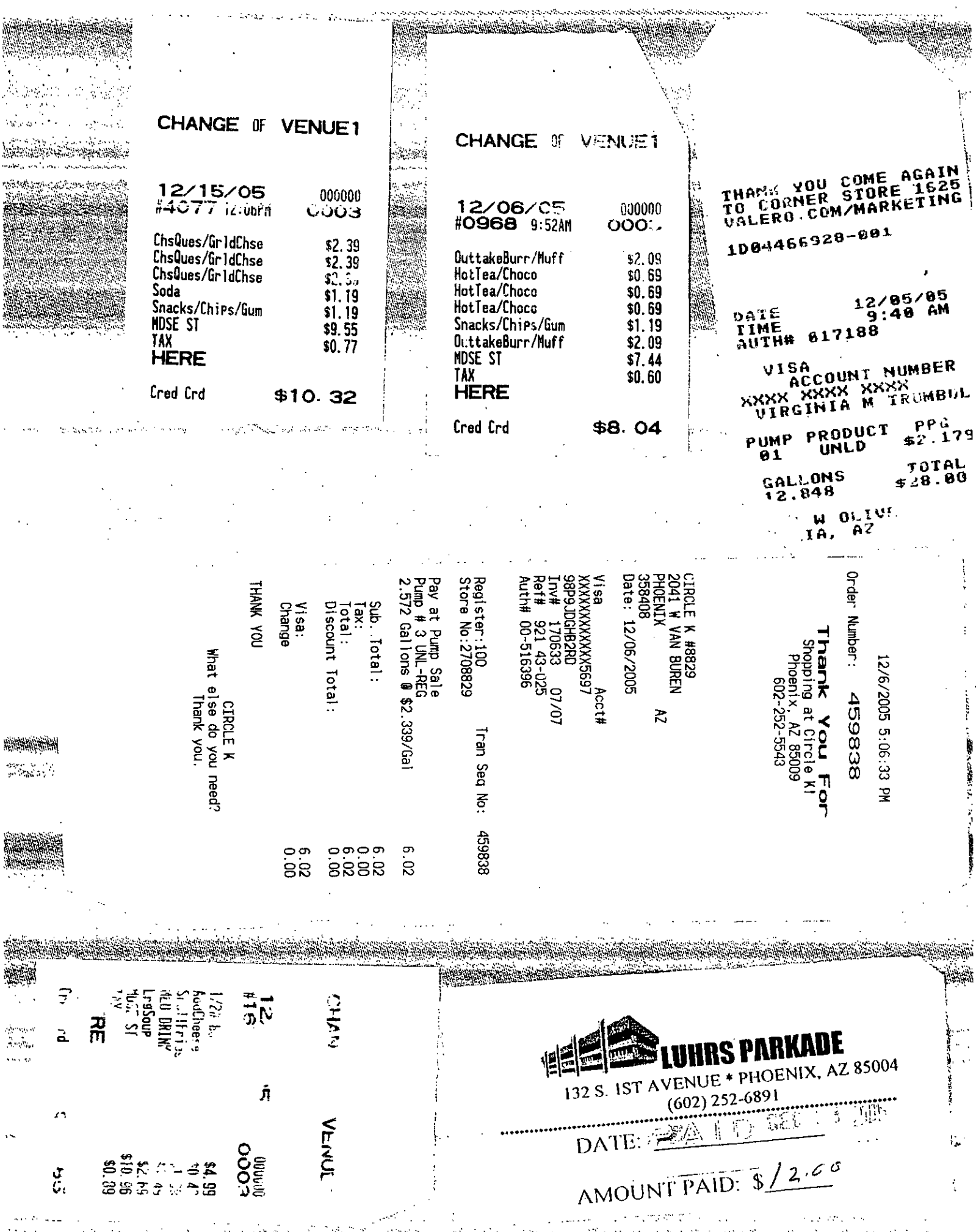
CITY HALL GARAGE
PHOENIX AZ
ACE PARKING
602 495 6777

Rcpt# 94992
11/30/05 12:38 L# 7 A# 5 Txn#845
11/30/05 09:17 In 11/30/05 12:38 (
Tkt# 169273
CASH PAID $ 10.50-
THANK YOU!!!
PLEASE DRIVE WITH CARE
DON'T DRINK AND DRIVE

CHANGE OF VENUE1

12/13/05 000000
#3381 12:23PM 0003

ChsQues/GrldChse	$2.39
ChsQues/GrldChse	$2.39
GrldChkBrst	$3.79
[illegible]onDay	$0.99
[illegible]Fries	$1.39
SalovJ69	$3.69
Soda	$1.19
MDSE ST	$15.83
TAX	$1.28
HERE	
Cred Crd	**$17.11**



CHANGE OF VENUE1

12/15/05 000000
#4077 12:08PM 0003

ChsQues/GrldChse	$2.39
ChsQues/GrldChse	$2.39
ChsQues/GrldChse	$2.39
Soda	$1.19
Snacks/Chips/Gum	$1.19
MDSE ST	$9.55
TAX	$0.77
HERE	
Cred Crd	$10.32

CHANGE OF VENUE1

12/06/05 000000
#0968 9:52AM 0002

OuttakeBurr/Muff	$2.09
HotTea/Choco	$0.69
HotTea/Choco	$0.69
HotTea/Choco	$0.69
Snacks/Chips/Gum	$1.19
OuttakeBurr/Muff	$2.09
MDSE ST	$7.44
TAX	$0.60
HERE	
Cred Crd	$8.04

THANK YOU COME AGAIN
TO CORNER STORE 1625
VALERO.COM/MARKETING

1D04466928-001

DATE 12/05/05
TIME 9:40 AM
AUTH# 017188

VISA
ACCOUNT NUMBER
XXXX XXXX XXXX
VIRGINIA M TRUMBUL

PUMP	PRODUCT	PPG
01	UNLD	$2.179

GALLONS 12.848 TOTAL $28.00

W OLIVE
IA, AZ

12/6/2005 5:06:33 PM

Order Number: 459838

Thank You For
Shopping at Circle K!
Phoenix, AZ 85009
602-252-5543

CIRCLE K #8829
2041 W VAN BUREN AZ
PHOENIX
358408
Date: 12/06/2005

Visa Acct#
XXXXXXXXXXXX5697
98P9JDGHB2RD
Inv# 170633 07/07
Ref# 921 43-025
Auth# 00-516396

Register:100 Tran Seq No: 459838
Store No:2708829

Pay at Pump Sale
Pump # 3 UNL-REG
2.572 Gallons @ $2.339/Gal 6.02

Sub. Total: 6.02
Tax: 0.00
Total: 6.02
Discount Total: 0.00

Visa: 6.02
Change 0.00

THANK YOU

CIRCLE K
What else do you need?
Thank you.

CHANGE OF VENUE

12/ 5
#16

000000
0002

$4.99
$0.4
$2.69
$10.96
$0.89

LUHRS PARKADE
132 S. 1ST AVENUE * PHOENIX, AZ 85004
(602) 252-6891

DATE: PAID

AMOUNT PAID: $12.00

12/12/2005 10:01:12 PM

Order Number: 338900

Thank You For
Shopping at Circle K!
Phoenix, AZ 85035
623-873-6565

CIRCLE K #8696
7494 W MCDOWELL RD
PHOENIX AZ
00358630
Date: 12/12/2005

Visa Acct#
XXXXXXXXXXXX5697
8689GGDMQ2MG
Inv# 220112 07/07
Ref# 921 89-038
Auth# 00-505807

Register:100 Tran Seq No: 338900
Store No:2708696

Pay at Pump Sale
Pump # 6 UNL-REG
11.686 Gallons @ $2.139/Gal 25.00

Sub. Total:	25.00
Tax:	0.00
Total:	25.00
Discount Total:	0.00
Visa:	25.00
Change	0.00

THANK YOU

CIRCLE K
What else do you need?
Thank you.

CHANGE OF VENUE!

11/30/05 000000
#3818 12:27PM 0008

SaladItem	$4.69
MDSE ST	$4.69
TAX	$0.38
HERE	
***TOTAL	$5.07
CASH	$10.0
CHANGE	$

CITY HALL GARAGE
PHOENIX AZ
CENTRAL PARKING SYSTEM
602 495 6777

Rcpt#123451
12/13/05 16:41 L# 2 A# 13 Txn#641290
12/13/05 10:08 In 12/13/05 16:41 Out
Tkt# 165502
CASH PAID $ 6.00-
THANK YOU!!!
PLEASE DRIVE WITH CARE
DON'T DRINK AND DRIVE

TACO BELL
& PIZZA HUT
EXPRESS

12/13/05 000000
#4875 12:18PM 0001

OthrFoodSales	$2.29
Combo1	$4.29
** TO GO ****	
MDSE ST	$6.58
TAX	$0.53
TOGO	
***TOTAL	$7.1
CASH	$20.1
CHANGE	$13.00

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The Pharmacy America Trusts

I'm JENNIFER. Thank you for allowing me to serve you today.

865	10	1146	04139	038
865	10	1147	04139	038

RFN# 0413-9381-1475-0512-1320

F WLPHD LOCP20	1A	5.99
F TUMS SNGL 8S	1A	.99
F TUMS X/S 8S	1A	.99
ECLIPSE 12S	1B	.99
SUBTOTAL		8.96
A=8.1% SALES TAX		.65
TOTAL		9.61
VISA		9.61
ACCT#********5697		
CHANGE		.00

3450 W. Dunlap Road Phoenix, AZ
STORE (602)973-0592
PHARMACY (602)973-0971

F=FLEXIBLE SPENDING ACCOUNT ITEM (FSA)

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FREE REPORT TO HELP YOU CHOOSE THE MEDICARE PLAN THAT FITS YOU BEST. ASK IN THE PHARMACY TODAY.

021
RETAIN THIS RECEIPT FOR YOUR RECORDS

JACK IN THE BOX.
EAT IN # 446
Tel(602) 249-0170
12/07/2005 JIB# 1181
09:15:05 AM
Emp Joyce

1 Cbata Brkfst + HB	3.99
No Bacon	
Pls Sausage	0.49
Pls Hasbrwn	
Sml Drink	
2 Ult Brk + HB (#16)	6.58
Pls Hasbrwn	
Sml Drink	
1 Brkfst Jack	0.99
1 Meaty Bfast Burrito	2.19
SubTotal	14.24
Tax	1.15
Total	15.39
Visa	15.39

Acct: XXXXXXXXXXX5697
Authorization: 020863

Thank you for your visit
461246

1M1504

Maricopa County Attorney

ANDREW P. THOMAS

Re: Defendant: Lonny Allen BassettGlyn Long
DR#: 2004-41151278

Victim: Frances M. Tapia-Trumbull
Victim Compensation Case #: 04-06-21-6557-0

Dear Jennifer :

The Victim Compensation Bureau assists eligible victims in Maricopa County with up to $20,000.00 for crime-related medical, counseling, wage loss and funeral expenses. The funding for this program is very limited as it is supported by a small portion of the surcharge assessed to fines ordered at sentencing. As the only program that provides financial assistance for victims of crime in our community, the demand upon the program often exceeds funding allocations and sometimes payments are delayed to eligible victims.

In an attempt to meet the financial needs of the community, we have begun to actively seek restitution. In April 1996, the legislature amended A.R.S. 13-804.E. to include Victim Compensation as a restitution recipient. I am asking for your help in securing restitution from this defendant and request that the Victim Compensation Bureau be included in the restitution order.

To date, the following expenses have been paid by the Maricopa County Victim Compensation Program on behalf of the victim:

VICTIM COMPENSATION
04-06-21-6557-0

	Awarded To	Type of Expense	Award Amount	Check Total
1	Antonio Tapia	Funeral reimbursement	$416.08	$416.08
2	CHAPEL OF THE CHIMES	Funeral	$4,083.92	$4,083.92
3	RESTHAVEN PARK CEMETERIES	Funeral	$500.00	$500.00
			$5,000.00	$5,000.00

So that we may maintain accurate records, please reference the Victim Compensation case number, as well as the victim's name, and address payments to:

Maricopa County Attorney's Office
Victim Compensation Bureau
301 West Jefferson, 9th Floor
Phoenix, AZ 85003

If you need further clarification, do not hesitate to contact me at 506-4955. Your help in this endeavor is greatly appreciated, and will benefit all of the victims in our community.

Sincerely,

Phillip Dominguez
Victim Compensation Advocate

William R. Plants
PO Box 1556
Snowflake, AZ 85937

4 January, 2005

Honorable Brian R. Hauser
Maricopa County Superior Court
201 West Jefferson
Phoenix, AZ 85003

RE: **defendant Lonnie Bassett CR2004005097001DT**
CA204021980

Your Honor:

I am writing this letter to express my concern about Mr. Lonnie Bassett's sentencing on January 27, 2006 in your court. For the murder of two young people and the loss to the families and friends who will never experience life the same again, the maximum penalty under the law should be applied to Mr. Bassett. I have heard a statistic that 10% of all criminals do 90% of the violence – letting this defendant back on the streets would be a threat to society. Mr. Bassett should be incarcerated for the rest of his natural life; the victims of the defendant deserve justice and a full accounting from Mr. Bassett.

Thank you

William R Plants

William R. Plants

Trina Trumbull has requested our help with letters to the judge asking for the maximum sentence allowed to be given to the murderer of her daughter, Frances Maria Trumbull and her boyfriend. Lonnie Bassett was found guilty of two counts of first-degree murder and the sentencing will be January 27.

Frances Maria was a mother to two young girls who will be forever impacted by the loss of their mother in their lives. Trina says that as one person she cannot make a difference, but we as a group can. Please express to the judge that justice must be served and our communities must be safe from murderers.

Send letters asap to **Judge Brian R. Hauser**
Maricopa County Superior Court
201 West Jefferson
Phoenix AZ 85003
RE: defendant Lonnie Bassett CR2004005097001DT
CA204021980

Thank you everyone and take care of and be good to yourselves.

Beckie

Beckie A. Miller, Chapter Leader
Parents Of Murdered Children, Inc.
P.O. Box 39603
Valley of the Sun Chapter
Phoenix AZ 85069-9603
(602) 254-8818 Fax: (623) 582-0917
www.pomc.org/phoenix

Hope is the thing with feathers ...
That perches in the soul ...
And sings the tune without words ...
And never stops at all ... (Emily Dickinson)

Dear Judge,

Please give this person the maximum sentence under the law. He committed 2 crimes. He should do the time. Our 21yr. old son was murdered Sept. 12, 1998 and his murderer got 2½ yrs. Justice? I think not! Please consider all facets of case when sentencing... Thank You,

Louise Ellis 1/5/06

Parents Of Murdered Children, Inc.

"For the Families & Friends of Those Who Have Died By Violence"

P.O. Box 39603
Phoenix, Arizona 85069-9603
Web site: www.pomc.com/phoenix

(602) 254-8818
Fax:(623) 582-0917

January 4, 2006

Judge Brian R. Hauser
Maricopa County Superior Court
201 West Jefferson
Phoenix AZ 85003

RE: Sentencing of Lonnie Bassett CR2004005097001DT CA204021980

Dear Judge Hauser:

This letter is to request the maximum sentence allowable when sentencing Lonnie Basset, convicted of two first-degree counts of murder, for killing young Frances Maria Trumbull and her boyfriend. In Bassett's cold-blooded ending of the life of Frances, he left her two young daughters who will be forever impacted by the loss of their mother in their lives. He left Trina Trumbull, Frances' mother, with a grief that no parent should ever have to endure. It is a lifelong journey through the aftermath of murder and what it leaves behind for surviving family members. It is devastation and shattered lives, sorrow and unimaginable pain.

Trina is the first to say that asking for the maximum sentence will not bring her daughter back. It should however be given because it will ensure that a cold-blooded murderer with no respect for the lives he took be imprisoned so that he may never take another life. We must always send a strong message that violence will not be tolerated and we must attempt to keep our communities safe from the likes of Lonnie Bassett.

I thank you for your careful consideration of this matter.

Sincerely yours,

Beckie A. Miller, Chapter Leader

Jan. 25, 2006

To whom it may concern.

Im Jane L. Alexander Im writing to you about Lonny A Bassett. He calls me Grandma as we have had him since he was 2 days old.

We lost a son at 23 years old & my Mother a few month before. Lonny coming into our life was a blessing Such fun watching him grow.

Now I wish people knew him as we do. My Husband Dave & my son Scott had Lonny playing Golf or driving the cart. He did good Then it was Base ball there he was a catcher & a darn good one. Some times he played 3rd base just for a Change.

Lonny & I have a very close relationship he calls every day just to tell me he loves me & see if Im alright.

Lonny would take care of me if I didn't feel well. I had a small stroke & had to stay in the Hospital for 4 days & he stayed with me all the time. They liked him so much he got a pass to go to the kitchen anytime.

Even tho I love him forever there are a lot more that love him. He's a very polite boy with everyone. Give you the shirt off of his back. Very loving also.

Jane L. Alexander
Lonnys Grandma.

What happened is not the Lonny people knows. He said he was very, very scared.

Good morning, my name is Amanda Treinen. I met Lonny when we went to school together in Jr. High. I have known Lonny now for more than 5 years. The past few years have brought us closer. Despite this whole experience we have become best friends, and currently we are engadged.

In the 3 years prior to this happening, Lonny was very responsible. Every summer there were two things Lonny always did; work with Grandpa at Phillip's Plastics and play baseball. Every morning he woke up, worked hard and long hours, then came home. A few nights during the week, after working long hours, he went and played baseball. ~~He had a commitment~~ Lonny was very good about not missing work or baseball. He had a commitment and he knew it was his responsibility to be there.

when I found out about this whole thing. I couldn't believe it. In the time I have known Lonny he has been nothing but a kind-hearted and gentle person. He is the type of person you can turn to in a time of need. He will provide a shoulder to cry on, or a stupid joke to help you feel better.

Before you make your decision today I ask you to consider a few things. Please consider the fact he recently turned 18 and has a full life ahead of him. Please do not let him become a victim of the system. Please realize this is his first criminal offense. I trust your discretion and experience when you make your decision. I hope my insight into Lonny's character will help you in your decision making.

CAUSE NUMBER: CR2004-005097-001-DT

Enclosed is the Criminal History information portion of the Pre-sentence Report. Dissemination is restricted to Criminal Justice Agencies **only**. Secondary dissemination to non-criminal Justice Agencies is **prohibited**.

LOCATION ONLY
See Discovery & Confidential Materials

APPENDIX 4

MICHAEL JEANES, CLERK
BY M. Miller DEP
FILED
2006 JAN 25 AM 8:25

OFFICE OF THE LEGAL DEFENDER
John Canby, Bar I.D. 010574
222 North Central Avenue, Suite 810
Phoenix, Arizona 85004-2237
Telephone (602) 506-8800
Facsimile (602) 506-8862
Attorney for the Defendant

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

STATE OF ARIZONA, Plaintiff, vs. LONNY BASSETT Defendant.	CR2004-005097-01DT Defendant's Sentencing Memorandum (Honorable Brian Hauser)

Defendant, Lonny Bassett, through Deputy Legal Defender John Canby, hereby files the following Sentencing Memorandum for the court's review prior to pronouncing sentence in the above-entitle matter.

Dated this 25th day of January, 2006.

ROBERT S. BRINEY
OFFICE OF THE LEGAL DEFENDER

By _____
John Canby

OFFICE OF THE LEGAL DEFENDER
222 North Central Avenue, Suite 810
PHOENIX, AZ 85004-2237

I. Procedural Facts

As this court is well aware, Lonny Bassett was found guilty by a jury of two counts of First Degree Murder after a jury trial before this court.

II. Childhood Background of Lonny Bassett

In 1987 Diane Kloepfer already had a son, Will, who was less than one year old. Diane, who was pregnant with Lonny, was having a hard time caring for Will. She was completely unprepared for another child. Will and Lonny's father, Merrill Bassett was not much help.

Diane Kloepfer befriended Charles and Jane Alexander, a much older couple, after meeting them at a motocross race where the Alexander's son Scott was competing. Diane gave birth to Lonny on November 18, 1987 at St. Joseph's Hospital in Phoenix. Jane Alexander reports that Diane called her from the hospital after Lonny was born and asked the Alexander's to take Lonny off her hands. She indicated that she did not want the responsibility of caring for Lonny. Lonny was raised by Charles and Jane Alexander. Diane kept custody of Will. Diane lived with the Alexander's periodically, when she would break up with Merrill.

In August of 1989 Merrill Bassett snatched Lonny and Will and left the state for an unknown location. On September 1, 1989 Merrill Bassett was charged with two counts of custodial interference in Maricopa County Superior Court Cause Number CR1998-009047. On September 6, 1989 Merrill Bassett was found with the children and arrested in Council Bluffs, Iowa. Merrill Bassett eventually returned to face the charges in Arizona and was convicted after a trial in February of 1992. (See Exhibit A, attached). Upon Lonny's return to

Arizona, the Alexander's resumed taking responsibility for his care and upbringing. As recently as January 23, 2006, Merrill Bassett was listed as "Wanted" for being $26,203.00 in child support arrearages. (See Exhibit B, attached).

III. Employment

In the summer of 2001, when Lonny was 14 years old, Lonny began working as a janitor for a company Charles Alexander worked for called Phillips Plastics in Phoenix, Arizona. Initially Lonny's duties included cleaning, filing and shipping. In the summer of 2004 Lonny was promoted to the position of "apprentice machinist" and received a raise. A letter from Phillip Smid and Susan Boulanger, (President and Vice-President, respectively), describe Lonny as an ethical hard worker who was a pleasure to have around. (See Exhibit C, attached).

IV. Accomplishments While Incarcerated

Lonny has taken full advantage of the few opportunities for self-improvement available to him as an inmate in the Maricopa County Jail. He attended the "Hard Knock's High School Program," completing courses in Biology, Literature and Geometry. He obtained his High School Equivalency Diploma on February 25, 2005. (See Exhibit D, attached).

V. Post Traumatic Stress Disorder

In 2002 Lonny began receiving therapy with Jewish Family and Children's Services for some of the symptoms he was still experiencing as a result of his experiences with his natural mother and father. Records obtained from Jewish Family and Children's

Services indicate that Lonny was diagnosed with Post Traumatic Stress Disorder in the course of his treatment. . The same records detail Lonny's exposure to violence and abuse at the hands of his biological father. (See Exhibit E, attached). Jane Alexander reports that Lonny first began making statements about physical and sexual abuse at his father's residence as early as age 3.

According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Addition, the symptoms of Post Traumatic Stress Disorder include hypervigilance, and an exaggerated startle response. (See Exhibit F, attached).

Records defense counsel was able to obtain from Jewish Family and Children's Services indicate that as of April 10, 2002 Lonny was non-compliant with his medications with the records indicating that he is less aggressive when he stays on his medications.

Jane Alexander also reports that Lonny stopped taking his prescribed medications sometime in 2003 because of side effects. At the time of the shootings of Joseph Pedroza and Frances Tapia, it appears that Lonny was not taking the medications he had been prescribed to address his Post Traumatic Stress Disorder symptoms. It is likely that this contributed to the manner in which he reacted to the events surrounding the deaths of Joseph Pedroza and Francis Tapia.

Discussion of Mitigating and Aggravating Circumstances

I. Statutory Aggravating Circumstances:

The State has alleged the following aggravating circumstances in this case:

(1) The offenses involved the infliction of serious physical injury.

(2) The offenses involved the use of a deadly weapon.

(3) The Defendant committed the crime in an especially cruel manner as to Francis Tapia.

(4) The defendant was convicted of the other homicide (multiple homicides).

With respect to (1) listed above, every homicide involves the infliction of serious physical injury. Item (2), use of a deadly weapon is present in most homicide cases. These factors do not make this case any more aggravated than any other homicide case and should be given minimal weight. Although not alleged by the state, the aggravating circumstance of the emotional harm to the victim's family is also present in virtually every homicide case.

Cruelty as to Francis Tapia

With regard to (3), case law simply does not support a finding that the killing of Francis Tapia was especially cruel.

The State has suggested that it was Francis Tapia's contemplation of her fate after Joseph Pedroza was shot that makes her killing especially cruel. In *State v. Cropper*, 206 Ariz. 153, 156, 76 P.3d 424, 427 (2003), the Arizona Supreme Court made clear that it had clarified the law regarding the especially cruel aggravating factor in its opinion in the case of *State v. Soto-Fong*, 187 Ariz. 186, 191, 928 P.2d 610, 615 (1996). *Soto-Fong* involved the killing of a grocery store manager, his uncle and an employee during a robbery, in the same room. *In Soto-Fong*, at least one victim saw and/or clearly knew what was happening when the first victim and perhaps the second were shot. 187 Ariz. at 190, 202, 928 P.2d 614, 626. The court noted that:

> Our cases hold that a killing is especially cruel if the victim suffers mental anguish by watching or hearing the defendant kill another person. *See State v. Runningeagle,* 176 Ariz. 59, 65, 859 P.2d 169, 175, *cert. denied,* 510 U.S. 1015, 114 S.Ct. 609, 126 L.Ed.2d 574 (1993); *State v. Kiles,* 175 Ariz. 358,

> 372, 857 P.2d 1212, 1226 (1993), *cert. denied,* 510 U.S. 1058, 114 S.Ct. 724, 126 L.Ed.2d 688 (1994); *State v. Greenway,* 170 Ariz. 155, 166, 823 P.2d 22, 33 (1991); *State v. Lavers,* 168 Ariz. at 392, 814_ P.2d at 349. However, in each of these cases, the victim watched or heard either a parent or a spouse killed while the victim awaited his or her own fate. More importantly, none of these cases involved the rapid type of murders involved here. Were there evidence that the trio had forced a victim to wait while the other victims were shot, the state might have a valid mental cruelty argument. On the facts presented in the briefs and at trial, however, when Fong began shooting, he was quickly joined by Minnitt, and the three victims were killed in rapid succession without any appreciable time to contemplate their fate. 187 Ariz. at 190, 202, 928 P.2d 614, 626.

The killings at issue in this case closely resemble the situation present in *Soto-Fong*. According the State's own witnesses, Ted Clavell and Chad Colyer, Joseph Pedroza and Francis Tapia were killed in rapid succession and Francis Tapia would have had no more time to contemplate her fate then the victims in Soto-Fong. The death of Francis Tapia was not *especially* cruel.

Double Counting of An Aggravating Circumstance

If the State's argument regarding the cruelty of Francis Tapia's death is correct the aggravating circumstance would be present in any case involving multiple homicides which is also a statutory aggravating circumstance. Virtually all multiple homicide cases involve the killing of one person followed thereafter by the killing of another person. In this case the same facts are being used to support both the multiple homicide aggravating circumstance and the especially cruel aggravating circumstance. However double counting of aggravating circumstances violates the Double Jeopardy Clause of the United States Constitution. *State v. Medina*, 193 Ariz. 504, 512, 975 P. 2d 94, 102 (1999) (although the fact finder may use one fact to find two aggravating circumstances, the fact cannot be weighed twice in balancing aggravating and mitigating factors).

II. Mitigating Circumstances:

The following mitigating circumstances are present in this case:

(1) The Age of the Defendant.

(2) The Defendant's capacity to conform his conduct to the requirements of the law was significantly impaired.

(3) The Defendant's Attempts at Self-improvement While Incarcerated and Prospects for Rehabilitation.

(4) The Defendant's Remorse.

Age of the Defendant

Lonny Bassett was 16 years old when he committed the crimes for which he is being sentenced. This fact is mitigating. It is common knowledge that 16 year olds do not possess the judgment and impulse control of an adult. This is why they are not allowed to drink, vote or otherwise engage in certain adult activities.

In the majority opinion in *Roper v. Simmons*, the case which overturned the juvenile death penalty, Justice Kennedy wrote of the profound differences between adults and juveniles and the ramifications those difference make when addressing juvenile crime. Justice Kennedy pointed to three general differences between juveniles and adults:

First:

> [A]s any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson, supra,* at 367, 113 S.Ct. 2658; see also *Eddings, supra,* at 115-116, 102 S.Ct. 869 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). *Roper v. Simmons,* 543 U.S. 55, 125 S.Ct. 1183, 1195.

Second:

> [J]uveniles are more vulnerable or susceptible to negative influences

and outside pressures, including peer pressure. *Eddings, supra,* at 115, 102 S.Ct. 869 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. *Roper v. Simmons,* 543 U.S. 55, 125 S.Ct. 1183, 1195.

Third:

> [T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968). These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835, 108 S.Ct. 2687 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford,* 492 U.S., at 395, 109 S.Ct. 2969 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson, supra,* at 368, 113 S.Ct. 2658; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood"). *Roper v. Simmons,* 543 U.S. 55, 125 S.Ct. 1183, 1195.

Capacity To Conform Conduct to Requirements of the Law

Through no fault of his own and as result of the traumatic events surrounding his kidnapping and custody battle, Lonny Bassett was diagnosed with Post Traumatic Stress Disorder. He suffered from both hypervigilance and an exaggerated startle response when confronted with stressful situations. This may well have led Lonny to severely overreact to events on the night of the shootings.

Prospects for Rehabilitation

Lonny's employers report that he was an exemplary worker. They write that he was ethical and a pleasure to be around. It is also apparent that Lonny has taken full advantage of the few opportunities for self-improvement available to an incarcerated inmate awaiting trial in the Maricopa County Jail. These facts bode well for his prospects for rehabilitation.

Attached as Exhibit G are additional letters from citizens who have come in contact with Lonny in various contexts and who were impressed by his character.

Remorse

Lonny Bassett will express his remorse at the time of sentencing.

III. Conclusion

The court in this case can require Lonny Bassett to spend the rest of his life in prison without any prospect of release. On the other hand the court can also impose a sentence that would allow Lonny Bassett the possibility of earning his release based on rehabilitation and good conduct while serving at the very least the next 25 years of his life in prison. A sentence that would allow for his release during his lifetime would severely punish Lonny for his crimes while recognizing that rehabilitation and self-improvement can occur while a person grows from a boy into middle or old age. A sentence of life with possibility for parole would mean that Lonny would be released after serving at least 25 years only if in the opinion of qualified corrections experts he had demonstrated through his behavior that he was truly

rehabilitated. Lonny's age and the circumstances of his upbringing make this possibility appropriate in this case.

Dated this 25th day of January, 2006.

ROBERT S. BRINEY
OFFICE OF THE LEGAL DEFENDER

By _____
John Canby

OFFICE OF THE LEGAL DEFENDER
222 North Central Avenue, Suite 910
PHOENIX, AZ 85004-2237

Original of the foregoing Pleading mailed/hand-delivered this 25th day of January, 2006 to:

Clerk of the Superior Court
201 West Jefferson
Phoenix, Arizona 85003

Copies of the foregoing Pleading mailed/hand-delivered this 25th day of January, 2006 to:
The Honorable Brian Hauser
Judge of the Superior Court
2001 W. Jefferson St., 4th Floor
Phoenix, Arizona 85003

Jeanette Gallagher
Deputy County Attorney
301 West Jefferson, 8th Floor
Phoenix, Arizona 85003

_____

Exhibit A

case history

Superior Court of Arizona, Maricopa County

Case Information

case history court calendar Superior Court dept. home page

Search go

Case Information

Searching archives now.

Case Information

Case Number	CR1991-007724		
Case Type	Criminal	Location	Downtown

Party Information

Party Name	Rel	Sex	Attorney	Judge	Case #
State Of Arizona	Plaintiff		E NELSON		
MARRILL IVAN BASSETT	Defendant	Male	Determined To Be	Cates	
Clerk Of The Court	In The Matter Of (IMO)		Determined To Be		

Case Documents

Filing Date	Description	Docket Date	Filing Party
4/12/1999	DEW - Disposition of Exhibit Worksheet	4/19/1999	
3/3/1999	LET - Letter	3/16/1999	
2/9/1999	LED - 2.8 (d) Letter	2/18/1999	
3/25/1993	DRE - Disposition	3/25/1993	
3/4/1993	ODP - Ord: Discharge from Probation	3/12/1993	
2/17/1993	PTP - PET EARLY TERMINATION PROB/ORDER	2/22/1993	
2/28/1992	DRE - Disposition	3/2/1992	
2/19/1992	PSR - Presentence Report	2/26/1992	
2/19/1992	NAP - Notice of Appeal	2/24/1992	
2/19/1992	999 - ME: Other	2/25/1992	
2/18/1992	181 - ME: Sentencing	2/21/1992	
2/18/1992	JOR - Judgment and Order	2/18/1992	
	NOTE: This docket was added by the conversion for a judgment		
1/22/1992	ECR - Exhibits/Classified/Receipt	1/27/1992	
1/21/1992	316 - ME: CASE ASSIGNED/REASSIGNED	1/24/1992	
1/16/1992	012 - ME: Trial	1/21/1992	
1/16/1992	EXW - Exhibits Work Sheet	2/24/1992	
1/15/1992	012 - ME: Trial	1/21/1992	
1/15/1992	999 - ME: Other	1/23/1992	
12/12/1991	MOT - Motion	12/13/1991	
	NOTE: FOR DISCOVERY		
12/12/1991	NDR - NOT DEFENSES/REQ REBUTTAL WITS	12/13/1991	
12/6/1991	TRF - Mot/Ord Temp Removal File Etc	12/13/1991	Defenc
11/21/1991	TSP - TRANSCRIPT OF PROCEEDINGS	11/22/1991	
	NOTE: PHX AZ 10/31/91		
11/20/1991	151 - ME: PRETRIAL CONFERENCE	11/27/1991	
11/7/1991	001 - ME: Disqualification	11/13/1991	
11/5/1991	ROR - RELEASE ORDER	11/7/1991	
	NOTE: REL-O/R 10/2/91		
11/5/1991	ORC - Order Regarding Counsel	11/7/1991	
11/5/1991	SUM - Summons	11/7/1991	Plai
11/5/1991	SUB - SUBPOENA	11/7/1991	Plai
11/5/1991	SUB - SUBPOENA	11/7/1991	Plai
11/5/1991	SUB - SUBPOENA	11/7/1991	Plai
11/5/1991	SUB - SUBPOENA	11/7/1991	Plai
11/4/1991	NCJ - Notice of Change of Judge	11/8/1991	Defenc
10/31/1991	INF - Information	11/5/1991	Plai
	NOTE: CT I & II CUSTODIAL INTERFERENCE CL 6 FEL		
10/31/1991	152 - ME: Not Guilty Plea Arraign	11/7/1991	
10/28/1991	NDP - NOT DISC/INTRVWS/PLEA Offer	10/31/1991	Plai
10/17/1991	176 - ME: CONTINUANCE	10/22/1991	

9/18/1991	DWL - Defendant/Witness List	9/18/1991	Plai
9/18/1991	DCO - Direct Complaint	9/18/1991	Plai
	NOTE: CTS I & II: CUSTODIAL INTERFERENCE CL 6 FELONIES; DR 89-116204 PPD SOUTH PHX - DOC: 8/7/89		

Case Calendar

There are no calendar events on file

STATE OF ARIZONA -- COUNTY OF MARICOPA -- ADULT PROBATION DEPARTMENT
NORMAN L. HELBER, CHIEF PROBATION OFFICER

P.O.: RICHARD RODGER PRIMARY / G: ENGLISH

NAME MERRILL IVAN BASSETT
RESIDENCE 2225 West Thomas Road
Phoenix, AZ ZIP 85015
PHONE 257-1944 MESSAGE PHONE None
AKA OR MAIDEN None
ID MARKS None
EMPLOYER/ADDRESS/PHONE Unemployed

OCCUPATION Nursing Assistant EDUCATION 31B
MARITAL Married RELIGION Christian CHILDREN 2

RACE White SEX M HT 6'0"
EYES Blu HAIR Gry WT 200
DOB 04-11-56 AGE 35
CITIZEN OF USA
BIRTHPLACE Dallas, TX
DRIVER'S LIC. B101197711/AZ/94
S.S. NO. 523-88-6224
FBI NO. 817 885 KA9
BOOKING NO. 352676/249675

CURRENT OFFENSE

CAUSE NO. CR9107724 OFFENSE DATE 08-07-89 NCIC 1098N
CHARGE Counts I and II, Custodial Interference, Both Class 1 Misdemeanors
A.R.S. NOS. 13-1302, 701, 702, 801, 812

DATE OF ARREST 09-20-90/10-02-91 ARRESTING AGENCY PHPD
DATE INCAR. 09-20-90/10-02-91 REL. DATE 10-16-90/10-02-91 REL. STATUS O.R.
DAYS IN JAIL THIS ARREST 39 REMAND JUVENILE COURT/DATE--NO

DEFENSE COUNSEL Grant Bashore, DPD PROSECUTOR Alan W. Johnson
GUILT BY/DATE Ct. Verdict/01-16-92 SENTENCING JUDGE BERNARD F. DOUGHERTY
DATE OF SENTENCE 02-18-92
CODEF/DISPOS None

CRIMINAL HISTORY

NO. CONVICTIONS: FEL MISD JUV
NO. INCARCERATIONS: PRISON JAIL
ESCAPE OTHER
NO. SUPERVISIONS: PROB PAROLE

WARRANTS OUTSTANDING

CASE NO.	CHARGE	STATE

OTHER:

GENERAL INFORMATION

NARCOTICS/ALCOHOL HISTORY U-Alcohol
TREATMENT/PROGRAMS

MILITARY HISTORY NOT APPLICABLE
BRANCH TYPE DISCH.
ENTRY DATE DISCH. DATE

☐ J. DESK
☐ DOCKET
☒ ACCTG.

SPOUSE/RELATIVES/CHILDREN

NAME	RELATION	AGE	ADDRESS	PHONE
Teri A. Bassett	Wife	30	2225 W. Thomas, Phoenix, AZ	257-1944
Hazel Bassett	Mother	73	3711 W. Huntington, Phoenix, AZ	268-6607
Jim Banks	Brother	50	4008 W. Burgess, Phoenix, AZ	237-2981

0363z/02-11-92/lois

THE STATE OF ARIZONA
Plaintiff

vs.

MERRILL IVAN BASSETT
Defendant

CAUSE NO. CR9107724

HONORABLE BERNARD J. DOUGHERTY

CRIMINAL DIVISION F

SUPERIOR COURT

PRESENTENCE INVESTIGATION

PRESENT OFFENSE:

The following information is taken from Phoenix Police Departmental Report #89-116204:

On August 7, 1989, between 2:00 p.m. and 7:00 p.m., Merrill Bassett took his belongings, his two children Lonnie Alan Bassett and Merrill William Bassett, age two and three respectively, their clothing, his truck and boat and left the family home at 4008 West Burgess, for parts unknown. While the suspect is the father of the victims, they were born out of wedlock, and are in the custody of their mother, Diane Kloepfer.

The children and their father were located in Council Bluffs, Iowa, where the defendant was arrested on September 6, 1989, and booked into jail. The charges were dismissed when the state of Arizona did not go to Iowa to pick him up. The defendant returned to Arizona, where he was again arrested for two counts of custodial interference on September 20, 1990, and was released again when charges were dismissed. The defendant was rearrested on October 2, 1991, on two counts of custodial interference and released later the same date on his own recognizance. The defendant remains released pending sentencing.

RELATED OFFENSES/STIPULATIONS:

The defendant was charged by direct complaint of two counts of custodial interference, class 6 felonies, on September 18, 1991.

Subsequent to trial to the Court, the defendant was found guilty of two counts of custodial interference, class 1 misdemeanors, on January 16, 1992.

DEFENDANT'S STATEMENT:

The defendant reports that he was arrested and charged for leaving the state of Arizona with his children, Will and Lonnie Bassett. The defendant reports that he did not realize that he was breaking the law, especially since the children's mother knew he was leaving the state. The

defendant reports that after he was arrested in Council Bluffs, Iowa, he spent ten days in custody and went to court every day scheduled until November of 1989 when the charges were dismissed. In December of 1989, according to the defendant, he returned to Arizona and bought a home. In September of 1990, the defendant states he was again arrested for the same charges and spent twenty-eight days in jail, going to court, until in January of 1991, the case was again dismissed. According to the defendant, the charges were refiled in September 1991 and the court process has brought him to this point.

According to the defendant he believed he was doing things in the right manner with his children as they were always with him and he was providing for them.

The defendant requests that if any sentence is to be imposed on him that it should be the very minimal sentence. He reports that all he and his family have gone through in the past two and one-half years has made him more than pay for his crime. The defendant reports that he has spent time in jail and is facing being placed on probation for the instant offenses. Even though the defendant has been convicted, the defendant reports, "The case has been dismissed twice, I feel I have been teased." The defendant reports he would just like to get on with his life, his new family, and be available for his children as they may need him.

STATEMENT OF VICTIMS:

The children's mother, Diane Kloepfer, stated "All I want is justice done." She reported her "husband" is not telling the truth and does not leave her with much confidence that he will not repeat his actions in the future. Ms. Kloepfer advised that she does not want to live in fear of the defendant taking the children again. She also reported that the defendant did not pay his child support in January of 1992. In discussing her economic losses in terms of finding the children, Ms. Kloepfer advised that her mother arranged for her to borrow $1,115.00 for plane tickets to fly to Iowa and return with the children. She herself paid $36.56 for flyers to be printed to aid in the search for her children. In addition, she reports she received a bill from the private investigator she hired, Phillip Rust, in the amount of $1,656.10, which she has not paid. Ms. Kloepfer requested that her mother, Jane Alexander, receive payment of the money for the plane tickets. Ms. Kloepfer did not make a recommendation for sentencing but hopes that she and her children will be able to live a relatively normal life in the future.

STATEMENT OF INTERESTED PARTIES:

The defendant's public defender, Grant Bashore, recommended that the defendant receive probation with some community service hours and be directed to follow all orders of the Domestic Relations Court.

Mr. Bashore continued by stating the defendant has been in and out of jail on three separate occasions, has been involved in the criminal justice system for more than two years, as well as being involved in the civil system in the Domestic Relations Court. He recommended that the defendant be granted probation in that he does not believe the defendant is in need of incarceration.

Deputy County Attorney Alan Johnson recommended that the defendant be placed on probation with a period of jail incarceration. In addition, he recommended that the defendant be required to pay restitution for all expenses involved in this case expended by the mother as well as the private investigator. Mr. Johnson advised that he makes his recommendation in the belief the defendant has never recognized that what he has done was wrong, even with his conviction in court, and the fact that he has put the victim and her children through several years of financial and mental hardship.

Private investigator Phillip Rust reported that he took the case on a referral from the Maricopa County Sheriff's Office. He advised that he knew Ms. Kloepfer probably did not have any money and might be unable to pay his bill. Nevertheless, he did report that he billed her for $1,656.10 for his investigative costs in locating the children. According to Mr. Rust, he did not believe the defendant was remorseful and he has never admitted he took the children illegally. Mr. Rust related he would accept restitution if it was ordered by the Court.

SOCIAL HISTORY: Unless otherwise noted, the following information was provided by the defendant:

Family: The defendant is one of five children. According to the defendant his father passed away when he was eleven years old as the result of a heart attack. The defendant has three sisters and one brother with whom he reports a better than normal relationship. He also states his older brother really acted as his father after the father passed away. The defendant also reports a very close relationship with his mother.

Education: A Word Recognition Aptitude Test administered to the defendant indicates a reading ability below the sixth grade level.

The defendant is not a high school graduate. He does report having completed the eleventh grade at Westminster High School in Colorado. The defendant reports that while in high school he achieved average grades and had no disciplinary actions. He also reports he was involved with the school wrestling team. In addition to his high schooling, the defendant has attended the LSU Business College, the TBS Bible College, the Iowa Western College for Certified Nursing. The defendant does not have his G.E.D.

Employment:

EMPLOYER	CITY/STATE	KIND OF WORK	DATES FROM/TO
Community Hospice	Phoenix, AZ	Certified Nursing Assistant	02-91/12-91
Runbeck Graphics	Phoenix, AZ	Driver	01-90/08-90
Indian Hills Nursing	Council Bluffs, IA	Certified Nursing Assistant	08-89/11-89
Merrill Trucking	Phoenix, AZ	Owner/Operator	08-86/03-89

The defendant reports he is two years short of receiving his license for practical nursing. At present, he is in the process of having his Certified Nursing Assistant's license transferred from Iowa to Arizona.

Substance Use: The defendant reports occasional use of alcoholic beverages in the form or beer. The defendant states he will drink approximately three beers at a time. According to the defendant he has not experienced any difficulties as a result of his drinking and does not believe he is in need of substance abuse counseling. The defendant denied any other licit or illicit substance use.

Marital: According to the defendant, he had a marital-type relationship with Diane Kloepfer for approximately seven years and six months beginning in 1982. This relationship produced two children; Merrill, currently age five, and Lonnie, age four.

In October of 1989, the defendant began a relationship with Teri A. Priest. This relationship has proceeded to a marriage which occurred on June 29, 1991. According to the defendant his current relationship is stable and his wife is very supportive of him.

Health: At the present time, the defendant considers himself to be in good health. He reports nothing more than the normal childhood illnesses and has never been seen for any type of mental health problem.

FINANCIAL STATUS AND EVALUATION:

At the present time, the defendant reports he is unemployed, having been unemployed since December 4, 1991. The defendant has interviewed for employment and expects to have resumed employment by the time sentencing occurs. The family at present subsists on the defendant's wife's income which is used to support he and his wife, his wife's grandson, and the

two children Lonnie and Merrill. The defendant reports assets in the form of a home and motor vehicle totaling $53,400.00 and monthly expenses amounting to $2,052.95.

It has been reported that the defendant has not made his January child support payment, although this has not been verified. It does appear, however, that the defendant has sufficient training and skills with which to obtain employment and it is expected that he should be employed relatively quickly. In addition, the defendant's combined income with that of his wife should provide adequate income to meet their personal needs as well as meet whatever assessments may be made by the Court.

The probation officer has considered the following factors in determining the manner of payment:

1. Defendant's age: thirty-five.
2. Defendant's income: the defendant is currently unemployed but expecting employment.
3. Defendant's expenses: $2,052.95.
4. Defendant's assets: $53,400.00.
5. Defendant's education: vocational training with eleventh grade, Certified Nursing Assistant.
6. Defendant's obligation to support dependents: five.
7. Defendant's employment history: generally employed with periods of brief unemployment.
8. Defendant's prospects for employment: currently pending hire for a new position.
9. Others: none.

Based on the above, it is recommended the defendant pay restitution through the Clerk of the Court per the attached restitution ledger sheet.

DISCUSSION AND EVALUATION:

Present before the Court for the purpose of sentencing is Merrill Ivan Bassett, age thirty-five.

The defendant involvement in the instant offense appears to stem from an unresolvable conflict between he and his "wife" over where the defendant would live and work. Apparently it escalated to the point the defendant resulted to taking his children with him when he left the state to seek "greener pastures." According to the defendant, his "wife" knew he was going to be leaving the state to seek employment and better opportunities for the future. However, things apparently did not work out as the defendant planned.

In considering the information available to this writer, it does not appear that the matter of the defendant leaving the state with the children was adequately discussed or resolved with the children's mother. In addition, it may be true that the children's mother had elected not to leave the state and did not wish the children to leave either. It may well be that the defendant simply decided to take matters into his own hands believing if the children were with him in a new location their mother would follow. Thus, the resulting conflict that has been brought before the Court.

It does not appear the defendant was attempting to harm the children or to create undue harm within the family structure. Nevertheless, that has been the result in that the children are now witness to the feuding between their parents that has continued over a period of approximately two and one-half years. In addition, the relationship between the parents of the children has been strained to the extent that the mother must constantly concern herself with the question of whether the defendant will attempt to remove the children from her custody again. This writer does not believe that is likely to happen based on what has occurred and in view of actions taken by the Domestic Relations Court.

The defendant has married and has begun a new life. It is believed that the defendant's sole intention at this point is to maintain that marital relationship and have what contact he can with his two boys. To aid in establishing a positive and stable environment, this writer believes the defendant is in need of the supervision that probation offers so that his behavior and activities can be monitored while they make a final adjustment to the current situation. In addition, the defendant should make restitution for the funds expended by the children's mother and their grandmother in obtaining their return from Iowa. The matter of payment to the private investigator for his services is somewhat questionable, and this writer is not inclined to recommend such payment be made. Nevertheless, if the Court feels it is appropriate, this writer believes the defendant could make restitution payments.

These factors were considered in making the sentencing recommendation:

1. The defendant's age and maturity.
2. The current case is two and one-half years old.
3. There is a continuing concern for the children's welfare.
4. The defendant appears to be amenable to probation supervision.
5. The defendant has no prior criminal convictions.
6. The defendant is capable of making restitution.
7. The interests of the victims and the defendant did not require incarceration.

GRANT R. BASHORE
AZ State Bar #012433
Deputy Public Defender
132 South Central Avenue, Suite #6
Phoenix, AZ 85004
(602) 506-8325
Attorney for Defendant

91 DEC 12 PM 3:47

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. MERRILL I. BASSETT, Defendant.	No. CR-91-07724 NOTICE OF DEFENSES AND REQUEST FOR NOTICE OF REBUTTAL WITNESSES (Assigned to the Hon. COLIN CAMPBELL - Div. #59)

COMES NOW the defendant, by and through the undersigned attorney, and gives notice that defenses checked below may be raised at trial.

___	1 Alibi	___	15 Invalidity of Prior Conviction
___	2 Insanity	_X_	16 Good Character
___	3 Self-Defense	_X_	17 Lack of Specific Intent
___	4 Entrapment	_X_	18 No Criminal Intent
_X_	5 Consent*	___	19 Mistaken Identification
___	6 Impotency	___	20 Insufficiency of Prior Conviction
___	7 Marriage	_X_	21 Insufficiency of State's Evidence
___	8 Mere Presence	_X_	22 Justification
___	9 Immaturity	___	23 Act of God
___	10 Intoxication	___	24 Suicide
___	11 Duress	___	25 Diminished Capacity
___	12 Coercion	___	26 Defense of Others
___	13 Accident	___	27 Defense of Property
___	14 Illegal Search	_X_	28 Lack of knowledge or Recklessness as to Legal Parental Rights (i.e. Lack of Knowledge or Recklessness that Ellen Kloepfer Was Lawful Custodian Children).

*(Implied & Expressed)

In support of each of the defenses, the defendant may call the following witnesses:

1. The defendant;

2. Mr. Jim Banks, 4008 W. Burgess Lane, Phoenix, AZ 85041, (602) 237-2981;

3. Ms. Hazel Bassett, 3711 W. Hunnington, Phoenix, AZ, phone, 268-6667;

4. Ms. Janie Alexander, c/o of Victim, Diane Klopfer;

5. Any and all individuals named or referred to in the State's Disclosure made pursuant to Rule 15 of the Arizona Rules of Criminal Procedure. Any and all individuals, including but not limited to Victim Assistance caseworkers and/or volunteers who have spoken with any witness in this case and/or any investigator of the Office of the Public Defender.

Defendant reserves the right to supplement this list as further witnesses become known. Also, pursuant to Rule 15.1(f), Arizona Rules of Criminal Procedure, the defendant hereby requests disclosure of the names and addresses of all persons who will be called as rebuttal witnesses, together with their written or recorded statements.

In addition, the defendant may introduce at trial the following tangible objects:

1. Photographs of the alleged crime scene.

2. Diagram of the alleged crime scene.

3. Any object, thing or document disclosed by the State or used or referred to at trial by the State.

entrusted by authority of law to the custody of DIANE ELLEN KLOEPFER, in violation of A.R.S. §§ 13-1302, 13-701, 13-702, 13-801, and 13-812.

E. Miles Nelson

E. MILES NELSON
DEPUTY COUNTY ATTORNEY

It is requested that a summons be issued.
It is requested that Defendant appear for fingerprints and photograph.

Agency: PPD

Complainant

Subscribed and sworn to before this Court this 17 day of September, 1991.

The Clerk of the Superior Court of Maricopa County, Arizona, is hereby directed to file this cause in the Superior Court pursuant to Rule 2.2(b) of the Arizona Rules of Criminal Procedure.

JUDGE OF THE SUPERIOR COURT

EMN:pdr9.16.5/AO

STATE V. MARRILL AN BASSETT

Defendant's Address: 2225 W. THOMAS RD PHOENIX, AZ 85015

Employer:

Attorney for Defendant: GRANT R. BASHORE
132 S. CENTRAL SUITE 6
PHOENIX, AZ 85004

FILED
91 SEP 18 PM 4:45
JUDITH ALLEN, CLERK
BY

DEFENDANT'S DESCRIPTION

Race: W Sex: M Hair: BRO Eyes: BRO

Hgt: 602 Wgt: 200 DOB: 04-11-56 SSN: 523-88-6224

DIRECT COMPLAINT FILED: SEPTEMBER _____, 1991

CR91- CR 91-07724

CHARGES: COUNTS I & II: CUSTODIAL INTERFERENCE, CLASS 6 FELONIES

ATTORNEY: E. MILES NELSON DOWNTOWN OFFICE

VICTIM:

LONNY ALLEN BASSETT
WILLIAM IVAN BASSETT
MOTHER OF VICTIMS: DIANE KLOEPFER 6733 N. 33RD AVE PHX 85017
973-2007

SUBPOENA LIST

LONNY & WILLIAM BASSETT C/O DIANE KLOEPFER 973-2007
6733 N. 33RD AVE. PHOENIX, AZ 85017

DET. R. MEENK #2341 PPD

DR 89-116204 PPD

WARRANT ____ SUMMONS ____ IN CUSTODY ____

EXTRADITE: AO

Exhibit B

Arizona Department of Economic Securi

::DES Home::DES FAQ's::Contact DES::About DES::

::DES Search:: GO

FIND BY CATEGORY

DCSE Home

About DCSE

Parents/Caretakers

Employers

My Case Information

FAQs

Contact Us

The Division of Child Support Enforcement (DCSE)

WANTED



AMOUNT OWED: **$73,479.00**
MONTHLY OBLIGATION: **$363.00**
DATE OF BIRTH/AGE: **April 11, 1956/ 50 years old**
GENDER: **Male**
HEIGHT: **6'0"**
WEIGHT: **190**
EYES: **Blue**
HAIR: **Gray**
ETHNICITY/RACE: **Caucasian**
OCCUPATION: **Home Care, Nursing, Truck Driver**
LAST KNOWN ADDRESS: **Phoenix, Arizona**
NUMBER OF CHILDREN: **2**
FEATURES:
LAST SEEN: **1996 Phoenix, Arizona**

If you have any information concerning this parent, please call 1-877-WANTED4 (1-877- 926 8334)

Site Map | Privacy Statement | Disclaimer

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Exhibit C

PHILIP'S PLASTICS, LTD.
3801 East Roeser Rd., Unit 18
Phoenix, AZ 85040
Phone (602) 470-1808
Fax (602) 470-1883

06-25-04

TO WHOM IT MAY CONCERN:

LONNIE BASSETT HAS WORKED FOR PHILIP'S PLASTICS PART TIME SINCE HE WAS FOURTEEN YEARS OLD. HIS GRANDFATHER HAS BEEN EMPLOYED HERE FOR OVER FOUR YEARS. LONNIE WORKED DURING THE SUMMER AND CERTAIN WEEKS DURING THE YEAR WHEN HIS SCHOOL WAS OFF FOR DIFFERENT VACATIONS.

LONNIE'S DUTIES INCLUDED CLEANING, FILING, SHIPPING AND HELPING OTHER EMPLOYEES WHEN NEEDED. THIS SUMMER LONNIE WAS HIRED ON FULL TIME TO BECOME ONE OF OUR APPRENTICE MACHINISTS. HE WAS ALSO GIVEN A ONE DOLLAR PER HOUR RAISE FOR HIS FINE WORK.

DURING HIS EMPLOYMENT AT PHILIP'S PLASTICS, HE HAS ALWAYS CAME TO WORK ON TIME AND WORKED VERY HARD WHEN HE WAS HERE. LONNIE IS VERY WELL LIKED BY HIS FELLOW EMPLOYEES AND HAS A GOOD WORKING RELATIONSHIP WITH EVERYONE HERE.

LONNIE IS A VERY FRIENDLY YOUNG MAN AND ALWAYS CAME TO WORK WITH A SMILE. LONNIE HAS GREAT WORK ETHICS FOR HIS AGE AND WAS A PLEASURE TO HAVE HERE. WE HAVE ALSO SPONSORED HIS HIGH SCHOOL BASEBALL TEAM THAT HE WAS PROUD OF. LONNIE WILL BE MISSED HERE BY ALL.

SINCERELY,

PHILIP SMID - PRESIDENT
SUSAN BOULANGER - VICE PRESIDENT

Email: philipsplastics@aol.com
Website: www.philipsplastics.com

Exhibit D



ET0514916

062

State of Arizona

Arizona High School Equivalency

Diploma

This certifies that **LONNIE BASSETT**

having satisfactorily completed the General Educational Development Test, has thereby demonstrated the possession of the equivalent of a High School Education and on authority of the State Board of Education is awarded the Arizona High School Equivalency Diploma

issued this **25th** day of **February** 20**05**

by the Office of the State Superintendent of Public Instruction
Arizona Department of Education • Phoenix, Arizona

Tom Horne
Tom Horne
State Superintendent of Public Instruction

Karen Liersch
Karen Liersch
Deputy Associate Superintendent

Certificate of Participation

Awarded to

Lonnie A. Bassett

For completion of the H.E.P.S. Class

Mely Mojica

Instructor

October 13th 2004

Date

Academic Award

Presented to

Lonny Bassett

In recognition of successful completion of

Biology

Hard Knocks High School Phoenix, Arizona

From

10/4/04 - 11/17/04

Presented this

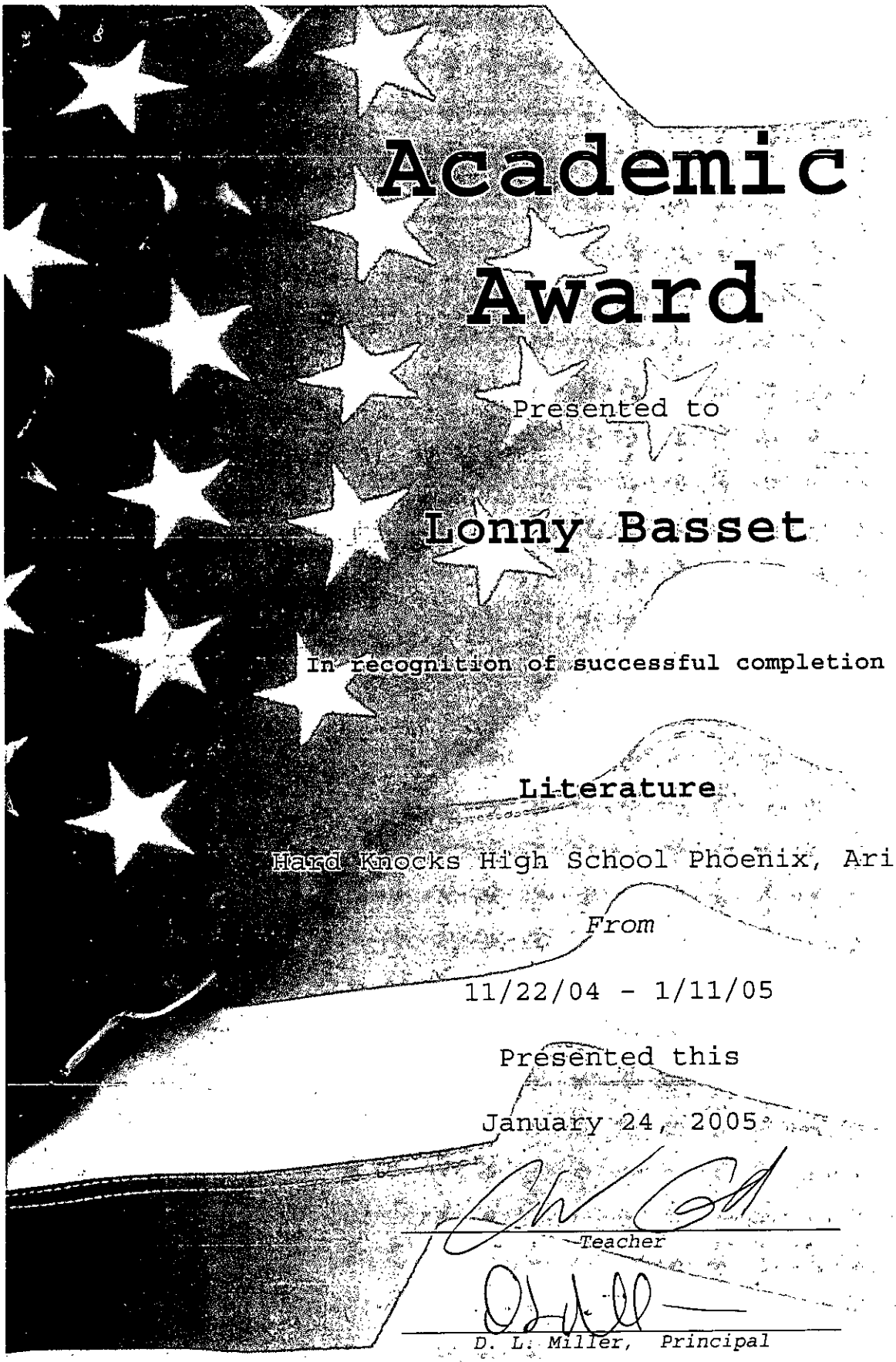
November 24, 2004

Teacher

Debra L. Miller, Principal

Grade: A

Credit: .5



Academic Award

Presented to

Lonny Basset

In recognition of successful completion of

Literature

Hard Knocks High School Phoenix, Arizona

From

11/22/04 - 1/11/05

Presented this

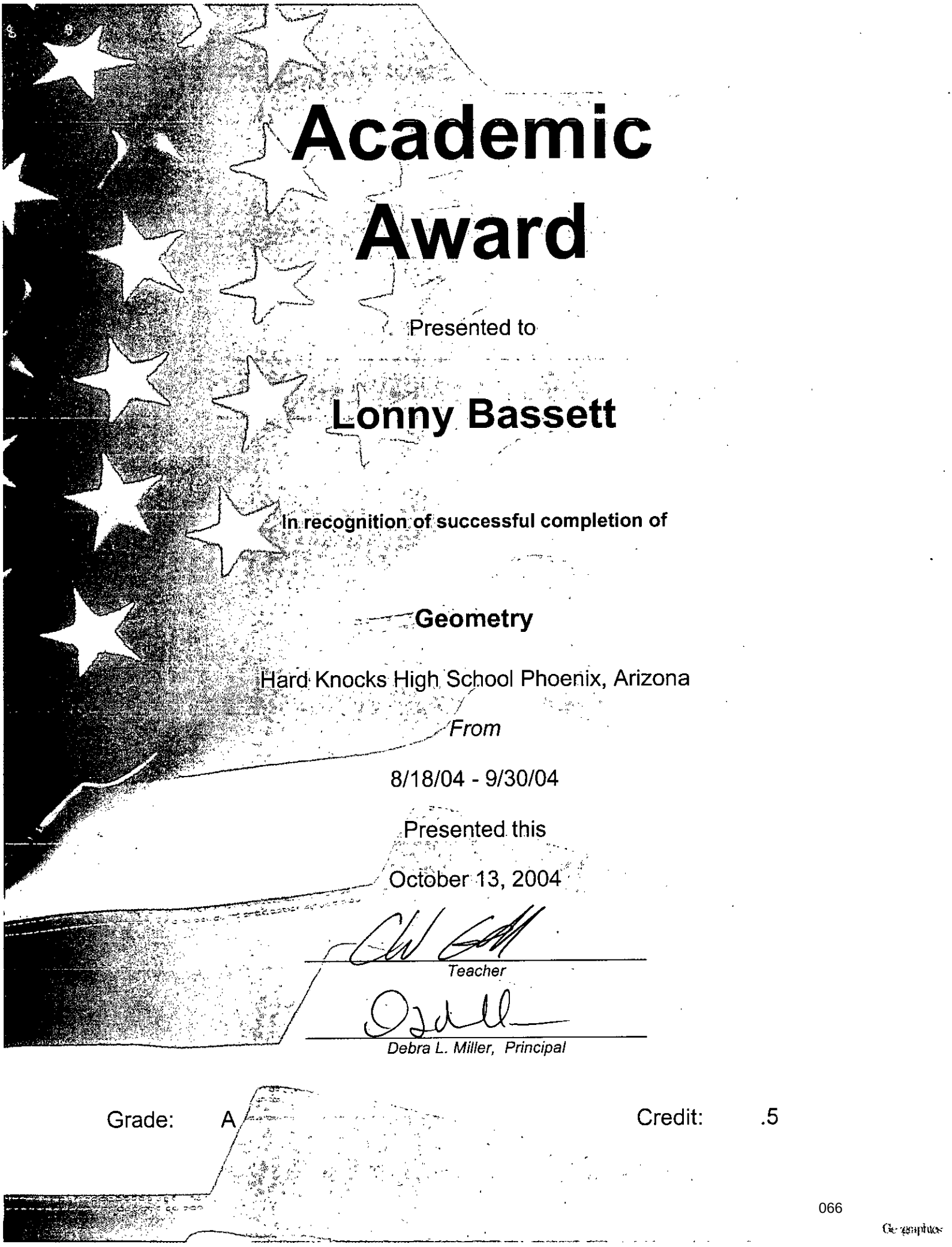
January 24, 2005

Teacher

D. L. Miller, Principal

Grade: A

Credit: .5



Academic Award

Presented to

Lonny Bassett

In recognition of successful completion of

Geometry

Hard Knocks High School Phoenix, Arizona

From

8/18/04 - 9/30/04

Presented this

October 13, 2004

Teacher

Debra L. Miller, Principal

Grade: A

Credit: .5

"Hard Knocks High"

congratulates you for your hard work

and efforts in receiving your

Arizona General Equivalency Diploma

given this day, March 24, 2005, to

Lonnie Bassett

Sheriff Joe Arpaio

D.L. Miller, Principal

Maricopa County Sheriff's Office

Hard Knocks High Program

067

GED℠ Official Transcript of GED Tests Results

Issued by
OFFICIAL GED TESTING CENTERS
of the
General Educational Development Testing Service of the American Council on Education
(For additional transcripts, contact the center below.)

890

Candidate's Name

Last: BASSETT First: LONNIE Middle Initial:

Address: 225 W MADISON ST
PHOENIX, AZ 85003

Phone Number:

Date of Birth: 11/18/1987 Social Security Number(if required): E05-27-0111

Issue Date: 02/25/05

Test Format: English

Reported to: Arizona Dept. of Education / GED
1535 W. Jefferson, Bin #30
Phoenix, AZ 85007

Karen Lunch 02/25/05
Examiner's Signature Date

Center Name: MIKE FORTIN - ADE
Center Identification No.: 003000050963
Phone Number:
Center Address: 1535 W JEFFERSON ST
PHOENIX, AZ 85007
ET0514916

	TEST DATE	TEST FORM	**STANDARD SCORE	PERCENTILE RANK	INDIVIDUAL TEST STANDARD SCORE
Language Arts, Reading	02/07/05	IB	550	69%	XXXXXXXXXXXXXXXXXXXXXXXX
Language Arts, Writing	02/10/05	IB	630	90%	XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
Mathematics	02/10/05	IB	540	66%	XXXXXXXXXXXXXXXXXXXXXXXX
Science	02/07/05	IB	570	76%	XXXXXXXXXXXXXXXXXXXXXXXXXX
Social Studies	02/07/05	IB	660	95%	XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

		*PASS	*NON-PASS
Standard Score Total	2950		
Battery Average	590	P	

200 Below 410 Above 800
PASSING SCORE

XXXXXXXXXXXXXXXXXXXXXXXXXX

200 Below 450 Above 800
BATTERY PASSING SCORE

** Standard Score. The scores on this report are the *highest* scores achieved by the candidate and not necessarily the most recent. If retest scores are lower than scores previously achieved, the retest scores are not reported.

*Pass or Non-Pass as determined by jurisdictional policy.

TOTAL BATTERY

Language Arts, Reading

Language Arts, Writing

Mathematics

Science

Social Studies

GEDTS Form 30- 10/01

Exhibit E

Psych

JEWISH FAMILY AND CHILDREN'S SERVICE
Psychiatric Evaluation

ncounter Date: 02/13/2002
Patient Name: **Lonny Bassett**
Provider Name: Leticia Jacinto MD

Referred by: School/ADE

Sources of information: self, Foster GM-Ms. Alexander

Chief Complaint: Anger problems

Presenting Illness: 14 y/o M with no previou psych treatment was BIB foster GM upon the recommendation of the school. Pt has been suspended for fighting. He had a couple of suspension related to fighting. He has difficulty controlling his anger. In terms of academics he is a straight A student. Pt was exposed to domestic violence as a child. He was physically abused by his father. He and his siblings were kept in a closet. They were only allowed 1 meal and 2 drinks a day. He had bruises as a result of the abuse. Pt was raised by his current foster family since birth but was taken by the mother and father on and off until he was five. He was kidnap by his father when he was2 y/o. He still remembers all the abuse he had from his father. At night he has flahbacks about the incident and becomes very nervous and can't sleep. He has a lot of hatred toward his father. He gets into fights because he wants to defend kids who are oppressed. He thinks that it is unfair to abuse someone. The mother lives away from him but she never showed that she cared for him. He reported that he is sad and sometimes wish he were dead when something goes wrong. He stated that he really does not want to kill mself. He wish he had an ideal family with a mother and father. He denied abusing drugs

Psychiatric History
History of previous treatment: Client has never been prescribed psychiatric medications. The client has not had any psychiatric hospitalizations. There is no history of previous outpatient behavioral health treatment.

There is no reported history of court ordered treatment.

History of dangerousness to self and/or others: There is no report of suicide attempts. No history of dangerousness to others is evident.

Birth, Development, and Education:
Developmental History: The client was raised by Foster GP. There were no known prenatal or birthing complications. Developmental milestones were reportedly reached on time. No hx of mental retardation.

History of Abuse/Neglect
There is no reported history of sexual abuse, .
Physical abuse: father
Emotional abuse/neglect: parents

Education: Highest grade completed: 8 Has not received special ed. services.

Medical History:
No history of seizures. No history of head injury.

Family History:

There is no family history of mental illness, suicide attempts, violence.
Substance abuse in family: father-alcohol

Current Living Arrangements and Support

Client lives in
with Foster GP and their son.
Sources of social support are foster family.

Legal History

No current or past history of legal issues.

Reportedly, no weapons are in home or easily accessible.
Client is in the custody of foster grandparents.

Alcohol and Substance Abuse History

Has the client ever been told they had a problem with substances? No
Does the client believe they have ever had a problem with substances? No
Client denies current use of substances.
Past substance use: Alcohol Marijuana Has been clean/sober for 1 Year.
Additional Comments:
Experimental use-1-2X
Client has no history of withdrawal symptoms. Client reports no prior substance abuse treatment.

Current Medications:

Client denies use of over-the-counter, herbal medications.
Prescription meds include Antibiotic for strep sore throat. No known drug allergies.

CGI

Severity of Illness: 4
Global Impairment: 0
Efficacy Index: 0

Mental Status Exam

Hygiene and grooming are adequate. Appearance unremarkable.
Clt is alert. Eye contact is good. Motor activity is within normal limits. **No AIMS completed.**

Speech quantity is normal. Rate of speech is normal. Amplitude of speech is normal. Associations are logical. Stream of thought is unremarkable. Thought content is non-psychotic.

Affect is appropriate.
Mood is depressed, .
Depressive content includes helplessness/hopelessness, .
Displays no thoughts of harm to self or others.

Perception is normal.
Oriented x 4. Concentration is fair. Memory is intact. Fund of knowledge is fair. Insight is fair. Judgement is fair.

Diagnosis:
Axis I: 309.81 Post Traumatic Stress Disorder

	99552	Neglect of a Child Focus on Victim
	995.54	Physical Abuse of a Child Focus on Victim
		R/O Dysthymia
Axis II:	V7109	No diagnosis on Axis II
Axis III:	7999	
Axis IV:	other psychosocial and environmental problems,	
Axis V:	60	

Plan for work up and treatment

Medication: Start Zoloft 50 mg 1 po q am Indications and side effects of medications were reviewed.

Labs: None

Therapy: Individual Family

Specific Instructions: Client was instructed to call crisis line if needed. Client instructed to phone clinic or drop in to see the RN if problems or questions arise prior to next visit.

L. Jacinto MD 2-13-02

Signature - Leticia Jacinto MD **Date**

Psych.

JEWISH FAMILY AND CHILDREN'S SERVICE
Psychiatric Progress Note # 1 since 03/13/2002

.counter Date: 03/13/2002
Patient Name: **Lonny Bassett**
Provider: Leticia Jacinto MD

Accomp by GM. He d/c the Zoloft because of side effects. He was having stomachache. He is feeling low and helpless but is able to maintain his grades. He wants to feel more energized and hopeful.

Health Status Exam: Appetite is fair. Sleep is fair.

Mental Status Exam: Oriented x3. Client is casually dressed. Concentration: fair. Behavior: cooperative. Affect is appropriate to content. Mood is neutral. Has no suicidal ideation Has no homicidal ideation Has no auditory hallucinations. Has no visual hallucinations. Has no delusions. Insight: good. Judgement: good. Client denies substance use/abuse.

Medications and Side Effects: Side effects of meds were explained.

CGI Last completed on 03/13/2002.
Severity of Illness: 4
Global Improvement: 4
Efficacy Index: 2

aboratory Data: No lab results received. No labs ordered.

Treatment Plan: No change in tx plan. Rx benefits/risks were discussed. Medications were changed. D/C Zoloft. Start Wellbutrin SR 150 mg 1 po q am Clt to be seen in 4 weeks

Diagnosis:

Axis I:	309.81	Post Traumatic Stress Disorder
	99552	Neglect of a Child Focus on Victim
	995.54	Physical Abuse of a Child Focus on Victim
	311.	Depressive Disorder NOS
Axis II:	V7109	No diagnosis on Axis II
Axis III:	7999	
Axis IV:	other psychosocial and environmental problems,	
Axis V:	60	

L. Jacinto MD
Signature

Psych.

JEWISH FAMILY AND CHILDREN'S SERVICE
Psychiatric Progress Note # 2 since 03/13/2002

counter Date: 04/10/2002
Patient Name: **Lonny Bassett**
Provider: Leticia Jacinto MD

Accomp by GM. He is not compliant with med. He is less aggressive when he stays on med.

Health Status Exam: Appetite is fair. Sleep is fair.

Mental Status Exam: Oriented x3. Client is casually dressed. Concentration: fair. Behavior: cooperative. Affect is neutral. Mood is neutral. Has no suicidal ideation Has no auditory hallucinations. Has no visual hallucinations. Has no delusions. Insight: fair. Judgement: fair. Client denies substance use/abuse.

Medications and Side Effects: Side effects of meds were explained. Denies experiencing side effects.

CGI Last completed on 04/10/2002.
Severity of Illness: 4
Global Improvement: 3
Efficacy Index: 9

Laboratory Data: No lab results received. No labs ordered.

Treatment Plan: No change in tx plan. Medications were not changed. Wellbutrin SR 150 mg 1po qam
Pt to be seen in 4 weeks

Diagnosis:

Axis I:	309.81	Post Traumatic Stress Disorder
	99552	Neglect of a Child Focus on Victim
	995.54	Physical Abuse of a Child Focus on Victim
	311.	Depressive Disorder NOS
Axis II:	V7109	No diagnosis on Axis II
Axis III:	7999	
Axis IV:	other psychosocial and environmental problems,	
Axis V:	60	

L. Jacinto MD
Signature

Exhibit F

Diagnostic criteria for 300.3 Obsessive-Compulsive Disorder *(continued)*

C. The obsessions or compulsions cause marked distress, are time consuming (take more than 1 hour a day), or significantly interfere with the person's normal routine, occupational (or academic) functioning, or usual social activities or relationships.

D. If another Axis I disorder is present, the content of the obsessions or compulsions is not restricted to it (e.g., preoccupation with food in the presence of an Eating Disorder; hair pulling in the presence of Trichotillomania; concern with appearance in the presence of Body Dysmorphic Disorder; preoccupation with drugs in the presence of a Substance Use Disorder; preoccupation with having a serious illness in the presence of Hypochondriasis; preoccupation with sexual urges or fantasies in the presence of a Paraphilia; or guilty ruminations in the presence of Major Depressive Disorder).

E. The disturbance is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition.

Specify if:

With Poor Insight: if, for most of the time during the current episode, the person does not recognize that the obsessions and compulsions are excessive or unreasonable

---

309.81 Posttraumatic Stress Disorder

Diagnostic Features

The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The person's response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganized or agitated behavior) (Criterion A2). The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event (Criterion B), persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C), and persistent symptoms of increased arousal (Criterion D). The full symptom picture must be present for more than 1 month (Criterion E), and the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion F).

Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe

automobile accidents, or being diagnosed with a life-threatening illness. For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury. Witnessed events include, but are not limited to, observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. Events experienced by others that are learned about include, but are not limited to, violent personal assault, serious accident, or serious injury experienced by a family member or a close friend; learning about the sudden, unexpected death of a family member or a close friend; or learning that one's child has a life-threatening disease. The disorder may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape). The likelihood of developing this disorder may increase as the intensity of and physical proximity to the stressor increase.

The traumatic event can be reexperienced in various ways. Commonly the person has recurrent and intrusive recollections of the event (Criterion B1) or recurrent distressing dreams during which the event can be replayed or otherwise represented (Criterion B2). In rare instances, the person experiences dissociative states that last from a few seconds to several hours, or even days, during which components of the event are relived and the person behaves as though experiencing the event at that moment (Criterion B3). These episodes, often referred to as "flashbacks," are typically brief but can be associated with prolonged distress and heightened arousal. Intense psychological distress (Criterion B4) or physiological reactivity (Criterion B5) often occurs when the person is exposed to triggering events that resemble or symbolize an aspect of the traumatic event (e.g., anniversaries of the traumatic event; cold, snowy weather or uniformed guards for survivors of death camps in cold climates; hot, humid weather for combat veterans of the South Pacific; entering any elevator for a woman who was raped in an elevator).

Stimuli associated with the trauma are persistently avoided. The person commonly makes deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event (Criterion C1) and to avoid activities, situations, or people who arouse recollections of it (Criterion C2). This avoidance of reminders may include amnesia for an important aspect of the traumatic event (Criterion C3). Diminished responsiveness to the external world, referred to as "psychic numbing" or "emotional anesthesia," usually begins soon after the traumatic event. The individual may complain of having markedly diminished interest or participation in previously enjoyed activities (Criterion C4), of feeling detached or estranged from other people (Criterion C5), or of having markedly reduced ability to feel emotions (especially those associated with intimacy, tenderness, and sexuality) (Criterion C6). The individual may have a sense of a foreshortened future (e.g., not expecting to have a career, marriage, children, or a normal life span) (Criterion C7).

The individual has persistent symptoms of anxiety or increased arousal that were not present before the trauma. These symptoms may include difficulty falling or staying asleep that may be due to recurrent nightmares during which the traumatic event is relived (Criterion D1), hypervigilance (Criterion D4), and exaggerated startle response (Criterion D5). Some individuals report irritability or outbursts of anger (Criterion D2) or difficulty concentrating or completing tasks (Criterion D3).

Specifiers

The following specifiers may be used to specify onset and duration of the symptoms of Posttraumatic Stress Disorder:

Acute. This specifier should be used when the duration of symptoms is less than 3 months.

Chronic. This specifier should be used when the symptoms last 3 months or longer.

With Delayed Onset. This specifier indicates that at least 6 months have passed between the traumatic event and the onset of the symptoms.

Associated Features and Disorders

Associated descriptive features and mental disorders. Individuals with Posttraumatic Stress Disorder may describe painful guilt feelings about surviving when others did not survive or about the things they had to do to survive. Avoidance patterns may interfere with interpersonal relationships and lead to marital conflict, divorce, or loss of job. Auditory hallucinations and paranoid ideation can be present in some severe and chronic cases. The following associated constellation of symptoms may occur and are more commonly seen in association with an interpersonal stressor (e.g., childhood sexual or physical abuse, domestic battering): impaired affect modulation; self-destructive and impulsive behavior; dissociative symptoms; somatic complaints; feelings of ineffectiveness, shame, despair, or hopelessness; feeling permanently damaged; a loss of previously sustained beliefs; hostility; social withdrawal; feeling constantly threatened; impaired relationships with others; or a change from the individual's previous personality characteristics.

Posttraumatic Stress Disorder is associated with increased rates of Major Depressive Disorder, Substance-Related Disorders, Panic Disorder, Agoraphobia, Obsessive-Compulsive Disorder, Generalized Anxiety Disorder, Social Phobia, Specific Phobia, and Bipolar Disorder. These disorders can either precede, follow, or emerge concurrently with the onset of Posttraumatic Stress Disorder.

Associated laboratory findings. Increased arousal may be measured through studies of autonomic functioning (e.g., heart rate, electromyography, sweat gland activity).

Associated physical examination findings and general medical conditions. Physical injuries may occur as a direct consequence of the trauma. In addition, chronic Posttraumatic Stress Disorder may be associated with increased rates of somatic complaints and, possibly, general medical conditions.

Specific Culture and Age Features

Individuals who have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of Posttraumatic Stress Disorder. Such individuals may be especially reluctant to divulge experiences of torture and trauma due to their vulnerable political immigrant status. Specific assessments of traumatic experiences and concomitant symptoms are needed for such individuals.

In younger children, distressing dreams of the event may, within several weeks, change into generalized nightmares of monsters, of rescuing others, or of threats to self or others. Young children usually do not have the sense that they are reliving the past; rather, the reliving of the trauma may occur through repetitive play (e.g., a child who was involved in a serious automobile accident repeatedly reenacts car crashes with toy cars). Because it may be difficult for children to report diminished interest in significant activities and constriction of affect, these symptoms should be carefully evaluated with reports from parents, teachers, and other observers. In children, the sense of a foreshortened future may be evidenced by the belief that life will be too short to include becoming an adult. There may also be "omen formation"—that is, belief in an ability to foresee future untoward events. Children may also exhibit various physical symptoms, such as stomachaches and headaches.

Prevalence

Community-based studies reveal a lifetime prevalence for Posttraumatic Stress Disorder of approximately 8% of the adult population in the United States. Information is not currently available with regard to the general population prevalence in other countries. Studies of at-risk individuals (i.e., groups exposed to specific traumatic incidents) yield variable findings, with the highest rates (ranging between one-third and more than half of those exposed) found among survivors of rape, military combat and captivity, and ethnically or politically motivated internment and genocide.

Course

Posttraumatic Stress Disorder can occur at any age, including childhood. Symptoms usually begin within the first 3 months after the trauma, although there may be a delay of months, or even years, before symptoms appear. Frequently, a person's reaction to a trauma initially meets criteria for Acute Stress Disorder (see p. 469) in the immediate aftermath of the trauma. The symptoms of the disorder and the relative predominance of reexperiencing, avoidance, and hyperarousal symptoms may vary over time. Duration of the symptoms varies, with complete recovery occurring within 3 months in approximately half of cases, with many others having persisting symptoms for longer than 12 months after the trauma. In some cases, the course is characterized by a waxing and waning of symptoms. Symptom reactivation may occur in response to reminders of the original trauma, life stressors, or new traumatic events.

The severity, duration, and proximity of an individual's exposure to the traumatic event are the most important factors affecting the likelihood of developing this disorder. There is some evidence that social supports, family history, childhood experiences, personality variables, and preexisting mental disorders may influence the development of Posttraumatic Stress Disorder. This disorder can develop in individuals without any predisposing conditions, particularly if the stressor is especially extreme.

Familial Pattern

There is evidence of a heritable component to the transmission of Posttraumatic Stress Disorder. Furthermore, a history of depression in first-degree relatives has

been related to an increased vulnerability to developing Posttraumatic Stress Disorder.

Differential Diagnosis

In Posttraumatic Stress Disorder, the stressor must be of an extreme (i.e., life-threatening) nature. In contrast, in **Adjustment Disorder,** the stressor can be of any severity. The diagnosis of Adjustment Disorder is appropriate both for situations in which the response to an extreme stressor does not meet the criteria for Posttraumatic Stress Disorder (or another specific mental disorder) and for situations in which the symptom pattern of Posttraumatic Stress Disorder occurs in response to a stressor that is not extreme (e.g., spouse leaving, being fired).

Not all psychopathology that occurs in individuals exposed to an extreme stressor should necessarily be attributed to Posttraumatic Stress Disorder. **Symptoms of avoidance, numbing, and increased arousal that are present before exposure to the stressor** do not meet criteria for the diagnosis of Posttraumatic Stress Disorder and require consideration of other diagnoses (e.g., a Mood Disorder or another Anxiety Disorder). Moreover, if the symptom response pattern to the extreme stressor meets criteria for **another mental disorder** (e.g., Brief Psychotic Disorder, Conversion Disorder, Major Depressive Disorder), these diagnoses should be given instead of, or in addition to, Posttraumatic Stress Disorder.

Acute Stress Disorder is distinguished from Posttraumatic Stress Disorder because the symptom pattern in Acute Stress Disorder must occur within 4 weeks of the traumatic event and resolve within that 4-week period. If the symptoms persist for more than 1 month and meet criteria for Posttraumatic Stress Disorder, the diagnosis is changed from Acute Stress Disorder to Posttraumatic Stress Disorder.

In **Obsessive-Compulsive Disorder,** there are recurrent intrusive thoughts, but these are experienced as inappropriate and are not related to an experienced traumatic event. Flashbacks in Posttraumatic Stress Disorder must be distinguished from illusions, hallucinations, and other perceptual disturbances that may occur in **Schizophrenia, other Psychotic Disorders, Mood Disorder With Psychotic Features,** a **delirium, Substance-Induced Disorders,** and **Psychotic Disorders Due to a General Medical Condition.**

Malingering should be ruled out in those situations in which financial remuneration, benefit eligibility, and forensic determinations play a role.

Diagnostic criteria for 309.81 Posttraumatic Stress Disorder

A. The person has been exposed to a traumatic event in which both of the following were present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

(2) the person's response involved intense fear, helplessness, or horror. **Note:** In children, this may be expressed instead by disorganized or agitated behavior

Diagnostic criteria for 309.81 Posttraumatic Stress Disorder *(continued)*

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

(1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. **Note:** In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
(2) recurrent distressing dreams of the event. **Note:** In children, there may be frightening dreams without recognizable content.
(3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). **Note:** In young children, trauma-specific reenactment may occur.
(4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the *following*:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma
(2) efforts to avoid activities, places, or people that arouse recollections of the trauma
(3) inability to recall an important aspect of the trauma
(4) markedly diminished interest or participation in significant activities
(5) feeling of detachment or estrangement from others
(6) restricted range of affect (e.g., unable to have loving feelings)
(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:

Acute: if duration of symptoms is less than 3 months
Chronic: if duration of symptoms is 3 months or more

Specify if:

With Delayed Onset: if onset of symptoms is at least 6 months after the stressor

Exhibit G

To whom it may concern,

Im writting this letter on behalf of Lonnie Bassett. I've known Lonnie for 3 years. My experiences with him have always been pleasant. He is very hard working and polite. He has always show the love and respect for Mr. & Mrs. Alexander that should make most Grandparents jealous. I 've spent many afternoons with Mr Alexander, golfing, and he was always bragging on Lonnie's accomplishments. In my opinion Lonnie is a good kid. He is smart and willing to learn new things. I only hope this letter helps you understand Lonnie.

Sincerely,
Matt Brewer

7/20/04

To whom it may concern,

My name is Penny Kwan, I am writing this letter for my mother Harriet Zieske in regards to Lonny A. Bassett.

Lonny moved in next door to my mothers when he was about six or seven years old to a wonderful family. He went to the grade school Ocatillo down the street from his house. He was very helpful to mother & me. like helping us to take the dog to the vet. He was always willing to help in any way. He brought over a 80th birthday present to my mother & wished her a very happy birthday. Mother ask him some questions about many things. such as what are you going to do in the future. He had many dreams. Lonny is a very polite & conciderate young man. He will always be in our prayers.

Penny Kwan
Harriet Zieske

6/27/04

To Whom It May Concern:

I am writing on behalf of Lonny Bassett, whom I have known since 1995. He has always been a very nice and respectful child and I must say that I am totally shocked by the allegations brought against him. It seems completely out of character from the boy I have known.

Sincerely

Kathleen Drozack

To Whom It May Concern:

Hello, my name is Amanda M. Treinen. I have known Lonny A. Bassett for about 5 years. I met him in Jr. High at Palo Verde Middle School.

As long as I have known Lonny I have never felt scared of him or threatened by him. I have seen him in a few fights but they were not that bad.

I know that Lonny would defend himself in any and every situation. He doesn't like feeling threatened or knowing that anyone he knows is being threatened.

Lonny is a sweet guy. He cares about people. 5 years is a long time to know someone. If I ever thought he was capable of anything like this I would not be writing this letter.

Please Thank you for taking the time to read my letter and please keep this letter in mind.

Sincerely,

Amanda Treinen

Amanda Treinen

TO: WHOM IT MAY CONCERN: 6-23-04

REF: LONNY BASSETT

THIS LETTER SUBMITTED TO ADVISE you OF MY ACQUAINTANCE WITH LONNY BASSETT.

I WORK WITH CHARLES ALEXANDER (WHO RAISED LONI). SEVERAL TIMES PER WEEK CHARLES AND I HAVE LUNCH TOGETHER. LONNY JOINED US ON SEVERAL OCCASSIONS AND ALSO WORKED PART TIME FOR THE SAME COMPANY.

MY EXPERIENCE AND OBSERVATIONS OF LONNY ON THESE OCCASSIONS WERE THAT HE WAS QUIET, DECENT MANNERS, AND EXHIBITED WHAT I WOULD CALL TYPICAL TEENAGER BEHAVIOUR.

ROBERT FEATHER

June 25, 2004

To whom it may concern,

I am writing this letter in support of Lonny Bassett. I have known Lonny for over a year. I first met Lonny when he was a caddy for his grandfather at golf tournaments his grandfather and I played in together.

As a Realtor, I helped Lonny's family purchase a new home. The family and myself spent many weekends out looking at homes. Lonny always accompanied us. Most of the time, when I had occasion to go to the house, Lonny was usually home.

Every time I met Lonny, he was polite and courteous. He always impressed me as being very bright. He was always clean cut and well mannered and genuinely a pleasure to be around. He always took time to talk with me and we joked a lot. I think highly of Lonny Bassett. I thought many times about asking him to caddy for me, but did not because I did not want to interfere with the special relationship he has with his grandfather. Lonny is someone I like being around.

When I heard of Lonny's recent problems, I couldn't believe it. I know Lonny grew up in an area where he was probably challenged to be a man frequently by his peers, but I cannot imagine Lonny being the instigator. I don't think it is in him. There must have been some extenuating circumstances because this is not the Lonny I know.

If I can provided any information or be of any help in any way, please don't hesitate to contact me.

Sincerely,

Hop Cassidy

Contact information:
Hop Cassidy
5001 N. 87th St.
Scottsdale, AZ 85250
Home 480-947-1592
Mobile 602-740-8354

APPENDIX 5

MICHAEL JEANES, CLERK
BY M. Mele DEP
FILED
2006 JAN 26 AM 8:38

OFFICE OF THE LEGAL DEFENDER
John Canby, Bar ID# 010574
222 North Central Avenue, Suite 910
Phoenix, Arizona 85004-2237
Telephone (602) 506-8800
Facsimile (602) 506-8862
Attorney for the Defendant

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

STATE OF ARIZONA, Plaintiff, vs. LONNIE BASSETT, Defendant.	CR 2004-005097-001-DT NOTICE OF FILING OF ADDITIONAL SENTENCING LETTERS (Honorable Brian Hauser) (Oral Argument Requested)

Defendant, Lonnie Bassett, through counsel John Canby, hereby respectfully files the attached additional sentencing recommendation letters for the court's review.

Dated this 26th day of January, 2007.

ROBERT S. BRINEY
OFFICE OF THE LEGAL DEFENDER

By _____
John Canby

Original of the foregoing
mailed/hand-delivered
January 26, 2006 to:

OFFICE OF THE LEGAL DEFENDER
222 North Central Avenue, Suite 910
PHOENIX, AZ 85004-2237

Clerk of the Superior Court
201 West Jefferson
Phoenix, Arizona 85003

Copies of the foregoing
mailed/hand-delivered
January 26, 2006 to:

The Honorable Brian Hauser
Judge of the Superior Court

Jeanette Gallager
Deputy County Attorney
301 West Jefferson
Phoenix, Arizona 85003

I was introduced to Lonnie Alan Bassett when he was only four days old. Lonnie, his older brother, and mother were living at our home.

Lonnie's mother and father left their children at our home and were gone for several weeks. Upon their return, Lonnie's mother said she finally found a place of her own and they moved out.

***After only a short while*, Lonnie's mother, who continually complained she could not take care of two children, asked if we could care for Lonnie. We happily took him into our home. I became an "uncle".**

Lonnie's mother moved only two miles from our home, but never even came by the see him. She would drive right by the house bringing her older son to and from school without a thought of her younger son.

Lonnie tried hard to get his mom to be a part of his life, but she always had an excuse to not see him and this upset Lonnie a great deal.

His father also showed little interest in his son and was out of his life completely by the time he was four years old.

He was raised as a part of our family. Lonnie was a normal kid. A pain sometimes, but a good kid.

He was a great student with very good grades and an excellent athlete. I helped coach his baseball teams and we had a lot of fun together.

Lonnie has always been a very generous person and always liked to help his friends when they were in need. He has a great heart. We raised him in a loving and caring family atmosphere.

Lonnie is a kid who got in over his head in something he didn't completely understand. He made a terrible mistake that he wishes he could undo with his heart and soul.....but he can't.

My hope for Lonnie is that he one day can have a second chance to show and prove to you the good person he is inside.



To Whom It May Concern:

My name is Debra Payne and I am a Special Education teacher at Mountain Ridge High School. I am writing this letter in hopes that you will see the Lonny Basset I know and love.

I was first acquainted with Lonny Basset at his previous residence when he was six years old. His grandparents and uncle, whom he lived with, were my neighbors (across the street) for twelve years. My first impression of this child was positive. He was respectful, polite, funny, and most of all I remember how much he loved his grandma. Lonny went to school at Ocotillo Elementary School (K-6th grade) along with my own children, Tyler and Keaton. Lonny always excelled in school earning high marks. His teachers and peers admired him. Lonny was never one to start fights or act as a bully. On the contrary, he was quite the pacifist, always trying to help others solve their problems. He and my younger son, Keaton, often played sports after school along with other children in the neighborhood for hours each day. I would also play with them acting as the pitcher referee etc. Those were some of the best memories I have☺.

As the years passed, Lonny and Keaton played baseball together on a summer league. Lonny was an amazing catcher. With each new year his skills increased. He was a good sport and had a strong bond with his coaches and the other players. My relationship with Lonny grew strong through these years, as did my relationship with his Grandma, Jane. To this day Jane is one of my best friends. Jane and I would often sit in the front yard together and talk for hours. Lonny would often join us which was always such a delight. Lonny thought of me as a mother and I called him my third son. It would have been an honor to have him as my son.

Lonny has always been the type of person who would take the shirt off his back to help anyone. His kindness and loyalty was often taken for granted. He trusted those he called friends with all his heart. As he matured specific individuals took advantage of his kindness, and this caused his downfall.

I hope through this letter I was able to reveal the Lonny Basset I know and love.

Sincerely,

Debra Payne

PHILIP'S PLASTICS, LTD.
3801 East Roeser Rd., Unit 18
Phoenix, AZ 85040
Phone (602) 470-1808
Fax (602) 470-1883

01-18-06

Subject: Lonny Bassett

To Whom It May Concern:

Lonny was hired for part time work in June of 2001. He was hired for weekends, breaks and summer vacations. His initial job was to help anyone who could use his assistance and for general cleaning.

He soon asked if we would give him a chance at being a "junior machinist" with his grandfather to oversee him. Due to his good attitude, promptness and basic machining ability, I gave him that chance. (Teenagers usually try to avoid work, not embrace it.)

By the end of the summer, Lonny received a raise, and was doing many projects on his own.

He had good work ethics, always willing to learn and help, was friendly and well liked by the other employees. Lonny worked for Philip's through June of 2004.

The plan was to hire him for full time employment when he graduated high school.

My personal opinion was that he seemed very friendly, was a nice person and adored by his Grandfather. We sponsored his baseball team and enjoyed having him work here.

Sincerely,

Susan Boulanger

Susan Boulanger
Philip's Plastics Vice President

Email: philipsplastics@aol.com
Website: www.philipsplastics.com

TO WHOM IT MAY CONCERN

My NAME IS PATRICK BARELA, I WOULD LIKE TO SAY A FEW THINGS ABOUT LONNIE! LONNIE AND I WORKED TOGETHER ABOUT 4 YEARS, HE WAS ABOUT 12 years old, AT THE TIME I FIRST MET HIM! HE WAS A good KID AND HAD THE WILL TO LEARN THE PLASTICS BIZ, HE WOULD COME TO WORK AND WAS ALWAYS ~~[redacted]~~ A GO getter, IF GIVEN THE CHANCE I THINK HE WOULD DO THE SAME IN SOCIETY. LONNIE WAS ALWAYS VERY NICE TO ALL THE WORKERS HERE AND WE ALL MISS HIM!

THANKS

PATRICK BARELA
LATHROP PHILLIPS PLASTICS

Hi my name is Ron Martin.
I am the supervisor for Philip Plastics; I have known Lonny for a number a years.
Lonny started working here on his summer vacations and worked for 2 to 3 years.
Charlie, My self and other people in the shop was training Lonny to be a machinist.
Lonny was doing very well, he got along with every body he worked with, he had a very good attitude towards others, his work was outstanding, and always looked forward to coming to work.
Lonny was a great employee and an asset to the company.
I can't say enough about Lonny and how well mannered he was and how Lonny would give you the shirt off his back, He helped anyone, any time, and in any way he could.
I enjoyed working with Lonny and every body in this shop feels the same.
There is no doubt in my mind that Lonny is a great person, and I would be very happy to work with Lonny again.

Philips plastics supervisor
Ron Martin
315 n cola
Mesa as 85201 (480-464-1701)

To Whom This Letter Is Addressed: Jan 4, 2006

My name is Francisco Denogean I'am 31yrs. I'am a father of six (6) children ranging from 13yrs to 2yrs. I'am currently employed at the same place where I met Lonnie. I was very shocked and still very saddened with his whole situation after all he is still a kid. I met Lonnie about three years ago through his grandfather Charlie. Lonnie started working in my area I took special interest in Lonnie simply because for his age at the time he was always so self motivated always trying to help me out wether it was sweeping around my machine or just empting our trash cans. I know Lonnie felt very comfortable talking to me, we would have lunch several times a week and I would sit there and just listen to all the plans he had. I was really upset when I found out what happened I just could not believe that any body would put a kid in that position.

01-17-06

To Whom It May Concern:

Subject: Lonny Basset

At the request of Lonny's "grandfather" (Charles Alexander), I am informing you of my observations/knowledge of Lonny during the several years he was employed part time at Philip's Plastics.

Charlie and I have been working associates and friends for over five years.

Lonny was a student in high school and worked at Philip's during his summer vacations and off times.

He was a good employee, relatively quiet and eager to learn.

Often, during lunch/coffee breaks, Charlie would discuss how well Lonny played baseball and how very intelligent he is. If is safe to say Charlie was very proud of Lonny. (Typical parent)

Sincerely,

Robert Feather
Philip's Plastics Q.C. Manager

APPENDIX 6

MICHAEL K. JEANES, CLERK
BY D. Dougherty DEP
FILED

2006 JAN 23 PM 5:07

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY
Jeannette R. Gallagher
Deputy County Attorney
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Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. LONNY BASSETT, Defendant.	CR 2004 – 005097 – 001 DT SENTENCING MEMORANDUM (Assigned to the Honorable Brian Hauser)

The State of Arizona, by and through undersigned counsel, and provides the attached sentencing memorandum for the Court's use in determining the appropriate sentence for the Defendant, Lonny Bassett.

Respectfully submitted this 23 day of January, 2006.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

BY _____
Jeannette R. Gallagher
Deputy County Attorney

SENTENCING MEMORANDUM

Range of Sentences:

During the early morning hours of June 16, 2004, the Defendant, LONNY BASSETT, ended the lives of Joseph Pedroza and Frances Tapia for reasons known only to him. Was it an armed robbery? Did Joseph have drugs or money that the Defendant wanted? Was it jealously because Joseph was ignoring him, preferring to spend time with his new girlfriend? Was it revenge for some slight by Joseph? Or was it a thrill killing? Did the Defendant murder these two people in cold blood because he could? The answer to the question of why may never be know but, by the jury's verdict, the answer is not that this was self-defense. Having been convicted of two counts of Murder in the First Degree, the range of sentence for each count is life without the possibility of parole for 25 years or natural life. By virtue of the jury's finding that both counts were of a dangerous nature and by their finding of guilt for two homicides, two statutory aggravating factors have been found. The State asks that the Court now consider additional aggravating factors in determining the appropriate sentence for the Defendant.

Aggravating Factors:

Pursuant to A.R.S. § 13 – 702 (C) (9), the State asks that the Court consider the emotional harm done to the immediate families of Joseph Pedroza and Frances Tapia. Both are survived not only by their parents and siblings but by their children. Joseph has a young son who lives in the Valley with his mother. Since getting out of prison, Joseph was establishing a relationship with that child, visiting him regularly, a relationship ended by the Defendant. How can anyone ever explain to a little boy why his father has been taken away from him? For Frances Tapia's two daughters, the trauma is even worse. These little girls have not only lost their mother but they have lost each other because they do not have the same father. While alive, Frances was raising the girls together but since her murder, the younger child has gone to live with her

father while the older child lives with her aunt. By his actions, the Defendant has cause irreparable damage to three innocent children.

Pursuant to A.R.S. § 13 – 702 (C) (5), the State asks this Court to consider the especially cruel manner in which Frances Tapia was murdered. "Cruelty" involves the pain and suffering of the victim, including any mental distress suffered prior to death. A crime is committed in an especially cruel manner when a defendant inflicts mental anguish or physical abuse before the victim's death. *State v. Murray*, 184 Ariz. 9, 37, 906 P.2d 542, 570 (1995). Mercifully, Joseph Pedroza did not suffer as the Defendant made sure he did not know there was a shotgun pointed at his head. Joseph died not ever knowing the fatal shot was coming. Not so for Frances. She first saw her boyfriend's head blown off. A victim who watches a loved one be killed, not knowing what their own fate will be has been found by the Arizona Supreme Court to be especially cruel. After the first shot, Chad Colyer had enough time to locate his door handle, get the door open and bail out of the car before the Defendant shot Frances the first time. By his own admission, Frances was screaming. Frances mental anguish and terror she must have felt is unimaginable. She not only suffered emotionally, she also suffered great physical pain. The first shot ripped off the top of her right shoulder with pellets lodging into the right forearm. In order to get off the second shot, the Defendant had to reposition himself in the back seat. Up to this point, Frances was still trying to drive the car. She registered what was happening to her as is evidenced by her vain attempt to defend herself by putting her right hand up to her head. It was the second shot, the one that destroyed her right bicep and right thumb that finally killed her. This was an especially cruel murder and should be considered by the Court in determining the appropriate sentence for the Defendant.

A.R.S. §13 – 702 (C) (21) allows a court to consider any other factor deemed appropriate to the ends of justice and the State requests that the Court consider the grave risk of death faced by Chad Colyer. A.R.S. §13 – 703(F) (3) specifically lists this factor in death penalty cases and the State believes it should also be considered in this case. The "grave risk of death to another" factor applies if a defendant's murderous act itself put another person in a zone of danger. The inquiry is whether, during the course of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injury. *State v. Wood*, 180 Ariz. 53, 69, 881 P.2d 1158 (1994). In this case, that third person was Chad Colyer. By committing the

murders in a moving car, the Defendant clearly put Chad's life in danger. Thankfully, he was not seriously injured when he jumped out of the car, at least not physically. How damaged Chad is mentally and emotionally as a result of witnessing Joseph's murder is unknown at this time but he was in the zone of danger created by the Defendant.

Finally, the State would ask the Court to consider in aggravation the Defendant's lack of remorse for the murder of Frances Tapia. In his statement to Det. Kulesa on June 18, 2004, he bemoaned the loss of Joseph and, if he is to be believed, he was remorseful for that killing. But he never expressed even the slightest degree of remorse or sorrow for taking Frances' life. It was as if she did not really matter. She was just someone in the car who he killed.

Consecutive Sentences Are Warranted

Pursuant to A.R.S. §13-708, the State requests that the sentences be ordered served consecutively. That statute provides in pertinent part as follows:

> ...{I}f multiple sentences of imprisonment are imposed on a person at the same time... the sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise, in which case the Court shall set forth on the record the reason for its sentence.

The legislative intent is clearly that a defendant who commits more than one crime be held accountable for each crime separately. Despite the fact that the two murders occurred close in time, the Defendant's conduct does not constitute a "single act". The Arizona Supreme Court in *State v. Gordon*, 161 Ariz. 308, 778 P.2d (1204) (1989), established a three-step process to help the Court determine whether consecutive sentences may be ordered or whether the Defendant's conduct constitutes a single act. The first step in the process is commonly referred to as the identical elements test found in *State v. Tinghitella,* 108 Ariz. 1, 491 P2d 834 (1971). The identical test precludes consecutive sentences if, after eliminating the elements of one charge, the remaining evidence will not support the elements of the additional charge(s). *State v. Griffin,* 148 Ariz. 81, 85, 713 P.2d 283 (1986); *State v. Devine,* 150 Ariz. 507, 509, 724

P.2d 593(1986).

The second step requires the court to consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime(s). *State v. Gordon, supra,* 315. If the crime is incidental to or inherent in the nature of the additionally charged crimes, the series of convictions must be sentenced concurrently. However, if it is possible for the defendant to commit a separate crime without also committing a secondary crime, a defendant is then eligible for consecutive sentences. Finally, the Court must consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. *State v. Gordon, supra,* 315. If the defendant's actions add to the victim's suffering and increase his harm or risk of harm beyond other crimes, then A.R.S. §13-116 does not apply. A defendant is eligible for consecutive sentences if two of the three steps in the analysis indicate the Defendant's crimes were separate acts. N this case, the final factor does not apply as there were two separate victims.

Case law provides guidance to the Court when applying the identical elements test. For example, in *State v. Griffin, supra,* 86, the Defendant was convicted of four counts of sexual assault. Count I charged the defendant with sexual assault by engaging in oral sexual contact with the victim by forcing her to place the defendant's penis in her mouth. Count II charged the defendant with sexual assault by forcing the victim to put her tongue on his anus. Count III and IV charged the defendant with sexual assault by forcing the victim to engage in vaginal and then anal intercourse. The Court held that each act was performed in an entirely different manner and each was accompanied by the use of force and lack of consent on the victim's part. *State v. Griffin, supra,* 86. The Court noted it is irrelevant that the acts were committed within a relatively short time span. The court reasoned consecutive sentences may be given for two crimes on the same occasions. That the punishable acts occurred within a very short time span was not material to the application of the test. *State v. Tinghitella,* 108

Ariz. 1, 3-4, 491 P.2d 834 (1971).

In the instant case, the jury found the Defendant guilty of two counts of premeditated First Degree Murder. This was not a case where a single act by the Defendant caused multiple people to die. The firing of three separate shots establishes that the murders of Joseph and Frances were not a single act. To impose anything less than consecutive sentences who be tantamount to a finding that one of these victims, Frances or Joseph, did not count. It would be the equivalent to giving the Defendant one free murder.

Restitution:

The State is requesting restitution to the Victim's Compensation fund in the amount of _____ for moneys paid

Mitigation:

The age of the Defendant of 16 ½ at the time of the murder is a mitigating factor pursuant to A.R.S. § 13-703 (G) (5). In addition to chronological age, this factor requires consideration of the Defendant's 1) level of intelligence, 2) maturity, 3) participation in the murder, and 4) criminal history and past experience with law enforcement. *State v. Clabourne*, 194 Ariz 379, 983 P2.d 748 (1999). If the Defendant is to be believed, he is extremely intelligent. He told Det. Kulesa during his June 18, 2004 interview that he was in advanced classes at school and his grades would have been better but for his having been suspended from school. As for his level of maturity, the State is unaware of anyone ever describing him as immature or impulsive. He was a full-time student and spent his summers working with Mr. Alexander at Phillips Plastics. The Alexanders apparently considered him mature enough to handle his own money as whatever he earned at his job was his to do with as he pleased. In an interview with Charles Alexander in preparing for trial, the State and defense counsel were advised that the Defendant was a lady's man and was sexually active. That he kept condoms in his room as shown in a photograph admitted at trial, is an indication of a level of maturity unfortunately not possessed by many young men the Defendant's age. As for the Defendant's participation in the murders, he was the sole participant.

Regarding the forth and final factor, the Defendant has had 3 referrals to Juvenile Court. The first police contact the State is aware of occurred in December,

2003.According to the police report, on December 3, 2003, the Defendant and a friend assaulted Robert Fait, the step-father of a girl the Defendant was dating. Mr. Fait sustained a black eye, injury to his forehead and a broken tooth. The State has provided copies of pictures of Mr. Fait's injuries to the Pre-Sentence investigator for this case. The following day, Mr. Fait got an Injunction Against Harassment against the Defendant that was served on him on December 4, 2003. That day, Mr. Fait heard the Defendant on the telephone with his step-daughter and called the police as that was a violation of the Injunction. The police contacted the Defendant as the Alexander home on December 4, 2003. A paper referral was submitted to the County Attorney's Office and the Defendant was given diversion on February 11, 2004. He was required to participate in 21 hours of education, 7 hours of counseling and perform 12 hours of work. He completed all of the requirements in advance of the due date. When the police searched his room on June 16, 2004, they found in the box where he kept his meth and marijuana pipes a certificate documenting his completion of the Assaultive Behavior Level 2 program on March 20, 2004.

The Defendant's second encounter with law enforcement occurred on December 20, 2003. The police stopped the Defendant and his girlfriend, Jessica on the street in connection with a fight he had been involved in. The Defendant dropped a baggie of marijuana on the ground which he later admitted was his. He told the officer he was not sure if he was going to smoke the marijuana himself or sell it. The officer noted that the Defendant smelled of alcohol and he admitted he had been drinking beer. His BAC was .128. During the interview, the Defendant admitted that he was violating the Injunction Against Harassment previously served on him by being with Jessica but said he did it because "I love her." The Defendant was booked into the Juvenile Court Center for Possession of Marijuana, Possession of Drug Paraphernalia and Minor with Alcohol. The Defendant was given drug diversion for those offenses and was ordered to complete 50 hours of education. Stan Bright was the probation officer for the Defendant while he was in this program. He completed the required education on June 1, 2004.

The Defendant's next contact with law enforcement occurred on May 13, 2004. He was stopped at 2:05 am for making an unsafe u-turn. The Defendant was driving the Alexander's van and acknowledged that he took the van without consent. There were two other people in the car. The arresting officer noted the smell of marijuana and saw several empty beer cans. The Defendant was arrested fro curfew violation was taken

home and released to Mr. Alexander who acknowledged that the Defendant had left the house without his knowledge and was driving the van without his knowledge. The County Attorney's Office chose not to file on that curfew charge as, by the time the paperwork was reviewed, the Defendant was already in custody for the murders of Joseph and Frances.

In a report authored by Stan Bright in connection with the Defendant's involvement in the Drug Diversion Program the following was written:

> Lonnie wants to go into the military and then become a police officer. He reports that he has been in about 15 fights in the last twelve months. He reports that some are at school but most are in the community. He reports that most start around dusk. He reports that he is not the aggressor in most cases. Mr. & Mrs. Alexander report hat he has been diagnosed with Post-Traumatic Stress Disorder. They report he was Physically/Sexually Abused or neglected when he was younger. They report that he is currently in counseling and Anger Management classes. They report that Lonnie sees his mother about twice per year, Thanksgiving and Christmas, maybe. They report hat the mother lives about a mile from them. They report that Lonnie has been living with them for most of his life. They report hat the mother has signed papers for them to provide education, medical needs, etc.

It is interesting to note that when the Defendant was arrested on December 20, 2004, he asked for his mother, Diane Kloepfer, to be present during his interview. The officers contacted Mrs. Kloepfer and she was in fact present during the Defendant's interview.

In his report, Mr. Bright also wrote the following:

> Lonnie reports that he smokes marijuana two or three times a week. He reports that the last time he smoked marijuana was the week of 8 March 2004. He reports that the first time he smoked marijuana was at the age of twelve. He reports that he drinks alcohol two to three times per week. He reports that the last time he drank alcohol was the first week of March, 2004. He reports that he has tried no other drugs.

Mr. Bright went on to note that the Alexanders appeared to be a positive influence on the Defendant.

While the Defendant's prior criminal history is not extensive, it is also not non-existent. It is apparent that he continued to do exactly as he pleased despite being involved in the juvenile justice system. The State had also been in contact with

Raymond Solis, a close friend of the Defendant. Raymond also happens to be Frances Tapia's step-brother. According to Raymond, the Defendant often carried a gun and on one occasion waived the gun at Raymond in an attempt to get him to use some drugs that Raymond did not want to use. Chad Colyer also told the police that the Defendant had a reputation for always carrying a gun so that when the Defendant produced the handgun from his waist on the evening of June 15, 2004, Chad was not surprised. According to Raymond, the Defendant's street name was "Little Scrapper". He told Raymond that he got that name because of all of the fights he was in.

The State requests that the Court consider all of the above information in determining how much weight to give the Defendant's age as a mitigating factor.

Requested Sentences:

Due to the aggravating factors present in this case as compared to the limited mitigating factors, the State respectfully requests that the Defendant be sentenced to consecutive natural life sentences for the premeditated murders of Joseph Pedroza and Frances Tapia. By his actions, the Defendant has forfeited his right to live in society and should never be allowed to do so again.

Respectfully submitted this 23 day of January, 2006.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

BY _____
Jeannette R. Gallagher
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
23 day of January, 2006,
to:

The Honorable Brian Hauser
Judge of the Superior Court

John Canby
John Curry
222 N. Central #810
Phoenix, AZ. 85004
Counsel for Defendant

BY Kristin Lovich for
Jeannette R. Gallagher
Deputy County Attorney

APPENDIX 7

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2006 JAN 26 PM 5:23

FILED BY: L. GAUNA

Keli B. Luther, AZ Bar #021908
William G. Montgomery, AZ Bar #021246
Crime Victims' Legal Assistance Project
P.O. Box 877906
Tempe, Arizona 85287
Telephone: 480-965-5640
Facsimile: 480-965-3229
Attorneys for Victims

IN THE SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA, Plaintiff, vs. LONNY BASSETT, Defendant. Trina Trumbull, Crime Victim.	CR 2004-005097-001 Crime Victim's Sentencing Memorandum (Honorable Brian Hauser)

TRINA TRUMBULL, mother of homicide victim Francis Tapia, by and through undersigned counsel, pursuant to A.R.S. § 13-702(e), §13-4426, §13-4426.01 and Rule 39(C)(4) of the Arizona Rules of Criminal Procedure, hereby asserts her right to be heard at Defendant's sentencing by and through the memorandum contained herein. Letters to the Court are enclosed.

RESPECTFULLY submitted this 26th day of January, 2006.

By _____
Keli Luther
William G. Montgomery
Crime Victims' Legal Assistance Project

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

As this honorable Court presided over the trial and presentation of evidence, only the facts as they relate to argument will be set forth where appropriate.

STANDING

Pursuant to Ariz. Const. Art. II, § 2.1 (A)(4) and Ariz. Rev. Stat. § 13-4426 and § 13-4426.01, Trina Trumbull asserts her right to be heard at sentencing through this memorandum. As the mother of Francis Tapia, Trina Trumbull is a Victim, pursuant to Article 2, section 2.1 (C) of the Arizona Constitution.

ARGUMENT

Pursuant to Ariz. Rev. Stat. § 13-4426, the Victim recommends that the Defendant receive a sentence of natural life without the possibility of parole for the murder of Francis Tapia consecutive to any sentence imposed for the murder of Joseph Pedroza. In making a sentencing determination, the Court is permitted, pursuant to A.R.S. § 13-703.01(Q) to "consider any evidence introduced before sentencing or at any other sentencing proceeding" and "[s]hall consider the aggravating and mitigating circumstances listed in § 13-702 and any statement made by a victim." Accordingly, the Victim asserts the following in support of this recommendation:

A. Aggravating Factors.

1. **The Defendant used a deadly weapon in the commission of the murder. Ariz. Rev. Stat. § 13-702 (C) (2).**

Specifically, the Defendant used a shotgun to fire twice at Francis Tapia from behind at close proximity and shifted positions for a second shot after the first shot, though doing serious physical injury to Ms. Tapia, did not result in a fatal injury.

2. **The manner in which Francis Tapia was killed was especially heinous, cruel or depraved. Ariz. Rev. Stat. 13-702(C) (5).**

After witnessing her boyfriend being shot from behind in the close confines of a car, the Defendant trained his shotgun onto Ms. Tapia who had nowhere to go and could not escape. After being hit with the first blast of the shotgun, for which she received serious physical injuries in a manner indicating she had tried to use her arm to shield herself, the Defendant repositioned himself to fire more directly at Ms. Tapia's head. Again, Ms. Tapia's injuries show she tried to shield herself with her right arm indicating she was aware of the Defendant's efforts after already being shot once. With absolutely no warning of the hell that was about to be unleashed, Ms. Tapia's senses must have been spinning from the loud blasts from the shotgun occurring just to the right and behind her ear, let alone the pain from the first blast to her shoulder. The fear and helplessness she must have felt, while escaping a complete rendition since she is dead, must have been tremendous and, under the circumstances, resulted in a cruel death.

3. **The Defendant's actions resulted in severe emotional harm to the victim's immediate family. Ariz. Rev. Stat. § 13-702 (C) (9).**

The pain of losing her oldest child and friend cannot be adequately measured for Ms. Trumbull. The Defendant murdered Francis at a time when her life was full of promise. She had just picked up her books to begin college courses with the full support of her

family. She had career goals and personal dreams that would have led her to a better life and future for herself and her children. Additionally, while the children of Francs Tapia are too young to fully comprehend the loss they have suffered, they will need her most at the point when they mature enough to face the reality of her loss. This is an irony no one should face.

B. Additional Information

Additional information for the Court to consider is the circumstances and the degree of planning and effort undertaken by the Defendant to carry out his evil plan. He concealed the weapon in order to get it into the car and brought along extra ammunition despite the fact that the shotgun was loaded. He decided to fire on the unwitting victims while someone he barely knew was in the vehicle. In other words, the presence of a witness, in whom the Defendant could not have had any confidence that his actions would go unreported, had no deterrent effect on the Defendant. The Defendant had to reposition himself to fire a second time to complete the murder of Francis Tapia. He tried to flee the scene by enlisting the aid of a passerby and ultimately fled past two other people without giving any indication that the victims remained in the car that had caught fire. The Defendant retrieved the murder weapon from the car before heading home to go to sleep. Lastly, the Defendant outright lied to the police about the nature and circumstances f his murders in an effort to avoid responsibility for his actions.

C. Mitigating Factors

The Victim anticipates that the Defendant may assert the following mitigating factors in an effort to avoid the full consequences of his actions:

1. **The Defendant's age. Ariz. Rev. Stat. § 13-702 (D) (1).**

The Defendant may assert that his age should be a mitigating factor because he was only sixteen at the time he killed two people and the parents of three children. However, age is only a mitigating factor if it results in a lack of judgment on the part of the Defendant. *See State v. de la Garza*, 138 Ariz. 408, 409, 675 P.2d 295, 296 (App. 1983). When considered in light of the degree of planning and his callous conduct following the murders, all in an effort to avoid responsibility, it would be an injustice for him to be mature enough to commit the crime but be too immature to face the consequences.

2. **The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. Ariz. Rev. Stat. § 13-702 (D) (2).**

The Defendant may assert that he was under the influence of drugs and/or alcohol when he committed the murders. However, once again, his conduct leading up to and after the murders betrays his abilities to kill two people and then attempt to conceal the nature of his conduct.

3. **Family support. Ariz. Rev. Stat. § 13-702 (D) (5).**

The Defendant may assert that he should receive something less than what his crime calls for because of the existence of his family's support or, alternatively, the fact that he did not have the support of his natural parents. However, and as an acknowledgment of the concern expressed by the people who have cared for the Defendant, he was given the best chance available to grow up in a warm environment

with encouragement and support. He was even given a job and supported in maintaining employment.

CONCLUSION

The nature and circumstances of the Defendant's crimes and their impact on the surviving members of Francis Tapia's family escape true measure. Nevertheless, when considered in light of the Defendant's actions and callousness in committing these murders, it becomes readily evident that he cannot be permitted to return to the community. If a near stranger cannot deter him from taking the life others, then there can be no guarantee he would not commit such a crime again at some point in the future. Additionally, if he were to leave prison after twenty-five years, that time would barely encompass the time Francis Tapia had among us or the time during which her daughters will have come to maturity and undertaken a journey of life without the mother who gave them life. Justice surely calls for more than this. Justice calls for natural life without the possibility of parole consecutive to any other sentence imposed.

Respectfully submitted this 26th day of January, 2006.

By _____
Keli Luther
William G. Montgomery
Crime Victims' Legal Assistance Project

ORIGINAL of the following
filed this 26th day of January, 2006,
to the Clerk of the Maricopa County Superior Court

and

Copies of the foregoing faxed
this 26th day of January, 2006, to:

The Honorable Brian Hauser
Maricopa County Superior Court Judge
101 W. Jefferson
Phoenix, AZ. 85003-22
Fax: 602.372.8567

Ms. Jeannette Gallagher
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Mr. John Canby
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Encls.

Parents Of Murdered Children, Inc.

"For the Families & Friends of Those Who Have Died By Violence"

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Phoenix, Arizona 85069-9603
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January 4, 2006

Judge Brian R. Hauser
Maricopa County Superior Court
201 West Jefferson
Phoenix AZ 85003

RE: Sentencing of Lonnie Bassett CR2004005097001DT CA204021980

Dear Judge Hauser:

This letter is to request the maximum sentence allowable when sentencing Lonnie Basset, convicted of two first-degree counts of murder, for killing young Frances Maria Trumbull and her boyfriend. In Bassett's cold-blooded ending of the life of Frances, he left her two young daughters who will be forever impacted by the loss of their mother in their lives. He left Trina Trumbull, Frances' mother, with a grief that no parent should ever have to endure. It is a lifelong journey through the aftermath of murder and what it leaves behind for surviving family members. It is devastation and shattered lives, sorrow and unimaginable pain.

Trina is the first to say that asking for the maximum sentence will not bring her daughter back. It should however be given because it will ensure that a cold-blooded murderer with no respect for the lives he took be imprisoned so that he may never take another life. We must always send a strong message that violence will not be tolerated and we must attempt to keep our communities safe from the likes of Lonnie Bassett.

I thank you for your careful consideration of this matter.

Sincerely yours,

Beckie A. Miller, Chapter Leader



January 9, 2006
The Honorable Brian R. Hauser
Maricopa County Superior Court
201 West Jefferson
Phoenix, AZ 85003

RE: Lonnie Bassett CR2004005097001DT
CA204021980

To Whom It May Concern:

As the mother of a murdered child, I know too well the heartbreak this family is going through. To see these two lovely children grow up with out a mother is nothing less than a tragedy. Not to mention, the suffering of Frances Maria Tapia's other family members who will have to live without their loved one for the rest of their lives. This person killed not just once, but twice and has devastated two families.

The purpose of this letter is to urge that you consider giving the maximum sentence that the law allows for this terrible crime. I feel that someone who could so callously take two lives should not be allowed to ever be free.

I thank you for taking the time to read this letter.

Sincerely,

Susanne Osolin

December 6, 2006

Honorable Judge Brian R. Hauser
Maricopa County Superior Court
201 West Jefferson
Phoenix, AZ 85003

RE: Defendant Lonnie Bassett, CR2004005097001DT
CA204021980

Subject: Murder of Frances Maria Trumbull and her boyfriend

Dear Judge Hauser:

I am writing you to urge you to impose the maximum sentence allowed in this case. The loss of another young woman should demand the maximum sentence for the person responsible for this crime.

I too lost a Daughter to murder in 2004 and I can tell you from personal experience that no sentence is too severe. I only wish there was some way to impose the pain and suffering this family feels on the defendant. There is nothing else like it and it goes on forever. It is a life sentence of pain, loss and emptiness that has no end and there is no reprieve from it.

There is no excuse for murder! The most severe sentence allowed is the only acceptable option in this case. Two little girls without a Mother are depending on it.

Sincerely,

Lois Baker
Sun City West, AZ

Shaw Cox
Crime Victims Legal Assistance Project
A.S.U. College of Law

My name is Alex Quintero, I met Frances in June of 1994 and we began dating soon after we met.
She & her family realized that I was being mistreated by my dad and they soon came to an agreement with my dad & took (temporary custody) of me through the courts.
Frances & I became very close until my mom decided she would take me. It was a very difficult situation, because ultimately the distance became too much for such a young couple. I will always remember Frances' mom being very protective of our relationship, she went as far as paying for pictures of her & I at Olen Mills which I still own to this day.
We were each others "first love" and I could never forget her, & per her family she never forgot me.
I've tried to find her through internet search engines without luck until July of 2005, when I realized she was possibly deceased. I located her obituary and as soon as I saw her picture I realized the tragedy was true.
I obtained her moms email address, and through her mom I was informed that she was senselessly murdered. This was my first contact with her family since 1995, and probably the most difficult part was seeing her siblings all grown up & then seeing her babies Nina & Athena. It still feels surreal when I occasionally visit with her family.
I personally will never be the same, due to the lack of closure mixed with the way she was taken at such a young age.

I realize that Lonnie Bassett was only 16 years old, but he was old enough to make a choice that will be a scar in many people's hearts for a very long time. He will have a lot of time to think about the damage he has inflicted to not only himself but to the lives of those that loved the victims of such a brutal crime. He will also have a Higher Power to answer to after his time on earth is complete.

In conclusion I believe that Lonnie should be an example to society & to our community that this kind of behavior is unacceptable & will lead to life in Prison... bottom line.

Carrying a loaded shotgun in the backseat of a car is in itself suspicious for a 16 year old.

I along with the other friends & family will grieve the loss for a very long time, and this is only a small request in comparison to what <u>can't</u> be done.

Sincerely,

Alejandro Quintero Jr.

Frances Iapa-Trumbull
State vs. Lonnie A. Bassett
(Shawn Cox)

January 13, 2006

Dear Judge Hauser;

As a citizen of the Phoenix area, I am recommending that Lonnie Allen Bassett be sentenced for two consecutive natural life sentences because he represents a serious danger to other citizens.

It is apparent from the evidence that this individual is so disconnected from humanity that he lacks a conscience and is incapable of discerning right and wrong. This problem is not treatable or teachable at his age. Ones conscience is developed during the early years of a young child's life and becomes part of the fabric of their character. Because of his age the ability to relate to others and to live within the laws of society will never be a part of his character. Consequently he will always be a serious threat and danger to society.

It is my belief that it is the legal systems duty to permanently remove individuals like Lonnie Allen Basset, from society in order to protect citizens who are able and willing to live within the laws. Although his crime was committed as a minor, he is without natural feelings for other humans and will commit further crimes to satisfy his distorted needs and approach to life.

Thank you for your consideration of my feelings and opinions.

Judy Maughan

1/20/06

Crime Victims Legal Assistance Project
Care of Shawn Cox
ASU College of Law
PO Box 877906
Tempe AZ 85287-7906

fax (480) 965-9229

To Whom It May Concern:

I am a concerned citizen writing to you regarding the guilty defendant, Lonnie Allen Bassett. His murder of two victims, unarmed inside a car is horrifying and commands swift and harsh penalty. It is my belief a person who commits such a crime be put away for the maximum sentence, 2 consecutive natural life years. A man of that disregard for the ever precious life of another human being is and will be a threat to the safety of society. The penalty of losing a daughter, sister, mother, and friend is far more than the maximum sentence he would receive.

I appreciate your time and attention.

Sincerely,

Lynda Evans

Honorable Judge Brian R. Hauser
Maricopa County Superior Court
201 W Jefferson
Phoenix, Arizona 85003

Re: Defendant Lonnie Bassett CR 2004005097001DT
CA204021980

Honorable Judge Hauser, please consider the following when sentencing Lonnie Bassett for the horrible crime of talking the lives of Frances Trumbull and her boyfriend. They were young with a life ahead of them, and 2 little children who now will never know their Mother. As a Mother she could have shaped their lives and given these children everything from childhood memories, to a sense of what is right and wrong. What a tragedy to not have your Mother in your life! Lonnie Bassett hasn't just hurt Frances Trumbull but he will forever change these children's lives and not for the better! He needs to be punished for a crime that is totally senseless and unnecessary, he deserves the maximum sentence allowed.

Your honor a message needs to be sent. People like Lonnie Bassett cannot just take someone's life. He must pay for his actions, he MUST be held accountable! Frances Trumbull's life is more than worth his maxium sentence. please send that message to people like him!

Thank you for considering our opinion when determining his sentencing.
Sincerely,
Sandy Lenny

01-05-06

Honorable Judge Brian R. Hauser
Maricopa County Superior Court
201 West Jefferson
Phoenix, AZ. 85003

Ref: Defendant Lonnie Bassett
CR2004005097001DT
CA204021980

Honorable Judge Brian R. Hauser:

I am writing to strongly urge you to give the maximum sentence allowed by law to the above referenced defendant. This defendant took the lives of two individuals leaving two young girls FOREVER with a mother, not to mention all the other lives impacted by this crime. No one will ever be able to give these victims a reprieve from the sentence this defendant has given them.

Justice must be served and we must make our communities safe from murderers. A message must be sent out saying we will not tolerate this type of crime any more.

Thank You

Michael M. Young

APPENDIX 8

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, Vs. LONNY BASSETT, Defendant.	1 CA-CR 06-0088 Maricopa County Superior Court No. CR 2004-005097-001

MICHAEL JEANES, CLERK
FILED
2006 JAN -3 PM 4:52

Phoenix, Arizona
January 27, 2006

BEFORE: THE HONORABLE BRIAN R. HAUSER, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Sentencing)

DIVISION 1
COURT OF APPEAL
STATE OF ARIZON
FILED
MAR 1 3 2006
PHILIP G. URRY, CLE
By

ORIGINAL
PREPARED FOR APPEAL

Prepared by:
Melody O'Donnell
Certified Reporter #50209

APPEARANCES

FOR THE PLAINTIFF:
Jeannette R. Gallagher
Deputy County Attorney

FOR THE DEFENDANT:
John Canby
John Ronan Curry
Office of the Legal Defender

(The following proceedings took place in open court:)

THE COURT: State of Arizona vs. Lonny Bassett, CR 2004-005097-001.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the State.

MR. CANBY: Good morning, your Honor. John Canby and John Curry on behalf of Mr. Bassett, who is present in custody and ready for sentencing.

THE COURT: Deputy, why don't you have Mr. Bassett come and sit at counsel table with Mr. Canby, please.

All right. Your name is Lonny Bassett?

THE DEFENDANT: Yes, sir.

THE COURT: What is your date of birth, please?

THE DEFENDANT: 11-18-87.

THE COURT: In previous proceedings a determination was made that you're guilty of two counts of first degree murder. Based on those determinations, it's the judgment of the Court that you're guilty of those two crimes, both dangerous, nonrepetitive Class 1 felonies committed on or about June 16th, 2004.

I've read the presentence report, the attachments. I've read the memoranda filed by the prosecutor, your attorneys, and also one that was

submitted today from the Crime Victims Legal Assistance Project. I've also ready letters that were attached to the presentence report.

You've been in custody 588 days as of today; is that correct?

THE DEFENDANT: Sounds right, sir, yes.

THE COURT: Ms. Gallagher, would you like to proceed?

MS. GALLAGHER: Yes, judge. There are several family members from both sides that wish to speak.

And I would ask Rachel -- this is Joseph's mother, your Honor.

THE COURT: All right. Ma'am, would you come up to the podium, please.

Would you state your name, please.

MS. MEDRANO: My name is Rachel Medrano, formerly Pedroza.

THE COURT: Yes, ma'am.

MS. MEDRANO: I wrote down a few things here that I would like to say.

Joseph Pedroza was my youngest son. Joseph did not know he was going to be murdered in cold blood by Lonny Bassett on the early morning of June 16th, 2004.

I will never forget that morning. Some detectives came to our house to tell us the bad news. My

son Joseph had been murdered. He had been shot in the back of the head.

On that dreadful morning my daughter, Ruth Stevens, answered the knock on the front door. After the detectives told her about Joseph's death, she came and knocked on my bedroom door. When I answered, she said, "Mom, I don't know how to tell you this. But you have to know. It's about Joe. The police just came to let us know that Joe had been murdered."

I could not believe what she was telling me. It sounded like a nightmare. No, not my Joe. That can't be true. He can't be dead. Immediately, I went into shock.

Lonny, if you were really afraid of Joe, you would not have called him to give you a ride somewhere. You would have not wanted to be around Joe. That does not make sense.

Why did you have to kill my son that I love so much? A precious little boy was left without his daddy that he loves so much.

Frances was an innocent victim, too. Two sweet little girls were left without their mother. That's not fair. A human life is precious and priceless.

Joe was a loving son. He had a gentle manner, a gentle manner about him that was special. I will always remember how he was. He will always be in my heart and

thoughts. I feel like a part of me is gone. My life will be forever changed without my Joe -- without my Joseph.

THE COURT: Thank you, ma'am.

MS. GALLAGHER: Your Honor, Joseph's sister, Ruth Stevens.

THE COURT: Yes, ma'am. Would you state your name, please.

MS. STEVENS: My name is Ruth Stevens.

THE COURT: Thank you.

MS. STEVENS: I'm sorry. It's kind of hard to prepare for something like this.

But first of all, I want to say that Joseph Medrano Pedroza was my baby brother. And if you knew him, he was rarely without a smile. He was a very friendly person. And he had endless amounts of friends, as well as the family of Frances Tapia. And they were very close, because Joseph grew up around their family because we lived in that area. So he knew Frances her whole life, even though their relationship didn't bloom until toward the end.

I just had a few things I wanted to say. First of all, what you did, Lonny, was so very wrong and has left me in shock since the first day. And you have no idea the pain you have caused both families, and the financial strain and burdens that it caused for all of us.

And at the time this happened, I had a four-month-old baby as well as my other children, and have since carried another child during all this ugliness, and you can't even know how hard that's been for me.

But I want you to know that I believe that your sentence is what you deserve, because I believe you caused a clear-cut premeditated murder on both of them. It seems as though you planned it every step of the way, except for the fact you didn't think of your own safety the way that you did it.

And little Joey, Jr. spends much time in my home with his grandmother and I. And he cries and he asks for his father, and he doesn't understand why you had to kill him. And as a little boy who is barely seven now, many times he says he wants to die.

I bet you never thought about the children. And I just -- I want everybody to know that they should never forget the three smallest victims in all of this, and that is little Joseph Pedroza, which is Joseph's son, little Nina and Athena, Frances' daughters.

And I just have to say that I just think you should pay for what you did. And you had many other opportunities. You had different ways to handle the situation.

And I just -- I can't believe it. Like I said,

I'm still in shock. It's so horrific. I can't believe how you sit there smiling, as if you've got something to smile about. It really is disgusting. That's all I have to say.

THE COURT: Thank you, ma'am.

MS. GALLAGHER: Your Honor, Gabriel Pedroza, Joseph's brother.

THE COURT: Your name, please.

MR. PEDROZA: Gabriel Medrano Pedroza.

The purpose for me being here is to express how I feel deep down inside. Joseph was not only my younger brother, but he was, as it were, my son, as I raised and I helped financially with his raising.

And it tears me inside to know that Lonny Bassett does not have any remorse in his heart for what he's done, that he's destroyed multiple families. And I just -- I hope to God and pray that every day of his life he remembers the two individuals that he took that did not deserve the cruelty that he showed to them, and that that same cruelty he will suffer, suffer that deep feeling and emotion.

I had to leave Arizona after that year, because it was just an emotional strain for me. I couldn't deal with everything on a day-to-day basis. I had to leave this state, and I was gone for a couple of months.

Emotionally, I couldn't handle it, because I just wanted -- I was so angry. I wanted Lonny to pay the same price that he did.

And I just hope that he looks in the mirror at himself. And he thinks he's so happy with what he's done, but in essence it was cruel -- like they say, cruel and unusual punishment. It's something he did with his own hand, and he deserves what he is receiving, because that's the seed that he sowed.

And that's all I have to say.

THE COURT: Thank you, sir.

MS. GALLAGHER: Your Honor, Virginia is Frances Tapia's aunt.

THE COURT: Your name, please.

MS. VIRGINIA TRUMBULL: Virginia Trumbull.

I don't think Lonny Bassett realizes the impact that it's done. The two little girls that he left behind are separated because their mom is dead. So not only have they lost their mom, but now they are separated as well because of his inhumane act.

And for what he has done there is no true punishment. For life is a wonderful thing that we all need to cherish, and he took two of those away, and he destroyed many of those around them, too. And I don't think that even life in prison and consecutive life in

prison would ever do the job.

And for him to sit, like everybody else has said, and just smirk upon everybody else and think it's just a joke and a fun thing.

And, you know what? He still has his parents that he gets to go and talk to and, you know, maybe put the hands up to the window and pretend they are touching.

But guess what? The little girls never get to touch mommy's hands again. And the eight-year-old, on medication because she can't sleep. Has nightmares all the time. On medication. She begs me every night before she goes to sleep, "Please never leave my side."

The last thing her mom got to say to her before she walked out that door that night, "Make sure you take care of your sister. I love you. See you in the morning."

Morning never came. Therefore, the baby doesn't want to go to sleep, because morning never comes.

I don't think, unless he was that child, he will ever realize. And the parents won't realize, because they still have their child.

There is no punishment great enough for the crime he has committed, and I just need him to know and understand what those two little girls are going through, because they are also separated, but they don't have their

mom that they get to look at every day and they don't get to touch and talk to.

And what I would give to have those little girls come in here and look you in the eye and tell you, you took their mom. You took their mommy, a 22-year-old beautiful young lady that had nothing to do with whatever anger you had with Joseph, just because she was sitting in the car next to him.

And you, thinking you're so afraid. What were you afraid of? A little 100 pound little girl, you know, that's driving a car? What were you afraid of that you had to shoot her, too? You already ruined one family's live and then you had to ruin two. Not only that family, but her kids and everybody else involved?

THE COURT: Ms. Trumbull, you need to direct your comments to me, please.

MS. VIRGINIA TRUMBULL: Well, it's just sad because he doesn't get to see and look at anybody and all the pain we suffered, judge. And it's terrible because he thinks it's a joke and so does his family.

It has ruined, because this little Frances was the glue to this family. You know, like every puzzle has its little piece. Well, she was that centerpiece that held everything together. And without her it has totally ruined everybody's family and ours.

And that's all I have to say.

THE COURT: Thank you, ma'am.

MS. GALLAGHER: Your Honor, Frances' mom, Trina Trumbull.

THE COURT: Yes.

MS. TRINA TRUMBULL: Your Honor, my daughter, Frances Tapia Trumbull, was my best friend. She was an amazing human being. People were drawn to her because of her loving, happy and compassionate personality. Her laugh was infectious, he smile was amazing, and she warmed the hearts of everyone who met her. Whenever her sister or brother needed anything, she was always ready to help them.

Frances loved life and had goals and dreams for her future. She wanted to complete college and eventually land a career in the criminal justice field.

She made every holiday special for everyone. For example, every December 31st she would be either calling or be there knocking on my door to wish me a Happy New Year, and every Valentine's Day and birthday she'd make her rounds, taking chocolate covered apples to everybody on Valentine's Day. That's my brother, my sister, my mom, everybody. Either that or she would bake cookies or a cake and she took them to my work.

Growing up, Frances was always the leader in her

class. She had so many friends. Frances was looked up to by her classmates and respected by her teachers. She was a good student and a good friend to others.

Frances grew into a wonderful woman and a devoted mother. She was a caring mom and her children adored her. She spent lots of time with her daughters taking them places and doing things with them. Her youngest daughter always followed her around like her shadow and was especially close to her.

Frances' murder has shattered our lives. My daughters and son have not only lost a wonderful sister, but a mentor on whom they had come to rely for help in their own lives. Her murder leaves a void in their lives that will not be filled.

They relied on her in emergencies. During the rough spots in their own lives she was always there to help them through. This loss has result in significant emotional stress for my children. My son, Ricky, and daughter, Trina, ended up losing a year in high school.

As a single mom, I relied heavily on Frances' help with our family. For me her murder also leaves a void that will never be filled. This is a loss and a hurt and a pain that will never go away.

We were always there for each other, and our bond was strong in good times and in bad. If I needed her to

enroll my other children in school, she would do so without hesitation. She would help me take them to and from the dentist and doctor and pick up the slack when I really needed the help. I trusted her.

Many times on my lunch hour when Frances would be picking up her daughter from school, we would meet to share a part of our day together. We treasured those times with each other, and now they are forever gone. The hole in my heart can never be repaired or filled.

Whenever Frances was angry, I could tell in her voice. She would call me "Mother." When she was happy, it was always "Mama."

How I long to hear her voice. I will never be able to speak or feel or hear my daughter Frances again. That is what Lonny Bassett has taken from me, and I will live with the consequences of his terrible crime every day of my life, and so will my children and Frances' children as well as my sister and my nieces and my brothers.

Her two little innocent girls will now have to grow up without their mother. When they ask where their mom is, painful memories resurface. My oldest granddaughter wakes up crying in the middle of the night for her mommy. My youngest granddaughter misses her mommy and longs for her to come home. We have had to work hard to help shield Frances' little girls of bloody details of

how and why their mommy is gone.

Frances used to volunteer with me to feed the homeless. The time we spent volunteering together was very special. We both really enjoyed reaching out to others who are in need. The whole community has suffered a great loss because of what Frances gave to that community.

Her daughters will never be able to show their mom their T-ball trophy. Her girls will never be able to show their forms from martial arts or share anything with their mom at all. Anything and everything that they learn or do, they now tell their mom through a cold headstone instead of within Frances' loving arms.

Witnessing this is a heart-wrenching experience. What do you say to two little girls who do not understand why their mommy was taken away?

People talk about closure and moving on and getting on with my life, but I could tell you there is no closure when a loved one is brutally murdered. We live with our pain and our loss every day and we will for the rest of our lives, remembering Frances, missing Frances and loving Frances.

There is no closure, but there is justice, and that is now up to you.

And these are some pictures I wanted to share

with you of my daughter and my niece, her family, and these are her two little girls.

THE COURT: Thank you, ma'am.

MS. GALLAGHER: Your Honor, those are all the witnesses I intend to call.

THE COURT: Yes. Do you have a recommendation for the State.

MS. GALLAGHER: Yes, judge, I do. You got my sentencing memorandum?

THE COURT: Yes, I read it.

MS. GALLAGHER: Your Honor, the State is requesting that the defendant be sentenced to natural life for both the killing of Joseph Pedroza and natural life for Frances.

Judge, as you know, this was alleged as a death penalty case. The only reason it isn't is because the Supreme Court said that at 16, a defendant cannot be sentenced to death.

That being said, that mitigating factor of age has been taken into account by the Supreme Court. The State recognizes the defendant is 16, but the law says he is eligible for a natural life sentence in this case.

The aggravating factors, as I set forth in my sentencing memorandum, are first the fact that there were -- this isn't a single murder. This is, obviously, a

double.

Defense counsel says, well, the murder of Frances Tapia was not especially cruel, and they cite to the Soto Fong case out of Tucson. But they forget the Herrera case, which the Supreme Court said that 18 seconds of worrying about what was going to happen to you was sufficient to qualify as an especially cruel murder.

As you'll recall from the testimony, judge, Frances not only watched her boyfriend be killed as she's trying to drive the car, the defendant then turns the shotgun on her. So we have the mental anguish that's going on. By his own admission she is screaming. She knows what has happened. And this isn't that they happened to be in the same room. Judge, they were sitting right next to each other and she is splattered with his brain matter when that first shot goes off.

So, there is the mental suffering. But then, when he shoots her the first time, it takes off the top of her shoulder and goes into her arm. So not only does she have the mental anguish, she has the physical pain, which is something that obviously in the Soto Fong case wasn't there. Those were execution style murders and each victim died from a single gunshot. Those were also gunshots. These are shotgun shots.

Clearly Frances anticipated what was coming next,

because she raised her hand up to ward off the blow, which obviously that wasn't going to happen. But it shows that she knew what was going on, and that makes this an especially cruel murder.

That is not the case as to Joseph, because mercifully he didn't know. He had no idea what was coming. But as to Frances, it was especially cruel.

And the defendant even said in his statement, "Oh, well, I thought I missed her." So he had time to think about it, to recognize that, to pump that shotgun for the third time and shoot her.

The defendant's lawyers in their sentencing memorandum say, well, one of the mitigating factors is his remorse. Judge, you heard his statement two days after the murder. He was bemoaning the death of Joseph, but said absolutely nothing about Frances, not a single word. He didn't even acknowledge knowing her name. As far as he was concerned, she was "that girl."

And he didn't want to talk about it when Detective Kulesa asked him. He didn't want to talk about what he had done to her. He said something to the effect of, "Well, that's hard for me, because I wouldn't normally do something like that. So I can't talk about it." Not, "I can't believe I shot an unarmed girl who had done nothing to me."

Absolutely nothing, no remorse at all. And anything he comes up with now is about as compelling as his doing well in the jail.

Anything that happened since the murder is clearly towards the end of saying, let me out of prison after 25 years when I'm only 42 years old and can have the rest of my life out in the public.

It's the State's position that the defendant is dangerous. He showed he was dangerous. And he needs in addition to protecting the community, he needs to be punished for what he did, and giving a concurrent sentence says one of these victims didn't count. Either Joseph didn't count or Frances didn't count, because he wants a two-for-one with a concurrent sentence.

Defense counsel says, well, one of the mitigating factors is his capacity to conform his conduct to the requirement of the law was significantly impaired. Judge, there is no basis upon which the Court could make that finding.

Yes, he was diagnosed by Jewish Family Services as suffering from post traumatic stress disorder in 2002. That does not equate, nor is there any current psychological information, does not equate to him being unable to conform his conduct. There is no current psychological evaluation. I suffer from post traumatic

stress disorder, and I don't go around --

MR. CANBY: Objection, your Honor.

THE COURT: I don't have your records either, Ms. Gallagher, so I don't think I can consider it. That is sustained.

MS. GALLAGHER: That is not a mental disease or defect that you naturally conclude that the person is going to become homicidal.

Those records show that he took Zoloft for a time in 2001, actually for one month, and then they switched him to Wellbutrin. It's interesting that Zoloft has been blamed for teen-agers who murder, but he wasn't on that, and it's a good thing because otherwise I'm sure we'd be hearing that that had something to do with that.

Wellbutrin is an antidepressant. That's all. It's prescribed for people who want to quit smoking. So, the fact that he stopped taking that, there is no information, no psychological information for the Court in order to make that quantum leap that somehow the fact that he wasn't taking the antidepressant had anything to do with his shooting Joseph or Frances.

And even if the post traumatic stress disorder caused him to be hyper-vigilant, if he was that hyper-vigilant he wouldn't have gotten in the car in the first place.

What he did when he felt threatened, according to him -- well, actually according to Chad Colyer, is he went inside the house and armed himself with a shotgun and made sure it was fully loaded.

Somebody who is concerned about their safety, to the point where if they have a mental problem that's causing this, would never have gotten in the car. So clearly, he had something else in mind. And as I pointed out, what it was, we don't know. We don't know why he did this.

It could well be that it was a thrill killing. But the only person that knows is him. And no matter what excuse he comes up with, it's never going to explain why he killed Frances. That was just a cold-blooded murder that was absolutely senseless.

The State is asking that you give the defendant the maximum punishment as was recommended by the probation Department of natural life sentences for both and that they run consecutively. We would also ask for the restitution as set forth in the presentence report.

THE COURT: Thank you.

Mr. Canby.

MR. CANBY: Judge, I know you've received some numerous letters from supporters of Mr. Bassett, and many of the people who wrote letters are here today and I

believe they would like to stand on their letters.

I do understand Mr. Alexander would like to talk to you. He has not written a letter.

THE COURT: Yes. Would you state your name again, please.

MR. ALEXANDER: Charles Alexander.

THE COURT: Thank you.

MR. ALEXANDER: First, I'd like to express my sympathy, deepest sympathy to the families because of what's happened, and hopefully this can be resolved other than the way the prosecuting attorney wants it resolved.

We acquired Lonny when he was a baby. We brought him home from the hospital. We raised him. We fed him. We clothed him, sent him to school in which he was an honor student in some years. He was on the Dean's list several times.

He played baseball. The company that he worked for, which is my company that I have worked for, sponsored his baseball team. He played catcher. He won the championship three years in a row. Missed the fourth year by one run.

Lonny worked. I allowed him to spend his money the way he wanted to, because he earned it. And he was being ready to be hired full time as an apprentice machinist.

We wanted him to go to college. But at the same time, until he graduated from high school, we wanted to teach him a trade, something that he would have that he could fall back on.

All of my associates, my family and everyone that even isn't here today are working people, and some of them couldn't be here because of that very fact.

And I'm trying to get on that Lonny Bassett was not street trash. He worked. He finished everything, as you've read the letters yourself, to try and do right.

He got involved with Joseph. 16-year-old kid, no experience in the world. Joseph influenced him greatly. How? I don't know. We'll never know.

And here's a man that's been three felony convictions, in the penitentiary, and he comes along and preys on the younger generation that's coming up, 16-year-old kids.

Lonny is not the only one that Joseph had experiences with. I'll put it that way. And bringing them along, getting them to do his dirty work so he don't go back to the penitentiary. And he just got involved into something that he didn't know what he was into at 16 years old, just a kid.

And I don't know how to say this other than to tell opposite truth -- I mean the absolute truth from the

bottom of my heart. Lonny Bassett pulled the trigger. We'll admit that. We all know that.

Joseph was responsible for Frances' death and everyone of you out there know that also.

I'm sorry, your Honor.

THE COURT: You need to address me, please.

MR. ALEXANDER: I'm sorry, but I get carried away. I've heard all of these fancy stories and everything this morning. And if all of that is so true, and these two people were so great, what were they doing out at 2:00 o'clock in the morning full of methamphetamine, hauling kids around. Why didn't they stay home with their family? Why didn't they stay home and take care of their own kids that these people have made so much statements about. Both of them were high on methamphetamine and out here running with the 16-year-old kids.

And what happened in that car that night we'll never know. But something had to happen. As I said before, Lonny Bassett was not street trash. Something happened that made him do what he did.

And Joseph was leading Frances down the same yellow brick road that he was travelling. And I hate to say that, but that's the honest truth, because there she was.

And what happened with Lonny shooting the two of them, we will never know. But something happened in that automobile to make him do that, because that is not Lonny Bassett.

Thank you, your Honor.

THE COURT: All right. Thank you, sir.

Mr. Canby.

MR. CANBY: Judge, I believe we have another person.

THE COURT: Yes. Your name, please.

MS. TREINEN: Amanda Treinen.

I went to junior high with Lonny. I've known him going on five-and-a-half years. In the five-and-a-half years I have never known him to do anything but be somebody that I can count on.

Currently, we're engaged, and I'm willing to wait as long as it takes to be with him. I love him and that's all that matters to me. No matter what happens I'm going to be there for him.

He's somebody that has been there for me. He made a bad decision. He shouldn't have got in the car that night if he was that scared, and I totally agree with you on that point. But we all make bad decisions.

Lonny has been so responsible in the five years I've known him. Every summer prior to this two things

have been done, he plays baseball and works at Phillips Plastics. It was counted on.

He was always there if I needed somebody to cry with. He was always there to hold me. He was there to tell me a joke when he wanted me to laugh, because he didn't want me to cry because it hurt him.

The biggest thing I really would like you to consider before you make your decision is his age. He was 16 when it happened. He was scared.

He's never had this -- he's never been through this before. He's never had any criminal history before today, before we're here on this instance. He's got a life ahead of him. This is his first offense.

I mean, we all have hard times in our lives, and I understand this is very hard for all the families here, including ours. And on behalf of Lonny Bassett and I, we would like to extend our apologies to the families for everything.

I would just like you to please consider the fact that this is his first offense. This isn't just some -- like what grandpa said, he's not street trash. He is an honest, caring person that has tons of friends that can't -- that all of them can't even be here today.

He's been -- he was good in school. He was there when people -- when he needed there to be for people.

That's just something that we would like you to consider on behalf of his family.

THE COURT: All right. Thank you.

MR. CANBY: Judge, the first thing I want to do is assure you this is not a joke to anyone in this courtroom. I am sure you can appreciate that fact.

Judge, I'm asking to you consider the fact that Lonny Bassett was a child at 16 years old when he committed the crimes that we're here to sentence him for. One of the reasons that the Supreme Court eliminated the death penalty for juveniles is that they took notice of numerous scientific studies that have been done recently that establish that the portions of the brain that control impulsivity and foresight and appreciation of consequences don't really form fully until the early 20's.

You know, the case that was cited by Ms. Gallagher in her memo that says you need to look beyond chronological age and look at the other things, involved a defendant who was 22 years old. And in that situation the mitigating aspect of the age is not quite as apparent. But at least for the Supreme Court of this country, the chronological age of 16 alone is mitigating on its own.

Ms. Gallagher has pointed out that Lonny had a lot more freedom than a lot of 16-year-olds do, that he

drank beer, that he had a job, that he had money of his own.

And the implication for her is that this means he's mature, and this should not be a mitigating factor. But, judge, freedom and maturity are two different things. One of the things we learn from the facts of this case is that Lonny did not possess the maturity to handle the freedom that he'd been given.

Now, the three misdemeanor incidents that were never actually -- never went to court and never resulted in convictions that Ms. Gallagher points to in her memorandum are really not evidence of his maturity. In fact, they are the opposite.

First of all, they are minor offenses, and we don't really know. They are just mere accusations. We didn't really get to get to the court on that and see how this stood up. But nonetheless, they are not the type of sophisticated crime that shows maturity. They appear to be immature juvenile acts that were appropriately dealt with as such.

It's one thing to say look, he had freedoms; therefore, he's mature, and then turn around and say look at his history. But you've got to remember the history has implications for maturity as well. These were not mature acts. This was a 16-year-old, clearly acting

immaturely. The facts of this case bear that out.

Judge, in overturning the death penalty, Justice Kennedy in Roper vs. Evans -- and I know I've put it in my memo and I won't go on too long about this -- but he cited three things that I think are applicable to this case.

He talked about the poor impulse control of people Lonny's age. And the reason the post traumatic stress syndrome is important in this case is that that impulsivity may well have been compounded in this case by this condition that he had been diagnosed with. And it is documented, yes, in our memo, and it's also documented in the memo provided by the State and comments by Stan Bright.

Judge, in the presentence report, which I hope you won't put too much weight on, which was written by a person that didn't attend the trial, there is not one motion of his history. There is no motion of his psychological background. Now, that may be because he didn't participate in an interview. But it's interesting that the State puts in its memo, quotes documents from his probation file that talk about this post traumatic stress disorder, which is clearly something that would have to be considered as mitigating, and they are unaware of it.

And so they write a report by the probation department that doesn't even take into account the

information in their own file. There was not any attempt to objectively look at this case, and I would hope that the pretrial -- the pretrial services report is taken as the incomplete document that it is. You saw the trial, judge. You know a lot more about this case than that presentence report writer.

Judge, the second thing that Justice Kennedy talked about in Roper vs. Simmons is that juveniles are susceptible to negative influences, particularly susceptible, more than adults, and that certainly applies to his relationship with Joseph Pedroza in this case.

Judge, the final thing Justice Kennedy pointed to as a reason why juveniles should not be subject to the death penalty was that juveniles' characters are not fully formed. He wrote in that opinion that, "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient. As individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." Your character is not fully formed at 16.

Judge, based on the support that Lonny has and the impression he's made on all these people at the courthouse, Lonny may well have the tools to better himself in the future, and we are asking that he be sentenced in a manner that if he outgrows his character

flaws, and if in the opinion of qualified professionals he has earned the right that he be considered for parole no earlier than 25 years from now, that if he earns that right and if it is appropriate, that he be given that opportunity.

Judge, 25 years is a very long time. It is two-and-a-half times his life at the time of this crime.

Thank you very much.

THE COURT: Now, Mr. Bassett, do you wish to say something on your own behalf today?

THE DEFENDANT: Yes, I do, sir.

THE COURT: All right.

THE DEFENDANT: Before Mr. Bassett speaks, however, Mr. Canby, is there any dispute as to the amount of restitution?

MR. CANBY: No, your Honor.

THE COURT: Thank you.

Yes, Mr. Bassett.

THE DEFENDANT: First of all, I'd like to thank you for letting me speak today. And I had some things I wanted to say, but before the I say that if I could address the gallery, if that's all right.

THE COURT: Yes.

THE DEFENDANT: I'd like to apologize to Frances Tapia and Joseph Pedroza's family and to the whole court

for what my Grandpa said. That was an inappropriate statement. I understand emotions are high today and built up emotions from almost two years now.

Please understand that no one in this courtroom, no one on either side, will take this as a joke. Thank you.

I'd like to read some stuff that I had --

THE COURT: Hold on one second.

We're going to stand in recess. We'll call you back into the courtroom when we're to proceed.

(Brief recess.)

THE COURT: The record will show the presence of the defendant and counsel.

Mr. Bassett, you may continue.

THE DEFENDANT: All right. To the family and friends of Joseph Pedroza and Frances Tapia --

THE COURT: Mr. Bassett, the court reporter is behind you so you need to keep your voice up.

THE DEFENDANT: I would like to say that to stand here and say I'm sorry is hard, because I know you guys deserve much more than that. But it's going something I wanted to since June 16th of '04, when I watched your reaction to what happened on TV. I've watched you suffer in court, and I've seen your pain through the media, and it tears me up inside knowing that I caused that pain.

I admire you all for your strength to be here today, but I sympathize for the reason why you were here. I would like to apologize to all of you for suffering because of what I've done, especially Ms. Ruth Stevens, Ms. Trina Trumbull, Mr. Tony Tapia, also to the three children who lost a parent because of me. They will probably suffer through this longer than anyone.

I am truly sorry that I took away two very special people in your lives. I can understand if my apologies are not accepted today, or any day for that matter. Please know that my words are sincere and I hope that you some day try to find it in your hearts to forgive me.

Thank you for listening to what I had to say, and God bless you all for what you've had to go through.

That's what I wrote. But hearing everything you guys have said, I also want to add that what I said before, please don't think that at any time during this I've taken any of this as a joke or my family. Thank you.

And to my family and friends, I want to thank you for all the support and kindness that you've shown me through all this. You have all helped me in one way or another, and it has been greatly appreciated. Darren, Will, Ashley, Bob, you all forever will have my love and my respect.

I'd also like to thank my fiancee for being there for me over the years, especially these last couple.

I want to thank Debbie, who has been like a mom to me, and supporting my family through anything and everything.

I also want to thank my Uncle Scott, who has been like a father to me. You have helped, taught and given me more than you'll ever realize. Your kindness and generosity know no limits.

Most of all, I want to thank the two most influential people in my life, my grandma and my grandpa. Grandma, you were the one who raised me. You have never let me down. I know you never will. You mean more to me than you'll ever know.

Grandpa, you're my role model, my teacher and my best friend, and I still hope to be like you some way. You two took me in and gave me the world when you didn't have to. There is not enough hours in the day to explain how much you mean to me, so just know that I love you two more than anything in the world. But I love you all and thank you for coming. And God bless you and know that you're always in my prayers.

Judge, thank you, sir, for giving me the chance to speak. It means a lot to me. And thank you for your assistance on the side issues during the trial, like the

pen situation and the other distractions. It was greatly appreciated.

I have watched you sentence many people in this courtroom, and I have noticed that you are a very fair man, so I will respect whatever sentence you give me today. And I feel better knowing that I won't have to serve my time alone, because God will be there with me every day.

I know the families of the victims may never forgive me, but I hope to earn God's forgiveness during my lifetime. That's why I will continue -- that's why I will continue to better myself and become the most intelligent and respectful person I can be.

I am not the same kid I was two years ago, just like I won't be the same guy I am now years down the road. But I do know that my love for others, my dreams of freedom and my faith in God will never change.

I am not one to ask for things, sir, but I am asking you to please take into consideration everything I've said today before you make your decision.

Thank you again, sir, for allowing me to speak, and God bless.

THE COURT: Is there any legal cause not to proceed?

MR. CANBY: No, your Honor.

MS. GALLAGHER: No, your Honor.

THE COURT: First of all, to resolve the issue without contest, that is the issue of restitution, the Court does order restitution at this time in the amount of $22,534.13 to the people listed in the restitution ledger request and in the amounts listed, with the individual victims to be paid first and the Victim Compensation Fund to be paid last, in the ordinary manner while you're incarcerated, Mr. Bassett, under the state law.

Now, with respect to the sentence in this case, I have considered all of the written materials that have been submitted. I have read them carefully. I've read all the letters that were submitted by friends and family on both sides of this case.

And I've considered the following factors: I've considered the emotional harm to the victims, the surviving family members. And the harm to the surviving family members is substantial, and as we heard today it spans several generations.

I have considered the physical cruelty as to Frances Tapia. She was conscious after the first wound was inflicted by you. She reacted to it. She tried to deflect the second shot she anticipated. She undoubtedly suffered physical pain before she was killed. She was still driving, and some period of time separates the two

shotgun blasts. And as the evidence also established, she was screaming between the shots.

I've considered the basic statutory aggravating factors of the serious physical injury, which goes without saying, and the use of a deadly weapon also pointed out by both counsel on both sides. I've considered the fact that these are multiple homicides.

I've considered your juvenile delinquent behavior and record. You do have two adjustments for possession of marijuana and possession for drug paraphernalia and for assault in 2003.

I've considered also the grave risk of death to Chad Colyer. You shot the driver of a vehicle in which Mr. Colyer was the passenger.

I also considered the fact you brought extra ammunition into the car as evidence of your intent and as evidence of your -- the danger that your conduct presents to the public.

I've considered the following factors which are in mitigation:

Your age. You were 16-and-one-half years old at the time of the crimes, and this factor is given considerable weight by the Court. But the weight is tempered because of your intelligence, your obvious intelligence, the fact that you were able to obtain and

hold employment and apparently do very well with employment.

I've also considered your contact with the juvenile justice system as a factor in your level of maturity, because in those contacts with the juvenile justice system you were given the opportunity to seek help, to address any issues that were present as a result of any mental health conditions such as the post traumatic stress disorder. And so even though you were young, you were presented with help, and you could have taken advantage of it. It's clear that you didn't.

In terms of the post traumatic stress disorder, that was diagnosed at age 14, and it was manageable with medication, according to the brief records that I was provided. But you stopped taking your medication, as indicated in the last doctor's note that was submitted to the Court.

I've considered your accomplishments in jail. Those are entitled to minimal weight.

And I've considered the support of your family and friends. It's certainly expected, it's understandable, and it is given some weight as well.

And I've considered your statement of remorse, and also note that up until today, as Ms. Gallagher has stated, there was no remorse expressed concerning your

killing of Frances.

I've taken all of these factors into account, Mr. Bassett, and what I am left with in this case with respect to Count 1, the murder of Frances Tapia, is that your behavior, your conduct, is evidence of a hardened heart, in my opinion, and I believe it's a personality trait that is extremely dangerous to the public.

There is no presumptive sentence for first degree murder when the death penalty is not allowed, and in your case it is not allowed, so I approach this with an open mind. And after reading all these materials and reflecting on the evidence during the trial, it is my opinion that the danger you present to the public cannot be addressed with anything less than a natural life sentence.

So as to Count 1, it is the judgment and sentence of the Court that you be imprisoned in the state prison for the term of your natural life.

As to Count 2, the circumstances are different, in my opinion, because of the facts of the case and what happened in that car that day. Giving full credit to all the aggravating and mitigating factors, I believe that the appropriate sentence, and it is the sentence imposed by the Court today, that you be imprisoned in the State prison for the term of your life with the possibility of

parole after 25 years. That sentence is to run, however, consecutively to Count 1.

The sentences date from today. You are entitled to 588 days of credit against the sentence.

You have the right to file a notice of appeal from today's judgment. You must file that notice within 20 days of today's date or you will lose that right.

Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Then it's ordered remanding you to the custody of the sheriff for the imposition of sentence.

(The proceedings concluded.)

I Melody O'Donnell, do hereby certify that the foregoing pages constitute a true and accurate transcript of my stenographic notes, taken at said time and place, all done to the best of my skill and ability.

DATED this 8th day of March, 2006.

Melody O'Donnell
Certified Court Reporter
No. 50209

APPENDIX 9

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 01/27/2006

HONORABLE BRIAN R. HAUSER

CLERK OF THE COURT
E. Morgenstern
Deputy

FILED: JAN 31 2006

STATE OF ARIZONA

JEANNETTE GALLAGHER

v.

LONNIE ALLEN BASSETT (001)

DOB: 11/18/1987

JOHN CANBY
JOHN RONAN CURRY

APO-SENTENCE IMPRISON-CCC
APPEALS-CCC
DISPOSITION CLERK-CSC
RFR
VICTIM SERVICES DIV-CA-CCC

SENTENCE OF IMPRISONMENT

8:58 a.m.

State's Attorney:	above-named counsel
Defendant's Attorney:	above-named counsel
Defendant:	Present
Court Reporter:	Melody O'Donnell

Several members of the victims' families address the court.

Several members of defendant's family address the court.

Count(s) 1:The Defendant was found guilty after a trial by jury.

Count(s) 2:The Defendant was found guilty after a trial by jury.

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

OFFENSE: Count 1: First Degree Murder

Class 1 dangerous felony
A.R.S. § 13-1101; 1105; 703; 702; 604(P); and 801
Date of Offense: June 16, 2004
Dangerous pursuant to A.R.S. § 13-604 - Non Repetitive

OFFENSE: Count 2: First Degree Murder
Class 1 dangerous felony
A.R.S. § 13-1101; 1105; 703; 702; 604(P); and 801
Date of Offense: June 16, 2004
Dangerous pursuant to A.R.S. § 13-604 - Non Repetitive

AS PUNISHMENT, IT IS ORDERED Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

Count 1: natural life without the possibility of parole from January 27, 2006
Presentence Incarceration Credit: 588 day(s)
Aggravated

Count 2: natural life with the possibility of parole after 25 years have been served from January 27, 2006
Presentence Incarceration Credit: 0 day(s)
Aggravated
This sentence is to be consecutive to sentence imposed as to Count 1.

IT IS ORDERED the Defendant shall pay through the Clerk of the Superior Court:

RESTITUTION: Count 1 and 2 - $22,534.13 to the following victim(s) in the following amounts:

Trina Trumball	(Individual)	$268.18
Antonio Tapia	(Individual)	$2,749.95
Ruth Stevens	(Individual)	$14,516.00
Victims Compensation Fund	(Business)	$5,000.00

Restitution ledger provided; priority of payment as stated in the restitution ledger.

Payment shall be 30% of Defendant's earnings while incarcerated at the Arizona Department of Corrections.

Community Supervision: Count - Waived due to length of imprisonment in this case.

IT IS ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

IT IS ORDERED the Clerk of the Superior Court remit to the Arizona Department of Corrections a copy of this order together with all presentence reports, probation violation reports, and medical and psychological reports that are not sealed in this cause relating to the Defendant.

Restitution shall be paid to the individual victims first in the order listed in the ledger, then to the victims compensation fund.

10:01 a.m. Matter concludes.

cc: DOC - Certified Copy via Certification Desk

cc: MCSO-DIS - Certified Copy via Certification Desk

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

BRIAN R. HAUSER

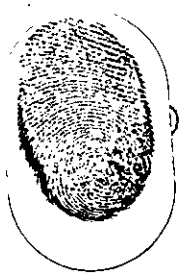
CLERK OF THE COURT
FORM TH1
Deputy

Date: 1-27-06

No. CR2004-005097

STATE v. Bassett

Let the record reflect that the Defendant's thumbprint is permanently affixed to this sentencing order in open court.



JUDICIAL OFFICER OF THE SUPERIOR COURT

1601-026 (flood)

Page ____

APPENDIX 10

CR2004-005097-001

MICHAEL K JEANES, CLERK
BY J Harbour DEP
FILED
13 JUN 20 PM 3:56

Superior COURT Maricopa County, Arizona

STATE OF ARIZONA Plaintiff
-vs-
Lonny Bassett
Defendant (FIRST, MI, LAST)

CR 2004-0050970
[CASE/COMPLAINT NO.]

NOTICE OF POST-CONVICTION RELIEF

NOTICE OF POST-CONVICTION RELIEF

Instructions: **When the notice is complete, file it with the clerk of the superior court of the county in which the conviction occurred.**

A person unable to pay costs of this proceeding and to obtain the services of a lawyer without substantial personal or family hardship should indicate this by requesting counsel in Question 8 of this notice and execute the affidavit of indigency on page 3. In the event an attorney is not appointed, a Request for Preparation of Post-Conviction Relief Record form must be filed by the defendant if some portion of the record is needed and has not previously been obtained.

No issue which has already been raised and decided on appeal or in a previous petition for post-conviction relief may be used as a basis for a successive petition for post-conviction relief.

1. Defendant's Name: Lonny A. Bassett
Defendant's prison number (if any): 202441

2. Defendant's address: ASPC Eyman (SMU II) PO Box 3500, Florence, AZ 85132

3. (A) Defendant was convicted of the following crimes: 1st Degree Murder (2 counts)

(B) Defendant was sentenced on _____, 20 ___, to a term of life, commencing on Jan. 27, 20 06, following a:
- [X] Trial by jury
- [ ] Trial to Judge without a Jury
- [ ] Plea of Guilty
- [ ] Plea of No Contest
- [ ] Probation Revocation Admission
- [ ] Probation Revocation Violation Hearing in the Superior Court in _____ County with judicial officer _____ presiding.

(C) The file number of the case was CR-- 2004 - 0050970.

4. Defendant has taken the following actions to secure relief from his convictions or sentences:
(A) Direct Appeal: [X] Yes [ ] No
(B) Previous Rule 32 Proceedings: [ ] Yes [ ] No

5. Defendant was represented by the following lawyers at: (provide name of counsel and counsel's address, if known)
Trial or change of plea: John Canby
Sentencing hearing: John Canby
Appeal (if any): Terry Adams
Previous Rule 32 proceedings (if any): _____

6. Is the defendant raising a claim of ineffective assistance of counsel? [X] Yes [ ] No

7. Defendant is presently represented by a lawyer? [ ] Yes [X] No
If yes, provide name and address: _____

_____

8. If you are not currently represented by a lawyer, do you want the court to appoint a lawyer for this proceeding?
[X] Yes [ ] No

9 Respond to this section only if this is an untimely notice or the defendant has filed a previous Rule 32 petition in this case.

(A) Is a claim pursuant to Rule 32.1(d), (e), (f), (g) or (h) being raised in this petition? [X] Yes [ ] No

(B) If yes, state the specific exception:

[ ] The defendant is being held in custody after the sentence imposed has expired.

[ ] Newly discovered material facts exist which probably would have changed the verdict or sentence.

[ ] The defendant's failure to file a timely notice of post-conviction relief or notice of appeal was without fault on the defendant's part.

[X] There has been a significant change in the law that would probably overturn the conviction or sentence.

[X] Facts exist which establish by clear and convincing evidence that the defendant is actually innocent.

(C) State the facts that support the claim and the reasons for not raising the claim in the previous petition or in a timely manner: The U.S. Supreme Court has ruled that mandatory life without parole sentences for juveniles are unconstitutional (Miller v. Alabama, 132 S.Ct. 2455 (2012)).

I am requesting post-conviction relief. I understand that I must include in my petition every ground for relief which is known and which has not been raised and decided previously. I also understand that failure to raise any known ground for relief in my petition will prohibit me from raising it at any future date.

6/17/13
Date

[signature]
Defendant

AFFIDAVIT OF INDIGENCY

I have requested the appointment of a lawyer to represent me in post conviction proceedings. I swear under oath and penalty of perjury that I am indigent and because of my poverty I am financially unable to pay for the cost of a lawyer to represent me without incurring substantial hardship to myself or my family.

6/17/13
Date

[signature]
Defendant

State of Arizona)
)ss.
County of)

Subscribed and sworn to or affirmed before me on:

_____
Date

My Commission Expires _____

_____
Notary Public

Did not have time to get Notarized

Form 24(b)

CREDIT(S)
Added Sept. 5, 2007, effective Jan. 1, 2008.
HISTORICAL NOTES
Former Forms 24(b) and 24(c) were abrogated effective January 1, 2008.
17 A. R. S. Rules Crim. Proc., Form 24(b), AZ ST RCRP Form 24(b)
Current with amendments received through 10/15/08
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NPC

APPENDIX 11

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
07/15/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 07/02/2013

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
T. Henninger
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

LONNIE ALLEN BASSETT (001)

LONNIE ALLEN BASSETT
#202441 ASPC EYMAN/BROWNING
P O BOX 3400
FLORENCE AZ 85132

COURT ADMIN-CRIMINAL-PCR

POST-CONVICTION RELIEF DENIED

The Court has reviewed Defendant's *Notice of Post-Conviction Relief* filed on June 20, 2013.

The procedural history of this case is noteworthy. Following a jury trial, Defendant was convicted of two counts of First Degree Murder, both Class 1 Felonies. The Court sentenced the Defendant on January 27, 2006, to natural life without the possibility of parole on one count, and natural life with the possibility of parole after 25 years have been served on the second count. The sentences were to run consecutively. Defendant later sought Rule 32 relief, which was dismissed on June 15, 2009.

This is the Defendant's second Rule 32 proceeding. It is both untimely and successive. Notwithstanding that fact, the Court shall address the legal issues raised in the Peititon.

Defendant is claiming, pursuant to Ariz. R. Crim. P. 32.1(g), that there has been a significant change in the law that if applied retroactively to the defendant's case, would probably affect the outcome. Specifically, Defendant cites *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

The Defendant claims *Miller* constitutes a significant change in the law that applies to his case. For the purpose of this order only, the Court shall consider that *Miller* could be a significant change in the law. Defendant asserts that under *Miller*, a juvenile could not be sentenced to life imprisonment. This is a misreading of *Miller* which does not place a categorical ban on juvenile life sentences without the possibility of parole. Rather, in *Miller*, the Supreme Court ruled that a mandatory life sentence without the possibility of parole was unconstitutional. Hence, the judge or jury must have the opportunity to consider mitigating circumstances such as age prior to imposing either life with the possibility of parole or the harshest sentence possible for a juvenile, that being natural life without the possibility of parole.

In the instant case, the record demonstrates that the age of the Defendant was given "considerable weight" as a mitigating factor. Even after considering defendant's age as a mitigating factor, the Court chose to sentence him to the term of his natural life pursuant to A.R.S. § 13-752. Since the sentence of natural life without the possibility of parole was not statutorily mandated and the Court had the discretion to order life with the possibility of parole but chose not to, defendant has failed to demonstrate that *Miller* is a significant change in the law as applied to his case.

IT IS THEREFORE ORDERED dismissing defendant's Notice of Post-Conviction Relief.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

APPENDIX 12

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/05/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 08/01/2013

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
T. Henninger
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

LONNIE ALLEN BASSETT (001)

LONNIE ALLEN BASSETT
#202441 ASPC EYMAN/BROWING UNI
P O BOX 3400
FLORENCE AZ 85132
APPEALS PUBLIC DEFENDER
ANDREW S HACKER

COURT ADMIN-CRIMINAL-PCR

RULING ON MOTION FOR RECONSIDERATION
BRIEFING SCHEDULE

The Court has reviewed Defendant's "Motion for Rehearing (Rule 32.9(A))" filed July 17, 2013. The Court has also reviewed the "Motion for leave to File Brief of Amicus Curiae in Support of Petitioner's Motion for Reconsideration" and "Brief of Amicus Curiae in Support of Petitioner's Motion for Reconsideration" both filed July 18, 2013.

Following a jury trial, Defendant was convicted of two counts of First Degree Murder, both Class 1 Felonies. The Court sentenced the Defendant on January 27, 2006, to natural life without the possibility of release on one count, and natural life with the possibility of release after 25 years have been served on the second count. The sentences were to run consecutively. The two sentences must be analyzed individually as to whether *Miller* applies.

Natural Life <u>without</u> the Possibility of Release

Assuming it is determined that *Miller* has retroactive application, which has not yet been determined by this Court or in Arizona, there is a threshold legal issue that must be addressed. In

this matter, Defendant was sentenced to life without the possibility of release on one of the murder counts. The *Miller* court did not foreclose the court's authority to enter a sentence of natural life. Rather, *Miller* mandated that mitigating factors such as age must be considered by the Court before it may impose the "harshest sentence" on juvenile offenders.

The record in this matter is clear that the sentencing judge took into account the age of the defendant as part of the sentencing determination (page 41 of sentencing transcript). Therefore, if *Miller* has retroactive application, its requirements regarding mitigation have been met in this matter and there is no basis for defendant to be relieved from the natural life sentence that was imposed upon him.

Natural Life with the Possibility of Release After 25 Years Have Been Served

Under Rule 32, an exception to the preclusion rule exists when "there has been a *significant change in the law* that *if determined to apply* to the defendant's case would probably overturn the defendant's conviction *or sentence*." Rule 32.1(g) (emphasis added). Defendant relies upon Miller as a basis for his relief. Defendant's request for relief presupposes that *Miller* applies retroactively, which, as noted above, has not yet been made by this Court or under Arizona law.

Assuming it is determined that *Miller* has retroactive application, there is an additional legal issue that must be addressed. In this matter, Defendant was sentenced to life with the possibility of release after 25 years. He was sentenced on January 27, 2006, and has not yet served the 25 years required before he would be eligible for release. While there is an argument to be made that there is no system for release in Arizona at this time and that commutation or pardon is not the functional equivalent, Defendant must demonstrate that he has a presently cognizable claim in advance of the 25 year minimum sentence imposed upon him.

The defendant makes several arguments, but none can be addressed if the Court does not find *Miller* to be retroactively applicable. The retroactive application is not briefed in the instant motion. Further, Defendant has not yet established that there is a presently cognizable claim that could be brought by Defendant if *Miller* does have retroactive application.

The Court therefore finds that before the Court can address the Motion For Reconsideration and the underlying Petition For Rule 32 Relief only on the sentence of life with possibility of release, these issues of retroactive application of *Miller* and whether there is a presently cognizable claim for relief must be briefed and considered by the Court. This allowance does not constitute any expression of opinion on the merits of any of defendant's claims raised in the motion for reconsideration or as to the issues raised herein.

IT IS ORDERED deferring determination of the Motion For Reconsideration on the life sentence with the possibility of release and allowing for additional briefing as follows:

1) Appointing the Office of the Public Defender to represent the defendant in this Rule 32 proceeding.

2) By no later than September 20, 2013, counsel for Defendant shall file a brief on the issues of retroactive applicability of *Miller* and whether there is a presently cognizable claim for relief.

3) The State shall file its Response within 21 days of the filing of Defendant's brief.

4) If appropriate, Defendant shall file his Reply no later than 10 days after the filing of the State's Response.

5) A copy of all pleadings filed in this matter shall be served only upon the Rule 32 Management Unit until this matter is assigned to a judge for ruling.

6) When all pleadings have been filed the case will be assigned to the Honorable Bruce R. Cohen for further proceedings and ruling.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

APPENDIX 13

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
05/14/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 05/09/2014

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
T. Gatz
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

LONNIE ALLEN BASSETT (001)

TENNIE BETH MARTIN
MIKEL PATRICK STEINFELD
KATHERINE A PUZAUSKAS

AZ DOC
COURT ADMIN-CRIMINAL-PCR
RULE 32 UNIT COUNSEL

ORDER RE: RULE 32 RELIEF UNDER *MILLER*

Oral Argument was conducted on May 2, 2014. The arguments and pleadings present common legal and factual issues among numerous defendants and were handled jointly for the purposes of consistency in ruling and judicial economy. Having taken the matters under advisement, the Court makes the following findings, conclusions, and orders:

The Miller Decision

In these consolidated Post-Conviction Relief proceedings, each of the Defendants raise a challenge to their sentences based on the United States Supreme Court opinion in *Miller v. Alabama,* 567 U.S. ——, 132 S.Ct. 2455, 183. L.Ed. 2d. 407 (2012). They assert that *Miller* applies retroactively and that, as applied, the *Miller* decision renders their life sentences unconstitutional. For each of these defendants, the sentence was life with the possibility of release.

The Supreme Court in *Miller* addressed the sentencing of Evan Miller and Kuntrell Jackson, two juvenile offenders who were convicted of murder. Both were sentenced to life imprisonment without the possibility of parole. In both cases, a sentence of life without the possibility of parole was mandatory as both sentencing courts lacked discretion to enter a sentence that allowed for the possibility of parole.

The *Miller* Court held that the Federal Constitution's ban against cruel and unusual punishment forbids a *mandatory* sentence of life imprisonment without the possibility of parole upon offenders who were under the age of 18 years at the time of their offense. They wrote: "[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Miller,* 132 S.Ct. at 2475.

The Supreme Court relied in part on its earlier decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), declaring unconstitutional the sentencing of a minor either to death or life imprisonment without parole for a non-homicide offense. The Supreme Court in *Miller* specifically stated that "*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult" because a mandatory sentence "precludes consideration of [the offender's] chronological age and its hallmark features-among them, immaturity, impetuosity, and failure to appreciate risks and consequences." 132 S.Ct. at 2468.

It must be noted that the Supreme Court refused to categorically declare that a juvenile can never receive a life sentence without the possibility of parole/release for a homicide offense. They did suggest, however, that a natural life sentence should be the exception and not the rule. They wrote that "[G]iven all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller,* 132 S.Ct. at 2469.[1]

The Court concluded by holding "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller,* 132 S.Ct. at 2469. While "[a] State is not required to guarantee eventual freedom" it "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller,* 132 S.Ct. at 2469 (quoting *Graham*, 130 S.Ct. at 2030).

Need for Review of *Miller*

It can be argued that *Miller's* application to Arizona law ends with a very simple conclusion, regardless of whether it applies retroactively. *Miller* proscribes a sentencing scheme

[1] Defense counsel argued that contrary to assumptions made in *Miller*, life without the possibility of parole (harshest possible sentence for a juvenile) has been imposed in nearly 50% of the cases involving juveniles convicted of murder. He maintains that this is far greater than the *Miller* proclamation that it should be "uncommon." This court is specifically not addressing this issue nor does it adopt as fact the percentage suggested by defense counsel.

that mandates life imprisonment without the possibility of release for a juvenile offender convicted of murder. Under Arizona law, there was no such mandate and the option has existed for the sentencing judge to impose life with or without the possibility of release.

It is therefore a viable argument to maintain that *Miller* applies only to States that did not allow the sentencing judge this discretion, with Arizona not being one of those States. However, for a myriad of reasons, this Court does not believe that such a simplistic approach can be taken, particularly given the statutory amendments made to Arizona's sentencing laws in 1994 regarding parole and the fact that *Miller* requires a "meaningful opportunity" for release.

Retroactivity of *Miller*

There is no dispute herein that this matter comes before this Court on a collateral (Rule 32) review. Defendant's sentence was final well before *Miller* was decided. Generally, new constitutional rules are not applicable to cases already final when the rule is announced. *See State v. Febles,* 210 Ariz. 589, 115 P.3d. 629 (2005). However, there are exceptions to this concept and those exceptions are the focus of this review.

Defendant asserts that the decision in Kuntrell Jackson's case[2] served to establish that the Supreme Court intended *Miller* to apply retroactively. However, it is not clear that Jackson's case was a true collateral review and there is nothing within *Miller* to show that the issue of retroactivity was addressed by the Court.

Since *Miller* was handed down, courts around the country have addressed *Miller* and there is by no means a consensus as to whether *Miller* is to have retroactive application on collateral review. Published opinions giving *Miller* retroactive application have been issued in Illinois and Iowa, as well as the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota). Prospective only application of *Miller* has been found in Louisiana, Michigan, as well as the Fifth Circuit (Louisiana, Mississippi, Texas) and Eleventh Circuit (Alabama, Florida and Georgia) Courts. For those courts that have held *Miller* not to be retroactive in its application, the common reasoning was that the new rule in Miller was procedural, not substantive.[3] One court denied retroactive application, at least in part, because "[a]pplying *Miller* retroactively would undoubtedly open the floodgates for post-conviction motions where at the time of conviction and sentencing, the judge did not have an affirmative duty to consider mitigating factors of youth."[4] While this Court respects the notion of finality of judgments, such a policy cannot be applied against a fundamental constitutional right raised herein.

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[2] Jackson's case has been characterized as coming before the Court through a collateral appeal.
[3] See, for example, *In re Morgan*, _ F.3d _, 2013 WL 1499498 (11th Cir. 2013)
[4] *Geter v. State*, No. 3D12-1736, ___ So.3d ___, 2012 WL 4448860 (Fla.Ct.App.3d Dist. Sept. 27, 2012)

Arizona courts have adopted and followed the United States Supreme Court's retroactivity analysis under *Teague* (addressed below). *State v. Slemmer*, 170 Ariz. 174, 823 P.2d 41 (1991). Historically, retroactive application of a Supreme Court decision turned on whether the case was being decided on direct appeal rather than through a collateral review. That has been expanded to cases that involve a new rule of criminal procedure.

Neither party herein suggested that *Miller* is not a new rule. Even Courts that have held that *Miller* does not have retroactive application have conceded that the *Miller* decision represents a "new rule."[5]

Miller is a new rule and it must be determined whether it represents a procedural or substantive new rule. This is an "important" distinction in collateral review cases[6] and there is a long-standing recognition that classification of cases as procedural versus substantive is not simple to resolve.[7] If procedural, it is generally accepted that the new rule is to have prospective application only. If substantive, it may be applied retroactively. A substantive new rule is not limited to those defendants who stand convicted of an act that the law does not make criminal. It also includes defendants who face a punishment that the law cannot impose because of his status or offense. *Schiro v Summerlin*, 542 U.S. 348 at 352, 124 S.Ct. 2519 (2004).

A second relevant analysis is whether the new rule is a "watershed rule of criminal procedure" that impacts fundamental fairness. If so, it may be given retroactive application in a collateral review. *Teague v Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d. 334 (1989). The Court in *Teague* held:

> "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Id. At 311-312

In *Whorton v Bockting*, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed. 2d 1 (2007), the Court elaborated on *Teague*, and defined a new rule as a rule that was not "dictated by precedent existing at the time the defendant's conviction became final." Before *Miller*, no court had addressed the issue of a mandatory life sentence for juvenile homicide offenders. In addressing

[5] See, for example, *People v Carp*, 298 Mich. App. 472, 828 N.W. 2d 686 (2012)
[6] *Bousley v U.S.* 523 U.S. 614, 188 S.Ct. 1604 (1998)
[7] *Robinson v Neil*, 409 U.S. 505, 93 S.Ct. 876 (1973)

whether it is a watershed rule of criminal procedure, the *Whorton* Court noted that "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id* at 417-418.

This Court must consider whether Defendant is entitled to relief under Rule 32.1(g), which provides grounds for relief when there has been a "significant change in the law." Rule 32 does not define what constitutes a significant change in the law, but for it to qualify as significant, there must be "some transformative event, a clear break from the past." *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991).

In *State v. Shrum*, 220 Ariz. 115, 203 P.3d 1175 (2009), the court provided the rationale for this exception to preclusion. The *Shrum* Court stated the following:

> Because the general rule of preclusion serves important societal interests, Rule 32 recognizes few exceptions. See Ariz. R.Crim. P. 32.2(b) (listing exceptions). At issue in this case is the provision allowing a "successive or untimely post-conviction relief proceeding" to raise a claim for relief based on Rule 32.1(g). Id. Rule 32.1(g) 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." (emphasis added)
>
> The rationale for the Rule 32.1(g) exception is apparent: A defendant is not expected to anticipate significant future changes of the law in his of-right PCR proceeding or direct appeal. Nor should PCR rules encourage defendants to raise a litany of claims clearly foreclosed by existing law in the faint hope that an appellate court will embrace one of those theories. In those rare cases when a "new rule" of law is announced, Rule 32.1(g) provides a potential avenue for relief.

From this Court's perspective, *Miller* is a substantive new rule. Not only does it preclude a mandatory life sentence without the possibility of a meaningful opportunity for release, it also suggests that the special class of defendants (juvenile offenders) should be given additional consideration at sentencing that goes well beyond what is considered for a similarly situated adult defendant.

This Court further concludes that *Miller* is watershed rule of criminal procedure. Before *Roper, Graham* and *Miller* were decided, juvenile offenders could be put to death, could be sentenced to life imprisonment for non-homicide offenses and could be mandated to life imprisonment without any possibility of release. All three cases create a clear demarcation of how the Eighth Amendment is applied to juvenile offenders and go to the heart of fundamental fairness in

our treatment of juvenile offenders. *Miller,* in the context of this triad of cases, is a true watershed in sentencing of juveniles.

Impact of Miller on Defendant

Having found that *Miller* applies retroactively, the court must turn to whether the sentence ordered herein violated Defendant's Eighth Amendment rights. Unlike Evan Miller and Kuntrell Jackson, this defendant was NOT sentenced to life imprisonment without the possibility of release and Arizona law did not mandate a natural life sentence. Therefore, on its face, it would appear that defendant cannot argue that his sentence was in violation of his Eighth Amendment rights since he was given the opportunity for release in the future at the time of his sentencing.

However, from 1994 to the present date, the only mechanism for release under a life sentence in Arizona has been through clemency or commutation. There is a vast difference between clemency/commutation and parole and the distinction is central to the issue of whether there is a "meaningful opportunity" for release as contemplated under *Miller*.

In *Solem v. Helm*, 463 U.S. 277, 303 (1983), the Supreme Court addressed this difference, and wrote:

> We explicitly have recognized the distinction between parole and commutation in our prior cases. Writing on behalf of the *Morrissey* Court,[8] for example, Chief Justice Berger contrasted the two possibilities: "Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals." In *Dumschat*, The Chief Justice similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence."[9]

The Supreme Court in *Solem* further noted that the possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." They found little difference from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. "Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless." *Id.*

Consistent with the Supreme Court's findings about South Dakota's release statistics in *Solem*, this Court has a basis to conclude that the frequency of release under parole in Arizona is

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[8] Morrissey v. Brewer, 408 U.S. 471 (1972)

[9] Connecticut Board Of Pardons V. Dumschat, 452 U.S. 458 (1981)

far greater than the percentages for release under clemency or commutation. This Court must therefore conclude that clemency or commutation is not a "meaningful opportunity" for release as would be mandated under *Miller* in cases in which the possibility for release is ordered for a juvenile offender.

Miller's retroactive application combined with the finding that there is not a meaningful opportunity for release under Arizona law leads this Court to the last issue, which is whether defendant's claim under *Miller* is ripe for determination. Defendant is not yet eligible for release under the terms of his original sentence, regardless of whether such possibility for release would come to him through clemency, commutation, parole or any other system for review. Until just days before the oral argument in this matter, this issue would likely have driven the ruling, as this court would have been inclined to reserve rights to Defendant to challenge Arizona law upon such time that he becomes eligible for release. However, there has been an intervening event that the State and at least five of similarly-situated defendants concur has resolved the entire issue.

On April 22, 2014, Governor Brewer signed into law HB 2593. This law serves to reinstate parole for juvenile offenders sentenced to life with the possibility of release, including those sentenced before the law becomes effective. Every indication is that it was proposed, supported and enacted in direct response to *Miller*. Separate from that anecdotal assessment, this Court believes that ARS § 13-716 read in conjunction with subsection (I) of ARS § 41-1604.09 (which will become effective on July 24, 2014), closes the "*Miller* gap"[10] that was created by the 1994 *Truth in Sentencing* Amendments to Titles 13 and 41 of the Arizona Revised Statutes.[11]

For the purpose of this order, this Court is compelled to set forth the new statute so that there is no confusion or ambiguity in the future as to the status of law relied upon in rendering this decision. The newly-enacted law provides the following relevant provisions:

> **13-716. Juvenile offenders sentenced to life imprisonment; parole eligibility**
>
> Notwithstanding any other law, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years of age is eligible for parole on completion of service of the minimum sentence, regardless of whether the offense was committed on or after January 1, 1994. If granted parole, the person shall remain on

[10] The "*Miller* gap" stated herein relates to clemency or commutation not being a meaningful opportunity for release.

[11] Parole was abolished in Arizona in 1994 with amendments to A.R.S. § 41-1604.09.

parole for the remainder of the person's life except that the person's parole may be revoked pursuant to section 31-415.

41-1604.09. Parole eligibility certification; classifications; appeal; recertification; applicability; definition

I. This section applies only to either of the following:
1. A person who commits a felony offense before January 1, 1994.
2. A person who is sentenced to life imprisonment and who is eligible for parole pursuant to section 13-716.

Conclusion

In summary, *Miller* prohibits a mandatory life sentence for juvenile offenders. Second, *Miller* must be given retroactive application under Arizona law. Third, Arizona did not have mandatory life sentencing for juveniles at the time of sentencing and allowed for commutation or clemency. Fourth, commutation or clemency as applied in Arizona does not provide a "meaningful opportunity" for release for juvenile offenders (under *Miller*) who were sentenced to life with the possibility of release. Fifth, defendant is not yet eligible for release. Sixth, HB 2593 resolves the residual issues for those sentenced to life imprisonment on or after January 1, 1994 that could have called into question whether Defendant's sentence violated the letter and spirit of *Miller*.[12]

Accordingly, notwithstanding the finding that *Miller* applies retroactively and that it represents a significant change in law under Rule 32.1(g) of the Arizona Rules of Criminal Procedure,

IT IS ORDERED denying Defendant relief under Rule 32 with the condition that upon ARS § 13-716 and § 41-1604.09(I) becoming effective under Arizona law,[13] the Arizona Department of Corrections shall set a specific date for parole eligibility for this Defendant.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

[12] During argument, one defense counsel raised an issue as to whether the new law, when effective, will provide a mechanism for termination of lifetime parole. He raised this as a basis to support the granting of Rule 32 Relief and the need for re-sentencing under the new statutes. *Miller* addressed the possibility of release and not issues relating to parolees, and this court rejects consideration of the impact on parolees.

[13] On or about July 24, 2014

APPENDIX 14

FILED BY CLERK

FEB 06 2017

COURT OF APPEALS
DIVISION TWO

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

M A N D A T E

2 CA-CR 2016-0151-PR
Department B
Maricopa County
Cause No. ~~CR2004005097~~
CR2004-005097-001

FILED
2/7/17 10:30 AM
MICHAEL K. JEANES, Clerk
By
Deputy

RE: STATE OF ARIZONA v. LONNIE ALLEN BASSETT

To: The Superior Court of Maricopa County and the Hon. Bruce R. Cohen, Judge, in relation to Cause No. CR2004005097.

This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its Memorandum Decision and it was filed on June 09, 2016.

A Motion for Reconsideration was filed and DENIED by Order of this Court.

A Petition for Review was filed and DENIED by Order of the Arizona Supreme Court.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the accompanying Memorandum Decision of this Court.

I, Jeffrey P. Handler, Clerk of the Court of Appeals, Division Two, hereby certify the accompanying Memorandum Decision (see link below) to be a full and accurate copy of the decision filed in this cause on June 09, 2016.

To view the decision, please click on the following link:
http://www.appeals2.az.gov/APL2Docs1/COA/652/3136057.pdf

DATED: February 06, 2017

JEFFREY P. HANDLER
Clerk of the Court

COURT OF APPEALS
DIVISION TWO
COURT OF APPEALS
STATE OF ARIZONA

2 CA-CR 2016-0151-PR
Maricopa County Superior Court Number CR2004005097

Superior Court Record returned on February 06, 2017

RECORD RETURNED on 08/05/2016

RECEIVED:_____
Clerk, Maricopa County Superior Court

BY:_____
Deputy Clerk

2 CA-CR 2016-0151-PR
Maricopa County Superior Court Number CR2004005097

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Hon. Bruce R. Cohen, Judge
Maricopa County Superior Court
175 W. Madison
Phoenix, AZ 85003-2243

Michael K. Jeanes
Clerk of the Court
Maricopa County Superior Court
601 W. Jackson
Phoenix, AZ 85003
(ORIGINAL MANDATE)

APPENDIX 15

Lonnie Allen Bassett (#202441)
Pro Se Petitioner
ASPC Eyman
Browning Unit
P.O. Box 3400
Florence, AZ 85132

17 JAN 18 PM 4:12
MICHAEL K. JEANES, CLERK
BY
M. HERNANDEZ FILED
DEP

SUPERIOR COURT OF ARIZONA
IN MARICOPA COUNTY

State of Arizona

Case Number: CR2004-005097-001 DT

Lonnie Allen Bassett

NOTICE OF REQUEST FOR POST-CONVICTION RELIEF

STATEMENTS MADE TO THE COURT, UNDER OATH OR AFFIRMATION:

1. INFORMATION ABOUT ME, the DEFENDANT:

Name: Lonnie Allen Bassett
Address: ASPC Eyman, Browning Unit, P.O. Box 3400, Florence, AZ 85132
Date of Birth: 11/18/87
Prison/Inmate Number: #202441

2. INFORMATION ABOUT MY CONVICTION: I was convicted of the following crime(s):

Common Name	Statute Number (A.R.S.)
First degree murder	A.R.S. 13-1105
First degree murder	A.R.S. 13-1105

3. INFORMATION ABOUT MY SENTENCE:

Defendant was sentenced on January 27, 2006

To a TERM of Natural Life and 25-to-life (consecutive).

Following a: (Place a check mark in the box below that applies.)

- ☑ Trial by jury
- ☐ Trial to Judge without a Jury
- ☐ Plea of Guilty
- ☐ Plea of No Contest
- ☐ Probation Revocation Admission

☐ Probation Revocation Violation Hearing in the Superior Court in _____ County with judicial officer _____ presiding.

The file number of this case was CR2004-005097-001 DT

4. **OTHER ACTIONS TO SECURE RELIEF**: Defendant has taken the following actions to get relief from his/her convictions or sentences. (Check the box below that applies to you):

☐ Direct Appeal – YES or NO

☐ Previous Rule 32 Proceedings – YES or NO

5. **INFORMATION ABOUT ATTORNEY REPRESENTATION**: (Check the boxes that apply.)

A. Defendant was represented by the following lawyers:
(Write in the name of address of the lawyer below):

- Trial or Change of Plea: John Canby - office of the Legal Defender 222 N. Central Ave. Suite 910 Phoenix, Az. 85004
- Sentencing Hearing: John Canby - office of the Legal Defender 222 N. central Ave. Suite 910 Phoenix, Az. 85004
- Appeal (if any): Terry Adams 620 W. Jackson, Suite 4015 Phoenix, Az. 85003
- Previous Rule 32 Proceedings (if any): Micheal Dew 6501 N. Central Ave Phoenix, Az. 85012 Jennie Martin - office of the Legal Defender 620 W. Jackson, Suite 4015 Phoenix, Az. 85003

B. Is Defendant raising a claim of ineffective assistance of counsel? YES or NO

C. Is Defendant presently represented by a lawyer? YES or NO If "Yes," write the lawyer's name and address here:

_____

D. If at this time you are not represented by a lawyer; do you want the court to appoint a lawyer for this Post-Conviction proceeding? YES or NO

6. **UNTIMELY NOTICE or PREVIOUS RULE 32 CASE**: Answer this section ***ONLY IF*** this is an untimely notice – or – the defendant has filed a previous Rule 32 petition in this case.

- Is a claim pursuant to Rule 32.1(d), (e), (f), (g), or (h) being raised in this petition? YES or NO
- If YES, place a check mark in the appropriate box:

☐ The defendant is being held in custody after the sentence imposed has expired.

☐ Newly discovered material facts exist which probably would have changed the verdict or sentence.

☐ The defendant's failure to file timely notice of post-conviction relief or notice of appeal was without fault on the defendant's part.

☑ There has been a significant change in the law that would probably overturn the conviction or sentence.

☐ Facts exist which establish by clear and convincing evidence that the defendant is actually innocent.

- **STATE THE FACTS** that support the claim and the reasons for not raising the claim in the previous petition or in a timely manner.

My sentence of "natural life" without the possibility of any type of release is unconstitutional under *Miller v. Alabama*, 132 S.Ct. 2455 (2012), *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), and *Tatum v. Arizona*, 580 U.S. ___, 2016 WL 1381849 (2016) because, as a juvenile offender under the age of 18 at the time of offense, I was entitled to a hearing where the sentencing court must decide whether the crime reflected "transient immaturity" or "irreparable corruption" before imposing the harshest sentence of "natural life." No such hearing took place in my case. I did not raise this claim in a previous petition because the U.S. Supreme Court did not make it clear that *Miller v. Alabama* was retroactive until its 2016 decision in *Montgomery v. Louisiana*. Also in 2016, the U.S. Supreme Court further explained the requirements of the sentencing court under *Miller* and *Montgomery* in *Tatum v. Arizona*. *Miller* and *Montgomery* require a sentencer to ask "whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *See Tatum v Arizona*, 580 U.S. __, 2016 WL 1381849 (2016) (Sotomayor, concurring).

7. NOTICE: I AM REQUESTING a HEARING FOR POST-CONVICTION RELIEF.

DECLARATION: I declare under penalty of perjury that the information contained in this form and in any attachments is true to the best of my knowledge or belief. I also understand that the failure to raise any known ground for relief in my petition will prohibit me from raising it at a future date.

1/12/17 _____ (Date)

_____ (Signature)

8. AFFIDAVIT OF INDIGENCY: I have requested the appointment of a lawyer to represent me in post-conviction proceedings. I swear under oath and penalty of perjury that I am indigent and because of my poverty I am financially unable to pay for the cost

of a lawyer to represent me without incurring substantial hardship to myself or my family.

1/12/17
(Date)

(Signature)

STATE OF AZ

COUNTY OF Pinal

Subscribed and sworn to or affirmed before me this: 01-12-17 by Lonnie A. Bassett.

(notary seal)

Deputy Clerk or Notary Public

VICTOR RUBOYIANES
Notary Public - State of Arizona
PIMA COUNTY
My Commission Expires
May 12, 2017

APPENDIX 16

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
02/01/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 01/30/2017

HONORABLE DEAN M. FINK

CLERK OF THE COURT
M. Mogel
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

LONNIE ALLEN BASSETT (001)

LONNIE ALLEN BASSETT
#202441 ASPC EYMAN BROWING
PO BOX 3400
FLORENCE AZ 85132
CEDRIC MARTIN HOPKINS

COURT ADMIN-CRIMINAL-PCR

ORDER RE: APPOINTMENT OF COUNSEL
RULE 32 BRIEFING SCHEDULE SET

Pending before the Court is Defendant's Notice of Request for Post-Conviction Relief filed on January 18, 2017.

This case arises out of two fatal shootings. After an eight-day trial, the jury found Defendant guilty of two counts of first-degree murder. He was 16 at the time of the offenses. This Court entered judgment and sentenced Defendant on January 27, 2006 to consecutive terms of natural life and natural life with the possibility of parole after serving 25 years. Thereafter, this Court summarily dismissed Defendant's first Rule 32 proceeding. It also dismissed a second Rule 32 proceeding, in which Defendant sought Arizona Rule of Criminal Procedure 32.1(g) relief based upon *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in an order filed on July 15, 2013.

In his current submission, the defendant again claims relief based upon a significant change in the law that, if applied retroactively, would alter the case outcome under Rule 32.1(g). (Notice at 3) According to Defendant, one such change occurred when the United States Supreme Court decided *Miller*. That Court subsequently held that the *Miller* decision,

prohibiting mandatory life sentences without parole for juvenile offenders, announced a new substantive constitutional rule that applied retroactively on state collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). The Court clarified that the Eighth Amendment requires more than consideration of "a child's age before sentencing him or her to a lifetime in prison" and permits a natural life sentence only for "the rare juvenile offender whose crime reflects irreparable corruption" as opposed to "transient immaturity." *Id*. More recently, the Arizona Supreme Court held that, in order to be entitled to resentencing, a defendant must establish that *Miller* applies and would probably overturn the sentence. *State v. Valencia*, 2016 WL 7422256, at ¶ 17 (Ariz. Dec. 23, 2016).

Defendant asserts that he may be entitled to Rule 32.1(g) relief arising from his juvenile status at the time of his offenses. (Notice at 3) There is no indication that a court has previously addressed whether the crimes reflected transient immaturity. Nor is his Rule 32.1(g) claim precluded by the earlier ruling. *See State v. Bonnell*, 171 Ariz. 435, 438, 831 P.2d 434, 437 (App. 1992) (applying the Rule 32.1(g) exception even though the first petition was filed after the decision establishing the change, and the subsequent decision entitling the defendant to retroactive application was filed after the first petition's denial). In addition, Defendant asserts a Rule 32.1(a) claim of ineffective assistance of counsel. (Notice at 2)

Although the information available to this Court at this time would likely lead to the same sentences, this Court also recognizes that there may be new information or further developments in the law to suggest otherwise. Out of an abundance of caution and solely to ensure that Defendant has the opportunity to fully develop his claims, the Court is electing to appoint counsel. This appointment is for the sole purpose of conferring with Defendant and assessing whether there are any viable Rule 32 claims.

IT IS THEREFORE ORDERED appointing Cedric Hopkins to represent Defendant in these proceedings.

IT IS FURTHER ORDERED that counsel shall determine whether Defendant has an actionable Rule 32 claim and, if so, to file a Petition for Post-Conviction Relief. The pleading on Defendant's behalf shall be filed no later than **60 DAYS**. The State's Response shall be filed within 45 days thereafter. The Reply, if any, shall be filed no later than 15 days after the Response is filed.

APPENDIX 17

Michael K Jeanes, Clerk of Court
*** Electronically Filed ***
M. Martin, Deputy
9/13/2017 8:11:44 AM
Filing ID 8659613

THE HOPKINS LAW OFFICE, P.C.
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objectionyourhonor@hotmail.com

Cedric Martin Hopkins, Esq.
California State Bar No. 226313
Arizona State Bar No. 22790

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. LONNIE ALLEN BASSETT, Defendant.	Case Number: CR2004-005097-001 DT **PETITION FOR POST-CONVICTION RELIEF** Hon. Danielle J. Viola

COMES NOW, Defendant, Lonnie Bassett, by and through undersigned counsel, and hereby submits his Petition for Post-Conviction Relief. Ariz.R.Crim.Proc., Rule 32.1. This Petition is supported by the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 13th day of September, 2017.

THE HOPKINS LAW OFFICE, P.C.

/s/
Cedric Martin Hopkins, Esq.
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF RELEVANT FACTS

On June 16, 2004, the defendant, Lonnie Bassett, was riding in the backseat of a vehicle that was being driven by Frances Tapia. Joseph Pedroza was in the front passenger seat. At some point, the defendant pulled out a shotgun and fatally shot the Tapia and Pedroza. He exited the vehicle after the vehicle crashed into a light pole, walked away, returned and retrieved the shotgun. He was apprehended the following day.

On June 25, 2004, a grand jury indicted Bassett on two counts of first-degree murder. Bassett exercised his right to a jury trial and after considering the evidence, the jury found Bassett guilty on both counts. The trial court sentenced Bassett to a natural life prison term for Count One involving Tapia, and sentenced Bassett to life with the possibility of parole after twenty-five years for Count Two involving Pedroza. Bassett's convictions and sentences were affirmed on appeal.

In 2012, the United States Supreme Court decided *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455 (2012). The *Miller* Court found that a sentencing scheme that makes it mandatory for juveniles to be sentenced to natural life without the possibility of parole is unconstitutional if the sentencing judge does not consider the minor's age, among other factors, at the time of sentencing.

The issue now before this Court is whether Bassett's prison sentence in Count One (natural life without the possibility of release) comports with the requirements explained in *Miller*.

II.

ARGUMENT

A. Bassett's prison sentence in Count One violates the mandates of *Miller v. Alabama* because the sentencing court rendered a life in prison without the possibility of release prison sentence without considering Bassett's age of minority, impulsivity and amenability towards rehabilitation.

In deciding *Miller*, the United States Supreme Court announced for the first time that the Eighth Amendment prohibits *mandatory* life sentences without parole for juvenile offenders. The *Miller* Court explained that prior to sentencing a minor to life without parole, a sentencing court must consider the following factors:

1. The minor's "demonstrated maturity and [potential for] rehabilitation." *Miller*, 132 S.Ct. at 2468-69.
2. The minor's "background and mental and emotional development." Id.
3. The minor's "family and home environment." Id.
4. The circumstances of the offense (including "the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected [the juvenile.]" Id.
5. The possibility that the minor "might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth." Id.

Judge Hauser's Findings

Judge Hauser sentenced Bassett to a natural life term in prison on Count One. With respect to mitigation as it related to the defendant's age, Judge Hauser stated the following:

"Your age. You were 16-and-one-half years old at the time of the crimes, and this factor is given considerable weight by the Court. But the weight is tempered because of your

intelligence, your obvious intelligence, the fact that you were able to obtain and hold employment and apparently do very well with employment." Reporter's Transcript ("R.T."), 01/27/06, pp. 37-38.

Because minors are no longer eligible for the death penalty, natural life prison terms are the harshest prison sentence available for a juvenile offender. In *Montgomery v. Louisiana*, — U.S. —, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016), the United States Supreme Court held that *Miller* reflects a substantive rule and noting "[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. at 734 (internal quotation marks omitted); *see also Tatum v. Arizona*, —— U.S. ——, 137 S.Ct. 11, 12, 196 L.Ed.2d 284 (2016) (summarily granting review, vacating, and remanding for reconsideration, in light of *Montgomery*, several decisions by the Arizona Court of Appeals rejecting claims for post-conviction relief under *Miller* where sentencing court had considered the petitioner's youth). *State v. Valencia*, 241 Ariz. 206, 209, 386 P.3d 392, 395 (2016).

Miller, as interpreted by the majority in *Montgomery*, did not adopt merely a procedural rule requiring individualized sentencing (as distinct from mandatory sentences of life without parole), but instead recognized that "sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.' " Id. at 734 (quoting *Miller*, 132 S.Ct. at 2469). *Miller* reflects a "substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Id. at 735. *Valencia*, 241 Ariz. 206, 209, 386 P.3d 392, 395 (2016).

More to the point of the instant case, the *Valencia* court explained that it is insufficient to meet the *Miller* requirements with respect to juvenile offenders by simply considering their age.

Rather, the sentencing court must find "that the juvenile defendant's crimes reflect permanent incorrigibility." *Valencia*, 241 Ariz. at 209, 386 P.3d at 395 (2016).

At Bassett's sentencing hearing, the sentencing court did consider Bassett's age. The sentencing court stated that it gave "considerable weight" to Bassett's age. The fact the sentencing court considered Bassett's age, standing alone, is insufficient to meet the requirements of *Miller, Montgomery* and *Valencia*, however.

The *Miller* rule, as expanded by *Montgomery*, not only instructs *what* sentencing courts are supposed to do (consider a juvenile defender's age), but more importantly, the rule instructs *how* sentencing courts are to consider a juvenile defender's age with respect to the crimes committed: whether there is "permanent incorrigibility." *Valencia*, *supra*. The sentencing court did not make such a finding in Bassett's case. The sentencing record is silent with respect to key constitutional components that would survive scrutiny under *Miller*, *Montgomery* and *Valencia*.

First, "'sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.' " *Montgomery v. Louisiana*, — U.S. —, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016), quoting *Miller*, 132 S.Ct. at 2469. Nowhere in Bassett's sentencing record is there a finding that his crime "reflects irreparable corruption."

Secondly, the United States Supreme Court held that natural life prison sentences for juvenile offenders are considered an "excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S.Ct. at 735. Again, Bassett's sentencing record does not address whether his crime "reflects transient immaturity."

The record in Bassett's case is insufficient. That record must be developed to determine whether Judge Hauser considered whether Bassett's crime in Count One showed irreparable corruption and whether the crime reflects transient immaturity. The fact that Judge Hauser

considered Bassett's age does not cure the constitutional defects presently at issue, however. Stated another way, the fact that a defendant's age of minority was given some weight at sentencing does not mean that minority was given the required constitutionally mandated weight required by *Miller*.

The *Miller* Court's explanation of how infrequently it expects natural life prison sentences to be rendered underscores the weight that should be given to a defendant's age of minority:

> "But given all we have said in *Roper, Graham* and [*Miller*] about children's diminished culpability and heightened capacity for change, we think appropriate occasion for sentencing juvenile to this harshest possible penalty will be uncommon. That is especially so 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." *Miller*, 132, S.Ct. at 2469 (internal citations omitted).

The *Miller* Court made clear that a state's sentencing scheme must afford a juvenile offender "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 132 S.Ct. at 2469 (quoting *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2030 (2010)). When Bassett was sentenced, no such meaningful opportunity existed, and he was afforded none.

CONCLUSION

Bassett respectfully requests to be resentenced with a determination as to whether his crimes reflect irreparable corruption or whether his natural life prison sentence is excessive because his crime reflects transient immaturity.

RESPECTFULLY SUBMITTED this 13th day of September, 2017.

THE HOPKINS LAW OFFICE, P.C.

/s/ /
Cedric Martin Hopkins, Esq.
Attorney for Petitioner

Electronically filed this
13th day of September, 2017, with:

Clerk of the Superior Court
Maricopa County Superior Court

A copy of the foregoing
delivered this 13th day of September, 2017, to:

Maricopa County Attorney's Office

Lonnie Bassett

APPENDIX 18

Michael K Jeanes, Clerk of Court
*** Electronically Filed ***
T. Alameda, Deputy
2/12/2018 10:23:16 AM
Filing ID 9078300

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
Diane Meloche
Deputy County Attorney
Bar ID No. 018197
Firm ID No. 00032000
301 W. Jefferson Street, Second Floor
Phoenix, AZ 85003
Telephone: (602) 506-7422
MCAOEXEC@mcao.maricopa.gov
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. LONNIE ALLEN BASSETT, Defendant.	NO. CR2004–005097–001 **STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF** (Rule 32 Management Unit Honorable Douglas Gerlach)

The State of Arizona, through undersigned counsel, concedes that Defendant is 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.

Submitted February 12, 2018.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ Diane Meloche
Diane Meloche
Deputy County Attorney

Copies of the foregoing were
mailed\delivered this
12th day of February, 2018, to:

The Honorable Douglas Gerlach
Judge of the Superior Court

Cedric Martin Hopkins
10645 N. Orical Rd. #121-326
Tucson, AZ 85737
objectionyourhonor@hotmail.com
Attorney for Defendant

BY: /s/ Diane Meloche
Diane Meloche
Deputy County Attorney

APPENDIX 19

Chris DeRose, Clerk of Court
*** Electronically Filed ***
M. Martin, Deputy
3/29/2018 3:36:51 PM
Filing ID 9212904

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Cedric Martin Hopkins, Esq.
California State Bar No. 226313
Arizona State Bar No. 22790

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. LONNIE ALLEN BASSETT, Defendant.	Case Number: CR2004-005097-001 DT **REPLY TO THE STATE'S RESPONSE TO THE PETITION FOR POST-CONVICTION RELIEF** Hon. Douglas Gerlach

COMES NOW, Defendant, Lonnie Bassett, by and through undersigned counsel, and hereby submits his Reply to the State's Response to his Petition for Post-Conviction Relief. Ariz.R.Crim.Proc., Rule 32.1. This Reply is supported by the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 29th day of March, 2018.

THE HOPKINS LAW OFFICE, P.C.

/s/
Cedric Martin Hopkins, Esq.
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I.

ARGUMENT

A. Because the record is plain with respect to the sentencing court not fulfilling the requirements of *Valencia*, this Court should order a resentencing hearing.

In its response, the State concedes that Bassett is entitled to an evidentiary hearing with respect to the claims under Valencia. (See, State's Response, pg. 1). The defendant believes, however, that the record presented in his case is plain on its face with respect to the issue before this Court. As shown in the petition for post-conviction relief, and as supported by the record, Judge Hauser sentenced Bassett to a natural life term in prison on Count One. With respect to mitigation as it related to the defendant's age, Judge Hauser stated the following:

"Your age. You were 16-and-one-half years old at the time of the crimes, and this factor is given considerable weight by the Court. But the weight is tempered because of your intelligence, your obvious intelligence, the fact that you were able to obtain and hold employment and apparently do very well with employment." Reporter's Transcript ("R.T."), 01/27/06, pp. 37-38.

If there were to be an evidentiary hearing, it would be only to consider whether the above-quoted language by the sentence judge satisfied the requirement in *Valencia* as to whether Bassett's crime shows "permanent incorrigibility." *Valencia*, 241 Ariz. at 209, 386 P.3d at 395 (2016). And while the sentencing court considered Bassett's age, the record, standing alone, clearly shows that the "permanent incorrigibility" finding was not made by the sentencing court. *Valencia*, *supra*.

Because the sentencing court did not make such a finding in Bassett's case, rather than an evidentiary hearing, Bassett's case should be set for a re-sentencing so the requirements of *Miller*, *Montgomery* and *Valencia* can be fulfilled.

CONCLUSION

Bassett respectfully requests to be resentenced with a determination as to whether his crimes reflect irreparable corruption or whether his natural life prison sentence is excessive because his crime reflects transient immaturity.

RESPECTFULLY SUBMITTED this 29th day of March, 2018.

THE HOPKINS LAW OFFICE, P.C.

/s/ /
Cedric Martin Hopkins, Esq.
Attorney for Bassett

Electronically filed this
29th day of March, 2018, with:

Clerk of the Superior Court
Maricopa County Superior Court

A copy of the foregoing
delivered this 29th day of March, 2018, to:

Maricopa County Attorney's Office

Lonnie Bassett

APPENDIX 20

Chris DeRose, Clerk of Court
*** Electronically Filed ***
06/22/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 06/13/2018

HONORABLE JOSE S. PADILLA

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA JESSI WADE

v.

LONNIE ALLEN BASSETT (001) CEDRIC MARTIN HOPKINS

RULING / RELIEF GRANTED

Good cause appearing,

IT IS ORDERED granting the State's Request for Nunc Pro Tunc, filed 6/8/2018 and correcting *nunc pro tunc* the Court's minute entry dated 5/29/2018 and filed 6/8/2018, entitled, Status Conference, as follows, in bold.

1. Defendant is **not** present.

2. IT IS ORDERED setting this matter for ~~Resentencing~~ **a Rule 32** Evidentiary Hearing on JULY 27, 2018 at 1:30 p.m. for 3 hours before the HON. CARI HARRISON.

APPENDIX 21

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

Julie A. Done
Jessi Wade
Deputy County Attorneys
Bar Nos. 024370, 021375
225 W Madison St, 4th Floor
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sp1div@mcao.maricopa.gov
MCAO Firm #: 00032000
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. LONNIE ALLEN BASSETT, aka LONNY ALLEN BASSETT Defendant.	CR2004-005097-001 **STATE'S MOTION TO VACATE EVIDENTIARY HEARING AND DISMISS LONNIE BASSETT'S PETITION FOR POSTCONVICTION RELIEF** **ORAL ARGUMENT REQUESTED** (Assigned to the Honorable Katherine Cooper, Div. CRJ16)

The State moves this Court to vacate the pending evidentiary hearing and dismiss inmate Lonnie Bassett's petition for postconviction relief (PCR) because *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), do *not* constitute a significant change in the law applicable to Bassett's case that would probably overturn his natural life sentence. The State requests oral argument on the motion. After *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the State's PCR response that Bassett "is entitled to an evidentiary hearing pursuant to *State v. Valencia*, 241 Ariz. 206 (2016),

and Rule 32.8," is no longer legally correct. *Valencia*'s interpretation of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), as clarifying *Miller* and entitling defendants like Bassett to an opportunity to establish that his crime reflected transient immaturity and not irreparable corruption was implicitly overruled by *Jones*. Accordingly, Bassett has not presented a colorable claim entitling him to a hearing and his PCR should be dismissed.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PERTINENT FACTS AND PROCEDURAL HISTORY

A. Facts.

On June 16, 2004, 16-year-old Lonnie Bassett was riding in the backseat of a car driven by Frances Tapia.[1] Joseph Pedroza was in the front passenger seat and Chad Colyer was also a passenger in the car. While riding in the backseat, Bassett pulled out a shotgun and fatally shot both Tapia and Pedroza. Bassett was friends with both victims. (Exh. A.) After the vehicle hit a light pole, Bassett jumped out of the car and walked away. Bassett then circled back to the car to retrieve the shotgun. Bassett was apprehended the following day and subsequently indicted for the two murders.

A. Procedural History.

Bassett was charged with two counts of first-degree murder. On December 19, 2005, after an 8-day trial, a jury rejected Bassett's self-defense claim and found him guilty of both counts. (Exh. A.)

[1] The facts were compiled from the State's sentencing memorandum (Exh. B), the Presentence Report (Exh. A), the sentencing transcript (Exh. C), Bassett's 9/13/17 PCR petition, and *State v. Bassett*, 215 Ariz. 600 (App. 2007).

In its sentencing memorandum, the State noted "the range of sentencing for each count is life without the possibility of parole for 25 years or natural life," but requested Bassett be sentenced to consecutive natural life sentences for both murders.[2] (Exh. B at 2, 4-6, 9.) After setting forth the aggravating factors, the State acknowledged Bassett's age, 16 and a half at the time of the murders, was a mitigating factor pursuant to A.R.S. § 13-703(G)(5). Specifically, citing *State v. Clabourne*, 194 Ariz. 379 (1999), the State noted: "[i]n addition to chronological age, this factor requires consideration of the Defendant's 1) level of intelligence, 2) maturity, 3) participation in the murder, and 4) criminal history and past experience with law enforcement." (*Id*. at 6.)

The State noted the following applicable to each consideration: 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. (*Id*. at 6-7.) Additionally, Bassett had a reputation for carrying a gun and was nicknamed "Little Scrapper" for fighting. (*Id*. at 9.)

The State noted Bassett's mother was present during his police interview at Bassett's request. (*Id*. at 8.) In its memorandum, the State quoted a report from Bassett's

[2] The State filed a notice of intent to seek the death penalty in this case. However, *Roper v. Simmons*, 543 U.S. 551 (2005), was decided soon thereafter, making Bassett ineligible for the death penalty, and the notice was struck without objection by the State.

Drug Diversion Program, detailing Bassett's history:

> Lonnie wants to go into the military and then become a police officer. He reports that he has been in about 15 fights in the last twelve months. He reports that some are at school but most are in the community. He reports that most start around dusk. He reports that he is not the aggressor in most cases. Mr. & Mrs. Alexander report [] he has been diagnosed with Post-Traumatic Stress Disorder. They report he was Physically/Sexually Abused or neglected when he was younger. They report that he is currently in counseling and Anger Management classes. They report that Lonnie sees his mother about twice per year, Thanksgiving and Christmas, maybe. They report [] the mother lives about a mile from them. They report that Lonnie has been living with them for most of his life. They report [] the mother has signed papers for them to provide education, medical needs, etc.

(*Id*.) The Diversion report also indicated Bassett smokes marijuana and drinks alcohol 2-3 times a week. (*Id*.) The report noted the Alexanders appear to be a positive influence on Bassett. (*Id*.) The State requested the court consider all this information in determining how much weight to give Bassett's age as a mitigating factor. (*Id*. at 9.)

Bassett likewise submitted a sentencing memorandum listing as mitigation his age, his capacity to conform his conduct to the law, his attempts at self-improvement and rehabilitation, and his remorse. (Exh. D at 7.) Bassett included a factual history showing that he was raised by his mother's friends, Charles and Jane Alexander, since he was a baby because she did not want to assume the responsibility for caring for him, although she kept custody of Bassett's brother, who was less than a year older than him. (*Id*. at 2.) In August 1989, a few months before his second birthday, Bassett's father kidnapped him and his brother. (*Id*.) Bassett's father was located a month later in Council Bluffs, Iowa, and

arrested and charged with two counts of custodial interference.[3] (*Id*.)

Bassett argued because he was 16 years old when he committed the crimes, he did not possess the "impulse control of an adult." (*Id.* at 7.) Citing *Roper v. Simmons*, 543 U.S. 55 (2005), Bassett noted the "profound differences between adults and juveniles and the ramifications those difference[s] makes when addressing juvenile crime." (*Id*. at 7.) Quoting *Roper*, Bassett pointed to three general differences between juveniles and adults: 1) a 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) a juvenile's character is not well formed rendering suspect any conclusion that a juvenile is among the worst offenders and "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (Quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

Two years prior to the murders, Bassett was diagnosed with PTSD by the Jewish Family and Children's Services and began receiving therapy and medication.[4] (*Id*. at 3-4.) The psychiatric evaluation detailed the abuse by his father and exposure to domestic violence. (*Id*. a 39.) Not long after his diagnosis, however, Bassett stopped taking his

[3] Information detailing the kidnapping of Bassett and his brother, Bassett's father's personal history, and the criminal charges that resulted were attached to Bassett's sentencing memorandum. (Exh. D at 11-27.)

[4] Bassett's psychiatric evaluation conducted by the Jewish Family and Children's Service in 2002, attached to his sentencing memorandum, diagnosed Bassett with PTSD likely due to Bassett's exposure to violence and abuse by his biological father. (Exh. D at 38-44.)

medication, making him more aggressive and likely contributing "to the manner in which he reacted to the events surrounding the deaths of Joseph Pedroza and Frances Tapia." (*Id*. at 3-4.) Bassett argued his Post Traumatic Stress Disorder (PTSD), hypervigilance, and "exaggerated startle response," resulting from his childhood background, caused him to overreact on the night of the shootings. (*Id*. at 9.)

Bassett's memorandum also detailed his prospects for rehabilitation. At the age of 14, Bassett was employed by Charles Alexander at Philips Plastics. (*Id*. at 3, 28.) He started out as a janitor but was quickly promoted to an apprentice machinist and described by the President and Vice-President as having "great work ethics for his age" and "a pleasure to have" at the business. (*Id*.) Before incarceration, Bassett was in advanced classes at school, prior to the crimes. (*Id*. at 3, 9.) After incarceration, he took advantage of self-improvement opportunities including obtaining his High School Equivalency Diploma and several academic awards at the Hard Knocks High School program. (*Id*. at 3, 29-37; Exh. B at 6.) Bassett's memorandum also noted his remorse. (*Id*. at 9.) Several people submitted letters stating Bassett was kind, generous, a hard worker, was taken advantage of because of his kindness, and if given a chance he could show he is a good person. (*Id*. at 51-57; 1/26/06 Notice.)

A presentence investigation report was prepared and submitted to the court, detailing the facts, the statements of the victims and interested parties, and the factors considered in making a sentencing recommendation. (Exh. A.) Attached to the presentence report were letters from victims and interested parties. (*Id*. at 6-19.) Bassett's criminal history was also attached and filed as confidential. (*Id*. at 20.)

At sentencing, the court advised it had 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. (Exh. C at 3-4.) After the victims addressed the court, the State explained Bassett would be a death-eligible, except for *Roper v. Simmons*, 543 U.S. 551 (2005), and requested the Court impose consecutive natural life sentences for each murder. (*Id*. at 16, 21.) The State argued the following aggravating factors: a double homicide; the murder of Tapia was especially cruel, as she endured mental and physical anguish (she watched Pedroza be killed as she was driving, and took a shot to the shoulder and tried to "ward off the blow" before Bassett fired again, killing her); use of a deadly weapon; grave risk of death to Colyer because Bassett shot the driver of the vehicle in which Colyer was a passenger; and lack of remorse for Tapia's death. (*Id*. at 17-22, 36-37.) The State noted Bassett told police "Oh well, I thought I missed her," referencing Tapia and then pumped the shot gun a third time and shot her. (*Id*. at 18.) 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 still appropriate. (*Id*. at 16, 21.)

Mr. Alexander spoke on Bassett's behalf, telling the court that Bassett was just a 16-year-old kid who was preyed upon by Pedroza and others like him. (*Id*. at 22-24.) Bassett's girlfriend told the court that he made a bad decision that night and he was only 16 years old and was scared. (*Id*. at 26.) Defense counsel emphasized Bassett "was a child at 16 years old when he committed the crimes." (*Id.* at 27.) Counsel 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." (*Id*.)

Counsel argued, "Lonny did not possess the maturity to handle the freedom that he'd been given," referring to Bassett's past with underage drinking and minor offenses while he maintained his job at Philips Plastics, which reflected his immaturity. (*Id*. at 27-28.) Counsel argued Bassett's juvenile referrals were "immature juvenile acts." (*Id*. at 28.) Referencing his memorandum, counsel argued *Roper*'s prohibition on the death penalty for juveniles was due, in part, to poor impulse control of people Bassett's age. (*Id*. at 29.) Specific to Bassett, his PTSD compounded his impulsivity. (*Id*.) Counsel emphasized that *Roper* determined juveniles are more susceptible to negative influences than adults, like what occurred here with Bassett and Pedroza. (*Id*. at 30.)

Lastly, counsel argued a juvenile's character is not fully formed at age 16, quoting Justice Kennedy's *Roper* opinion: "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient. As individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (*Id*.) Counsel argued that Bassett has the tools to better himself in the future and asked that he be sentenced to life with the possibility of parole after 25 years to be given the opportunity to "outgrow[] his character flaws" and be released. (*Id.* at 30-31.) Bassett allocuted and apologized to the victims' families and thanked his family for their support. (*Id*. at 31-35.)

The court stated it considered everything presented. (*Id*. at 36.) In aggravation, the court considered 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. (*Id*. at 36-37.) In mitigation, the court gave Bassett's age of 16 and a half years old "considerable weight" but found it tempered by Bassett's intelligence and ability to "to obtain and hold employment and apparently do very well with employment." (*Id*. at 37-38.) The court considered Bassett's contact with the juvenile justice system as a factor in his maturity because he was given the opportunity to seek help and he did not, his diagnosis of PTSD and that he stopped taking his medications, Bassett's family support, and his statement of remorse. (*Id*. at 38.)

The court found Bassett's conduct regarding Tapia showed a "hardened heart" and found it was "a personality trait that is extremely dangerous to the public." (*Id*. at 39.) The court emphasized that "[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 these materials and reflecting on the evidence during the trial the court found Bassett was a danger to the public that "cannot be addressed with anything less than a natural life sentence." (*Id*. at 39.) The court found a sentence of natural life appropriate for Tapia's murder and a consecutive sentence of life with the possibility of parole after 25 years appropriate for Pedroza's murder. (*Id*. at 39-40.)

On June 20, 2013 Bassett filed a *pro per* PCR notice checking the boxes that he was actually innocent and that there "has been a significant change in the law that would probably overturn the conviction or sentence," asserting, "[t]he U.S. Supreme Court has ruled that mandatory life without parole sentences for juveniles are unconstitutional (*Miller v. Alabama*, 132 S. Ct. 2455 (2012))." Bassett also requested counsel be appointed and

checked the box that he was raising an ineffective assistance of counsel claim.

On July 2, 2013, the court dismissed Bassett's PCR notice as untimely and successive, finding that even assuming *Miller* constituted a significant change in the law, *Miller* did not apply to Bassett's case. Specifically, the court found:

> in *Miller*, the Supreme Court ruled that a mandatory life sentence without the possibility of parole was unconstitutional. Hence, the judge or jury must have the opportunity to consider mitigating circumstances such as age prior to imposing either life with the possibility of parole or the harshest sentence possible for a juvenile, that being natural life without the possibility of parole.
>
> In the instant case, the record demonstrates that the age of the Defendant was given "considerable weight" as a mitigating factor. Even after considering defendant's age as a mitigating factor, the Court chose to sentence him to the term of his natural life pursuant to A.R.S. § 13-752. Since the sentence of natural life without the possibility of parole was not statutorily mandated and the Court had the discretion to order life with the possibility of parole but chose not to, defendant has failed to demonstrate that *Miller* is a significant change in the law as applied to his case.

(7/15/13 ME.)

On July 17, 2013, Bassett filed a motion for rehearing pursuant to Rule 32.9(A). A request for leave to file an amicus and an amicus brief were filed in support of Bassett's motion for rehearing. The PCR court stated that, because it was not determined whether *Miller* had retroactive application, it could only address the motion for reconsideration pursuant to Rule 32 only on the sentence of life with the possibility of release after 25 years, not the natural life sentence. (8/5/13 ME.) Furthermore, the court reasoned, even if *Miller* applied retroactively, "the sentencing judge *did* take into account the age of the defendant as part of the sentencing determination" and "[the *Miller*] *requirements regarding mitigation have been met in this matter* and there is no basis for defendant to be

relieved from the natural life sentence that was imposed upon him." (*Id*., emphasis added.)

The court appointed counsel to file a brief on the retroactive applicability of *Miller* to sentence of life with the possibility of release after 25 years. (*Id.* at 3.) Counsel filed a brief arguing *Miller* applied retroactively to mandatory life-without-parole sentences. The State argued *Miller* was not applicable to Bassett's natural life sentence, *Miller* did not apply retroactively, and the trial court considered Bassett's age when it imposed a discretionary natural life sentence. After accepting another amicus brief supporting Bassett and hearing oral argument,[5] the PCR court denied relief on his claim that his life with the possibility of release sentence was unconstitutional on the condition that DOC set a specific date for Bassett's parole eligibility when A.R.S. § 13-716 became effective. (5/14/14 ME.)

On petition for review, Bassett argued that H.B. 2593 entitled him to a full resentencing. *State v. Bassett*, WL 3211766, at ¶ 5 (Ariz. Ct. App. 2016). The Court of Appeals disagreed and denied relief, reasoning that where *Miller* applies, juvenile offenders may be considered for parole, rather than be resentenced. *Id*. at ¶ 6 (citing *Montgomery v. Louisiana* 136 S. Ct. 718, 736 (2016)).

On September 13, 2017, Bassett, represented by counsel, filed a PCR petition pursuant to Rule 32.1, arguing that *Miller* and *Montgomery*, 136 S. Ct. 718 (2016), constituted a significant change in the law entitling him to relief and resentencing. (9/13/17 PCR Pet.) Relying on *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) and *State v. Valencia*,

[5] Before the PCR court heard argument on the retroactivity of *Miller*, H.B. 2593 was passed, "establishing parole eligibility for juveniles sentenced to life imprisonment." *State v. Bassett*, WL 3211766, at ¶ 4 (Ariz. Ct. App. 2016).

241 Ariz. 206 (2016), Bassett contended that *Miller* "as expanded by *Montgomery*" instructs how sentencing courts are supposed to consider a juvenile defender's age and whether a juvenile's crime reflects "permanent incorrigibility." (*Id*. at 4-5.) Bassett argued although the 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.'" (*Id*.) Bassett asserted that the record in his case was insufficient and 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*.) Bassett contended that although his age was given some weight this does not mean it "was given the required constitutionally mandated weight required by *Miller*." (*Id*. at 6.)

On February 12, 2018, in its PCR 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." (2/21/18 PCR Resp.) The PCR court set the matter for a Rule 32 evidentiary hearing. (6/22/18 ME.) Since then this case has been pending a hearing or stayed based on *Mathena v. Malvo* and then *Jones v. Mississippi*.

On April 22, 2021, the United States Supreme Court ruled that "*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* held that *Miller* applied retroactively to cases on collateral review"—no more. *Jones*, 141 S. Ct. at 1314-16 (emphasis added).

II. LAW AND ARGUMENT

The pending evidentiary hearing should be vacated and Bassett's PCR petition dismissed because *Miller* and *Montgomery*, as clarified by *Jones*, 141 S. Ct. 1307, do not constitute a significant change in the law applicable to Bassett's case that would probably overturn his natural life sentence. 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)).

This Court should summarily dismiss a PCR petition if it finds a defendant's claims do not present a material issue of fact or law entitling the defendant to relief. Ariz. R. Crim. P. 32.6(d). To obtain an evidentiary hearing on non-precluded claims presenting a material issue, a defendant must present a "colorable" claim that requires further factual development. *See* Ariz. R. Crim. P. 32.6; *State v. Borbon*, 146 Ariz. 392, 399 (1985). A colorable claim consists of factual allegations that, if true, would have changed the outcome of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63 (1993); *State v. Schurz,* 176 Ariz. 46, 58 (1993).

Here, Bassett's PCR petition does not present a colorable claim entitling him to an evidentiary hearing, nor a material issue of fact or law entitling him to postconviction relief because after *Jones* it is clear that *Miller* is not a significant change in the law applicable to Bassett's case that would probably overturn his natural life sentence. *See Jones*, 141 S. Ct. at 1314-16. Bassett's natural life sentence is constitutional because it was not

mandatory and the sentencer considered Bassett's "youth and attendant characteristics" before imposing the sentence. *Jones*, 141 S. Ct. at 1316. **This is all that *Miller* requires**. *Id*. ("*Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence."). *See also State v. Soto*, 250 Ariz. 1, ¶¶ 19-23 (2020) (agreeing with Justice Bolick's concurrence in *Valencia* and Justice Scalia's dissent in *Montgomery* that *Miller*'s holding was narrow and requires only that a trial court "consider 'an offender's youth and attendant characteristics' before sentencing a juvenile to life without the possibility of parole") (quoting *Miller*, 567 U.S. at 483).

Miller does not require a "sentencer to make a separate finding of permanent incorrigibility before imposing" a natural life sentence and "*Montgomery* did not purport to add to *Miller*'s requirements." *Id*. *Montgomery* **only** made *Miller* retroactive to cases on collateral review and no more. *Id*. at 1314, 1321. Consequently, *Tatum*'s and *Valencia*'s interpretation of *Montgomery* as clarifying or broadening *Miller* was incorrect and implicitly overruled by *Jones*.

In *Valencia*, the State argued that *Miller* did not constitute a significant change in the law pursuant to Rule 32.1(g) because *Miller* "requires only that the sentencing court consider the juvenile's age as a mitigating factor before imposing a natural life sentence." 241 Ariz. at 209, ¶ 16. The *Valencia* Court found *Montgomery* refuted this argument "by expressly holding that *Miller* reflects a substantive rule and noting '[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 largely 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 Sotomayor's concurrence in *Tatum*, *Valencia* found the petitioners were entitled to an evidentiary hearing because they made colorable claims for relief based on *Miller*. 241 Ariz. at 209, ¶ 16. Because *Jones* clarified *Montgomery* **only** made *Miller* retroactive and no more, 141 S. Ct. at 1314, 1321, both *Tatum*'s and *Valencia*'s reliance on *Montgomery* for any finding beyond retroactivity was incorrect and implicitly overruled by *Jones*.[6]

As a result, Bassett's PCR argument that he is entitled to resentencing based on *Tatum*, *Valencia*, and *Miller*, "as expanded by *Montgomery,*" and the State's concession that Bassett was entitled to an evidentiary hearing pursuant to *Valencia*, 241 Ariz. 206, no longer provides a basis for an evidentiary hearing or PCR relief in this case. That is, Bassett is not entitled to an evidentiary hearing or PCR relief based on *Miller* because the court's discretionary sentence of natural life for Tapia's murder after considering Bassett's age,

[6] *Valencia* likewise erroneously relied on *Montgomery* for the proposition that "sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" 241 Ariz. at 209, ¶ 14 (quoting *Montgomery*, 136 S. Ct. at 734.) After *Jones*, any reliance on *Montgomery* beyond mere retroactive application of *Miller* is incorrect. All that *Miller* requires is a "hearing where youth and its attendant characteristics are considered as sentencing factors [] to separate those juveniles who may be sentenced to life without parole from those who may not." *Jones*, 141 S. Ct. at 1317-18 (quoting *Montgomery*, 577 U.S. at 210.) That is precisely what happened in this case.

youth, and attendant characteristics is "constitutionally sufficient" and satisfies *Miller*. *See Miller*, 567 U.S. at 477-78 (mandatory life without parole prohibited because it precludes consideration of a juvenile's "chronological age and hallmark features"); *Jones*, 141 S. Ct. at 1314 (a "State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient").

Jones clarified that *Miller* held a natural life sentence for juveniles is constitutional "only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment." 141 S. Ct. at 1314 (quoting *Miller*, 567 U.S. at 476.) That is precisely what happened here—the trial court had discretion to consider: 1) whether or not to impose a lesser punishment (and did in fact impose a lesser punishment for Pedroza's murder) and 2) Bassett's youth and attendant characteristics.

First, when Bassett was sentenced, A.R.S. § 13-703 provided sentencing options of death or life, and life could be natural life or life without eligibility for release "until the completion of the service of twenty-five calendar years." The trial court was fully aware of these sentencing options and its discretion to impose such sentences. In its sentencing memorandum, the State noted "the range of sentencing for each count is life without the possibility of parole for 25 years or natural life." (Exh. B at 2, 4-6, 9.) Bassett's sentencing memorandum also made clear he believed the trial court had discretion to sentence him to life with the possibility of parole after 25 years. (Exh. D at 9.) At the sentencing hearing, the court stated because "[t]here was no presumptive sentence for first degree murder when the death penalty is not allowed," he would "approach this with an open mind." (Exh. C at 39.) Moreover, Bassett's sentences themselves demonstrate that the trial court believed

it had discretion to sentence Bassett a sentence less than natural life because it sentenced Bassett to life with the possibility of parole after 25 years for Pedroza's murder. (*Id*.)

Furthermore, the PCR court already found Bassett failed to demonstrate that *Miller* was a significant change in the law applicable to his case when it denied his PCR petition in 2013 before *Montgomery* was decided. Specifically, the PCR court held:

> Even after considering defendant's age as a mitigating factor, the Court *chose* to sentence him to the term of his natural life pursuant to A.R.S. § 13-752. Since the *sentence of natural life* without the possibility of parole was *not statutorily mandated* and *the Court had the discretion* to order life with the possibility of parole but *chose* not to, defendant has failed to demonstrate that *Miller* is a significant change in the law as applied to his case.

(7/15/13 ME, emphasis added.)

Thus, Bassett is not entitled to an evidentiary hearing or PCR relief because the court had discretion to sentence Bassett to a sentence less than natural life, and in fact did sentence him to a sentence less than natural life for Pedroza's murder, and thus, *Miller* was not a significant change in the law applicable to his case. Indeed, *Jones* essentially put Bassett's case back in the position it was in, *before Montgomery*, *Tatum*, and *Valencia* were decided and his 2017 PCR petition was filed, when the PCR court found *Miller* not applicable to Bassett's natural life sentence and dismissed his PCR petition. (7/15/13 ME.)

Second, even assuming arguendo *Miller* applies to Bassett's case, as detailed above, this Court had discretion to consider, and did consider, Bassett's mitigation, including his age, youth, and attendant characteristics, before sentencing him to natural life. This satisfied *Miller*, 567 U.S. at 477-78, and was "constitutionally sufficient." *Jones*, 141 S. Ct. at 1313. Indeed, in denying Bassett's motion for rehearing on his PCR petition, the

PCR court already found "the sentencing judge *did* take into account the age of the defendant as part of the sentencing determination" and "[the *Miller*] *requirements regarding mitigation have been met in this matter*." (8/5/13 ME, emphasis added.)

Miller describes a juvenile's age, youth, and attendant characteristics as hallmark features that may include: "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. Here, before sentencing, 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.

Specifically, 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 of 16 and a half was a mitigating factor under A.R.S. § 13-703(G)(5) and that in "addition to chronological age, this factor requires consideration of the Defendant's 1) level of intelligence, 2) maturity, 3) participation in the murder, and 4) criminal history and past experience with law enforcement." (Exh. B at 6 (citing *Clabourne*, 194 Ariz. 379); Exh. C at 16, 21.) Applying these considerations to Bassett, the State described Bassett as extremely intelligent and not immature or impulsive, as mature enough to handle his own money, attend school full time and work in the summer, as a sexually responsible ladies' man, as the sole participant in

the murders, and detailed that his three juvenile referrals were for minor infractions. (Exh. B at 6-7.) The State asked the court to consider all this information in determining the weight to give Bassett's age in mitigation. (Exh. B at 9.)

Defense counsel emphasized Bassett "was a child at 16 years old when he committed the crimes." (Exh. C at 27.) He explained 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." (*Id*.) Bassett argued because he was 16 years old he did not possess the "impulse control of an adult." (*Id.* at 7.)

Bassett quoted extensively from *Roper*, 543 U.S. 55, in his sentencing memorandum and noted the "profound differences between adults and juveniles and the ramifications those difference[s] makes when addressing juvenile crime." (Exh. D at 7.) Quoting *Roper*, Bassett noted 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, and "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient [and] as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside," any conclusion that a juvenile is among the worst offenders is suspect. (*Id*. at 7-8 (quoting *Johnson*, 509 U.S. 350.)

Information was presented about Bassett's maturity and potential for rehabilitation. Defense counsel argued that although Bassett's steady employment reflect 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. (Exh. C at 27-29.) Bassett's steady employment and advanced school classes prior to the crimes and his self-improvement after incarceration, however, supported his potential for rehabilitation. (Exh. D at 3, 9, 28-37; Exh. B at 6.) Bassett argued that he had the tools to better himself and asked he be given an opportunity to "outgrow[] his character flaws." (Exh. C at 30-31.) Bassett argued he was remorseful and apologized to the victims in allocution. (Exh. D at 9; Exh. C at 31-35.) Several people wrote letters in support of Bassett stating he was kind, generous, a hard worker, was taken advantage of because of his kindness, and if given a chance could show he is a good person. (Exh. D at 51-57; 1/26/06 Notice.)

Information was presented that Pedroza was allegedly a negative influence on Bassett. Mr. Alexander told the court at sentencing that Bassett was just a 16-year-old kid who was preyed upon by Joseph and others like him. (Exh. C at 22-24.) Likewise, Bassett's girlfriend told the court Bassett made a bad decision that night, was only 16-years-old, and was scared. (*Id*. at 26.) Counsel emphasized that *Roper* determined juveniles are more susceptible to negative influences than adults, like what occurred here with Bassett and Pedroza. (*Id*. at 30.) The State countered that the Alexanders were a positive influence on Bassett, and the jury rejected his self-defense claim. (Exh. B at 8.)

Information was presented about Bassett's past conduct and contact with police. The State noted that Bassett was reputed to carry a gun, had been in a lot of fights and in counseling and anger management classes, and was nicknamed "Little Scrapper" for fighting. (Exh. B at 8-9.) The State also presented information about Bassett's ability to

deal with police including evidence of his prior juvenile referrals and the fact that Bassett requested the presence of his mother before he was questioned by police. (*Id*. at 8.)

Bassett presented information about his family background. Bassett was kidnapped by his father when he was 2 years old and raised by friends after his mother did not want to assume responsibility for him. (Exh. D at 2.) Bassett's father was charged and convicted for this kidnapping. (*Id*. at 2, 11-27.) Counsel argued Bassett's PTSD, hypervigilance, and "exaggerated startle response," resulted from his childhood background—abuse by his father and exposure to domestic violence—and that he stopped taking his medication, which likely caused him to overreact on the night of the shootings. (*Id*. at 9, 38-44.) Counsel argued Bassett's PTSD compounded his impulsivity. (Exh. C at 29.) Evidence showed, however, that although Bassett's mother did not raise him, the Alexanders gave Bassett a home, food, a job and supported him throughout the trial and sentencing.

Finally, defense counsel argued a juvenile's character is not fully formed at age 16. (Exh. C at 30.) Quoting Justice Kennedy's *Roper* opinion, defense counsel argued, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient. As individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (*Id*.)

Before sentencing, the trial court heard the evidence presented at trial, 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, and heard the evidence and argument at the sentencing hearing. (Exh. C.) The State recognized Bassett's age was mitigating but argued natural life sentences were still appropriate based on the

aggravating factors. (*Id*. at 16, 21.) The court gave Bassett's age considerable weight but tempered it with Bassett's intelligence and steady employment, which it was permitted to do. (*Id*. at 37-38.) The court also considered as factor's in Bassett's maturity, his contact with the juvenile justice system, that he was given the opportunity to seek help and did not, his diagnosis of PTSD and that he stopped taking his medications, his family support, and his statement of remorse. (*Id*. at 38.) 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." (*Id*. at 39.)

Accordingly, the trial court's discretionary sentencing of Bassett was "constitutionally sufficient" and satisfied *Miller*. That is, even if *Miller* applied to Bassett's case, it would not probably overturn his natural life sentence because the trial court satisfied *Miller* when it considered his youth and attendant characteristics, how children are different than adults, and possible rehabilitation in discretionarily sentencing him to a natural life for Tapia's murder. *See Jones*, 141 S. Ct. at 1313, 1316. That is all *Miller* requires.

Miller does not require the court to consider whether Bassett's crime reflects "permanent incorrigibility." (9/13/17 PCR Pet at 4-5.) Nor does it require the court to make "a finding that his crime 'reflects irreparable corruption,'" or "address whether his crime 'reflects transient immaturity.'" (*Id*.) Indeed, *Jones* clarified that *Miller* does *not* require the court to make any formal or specific findings, use magic words, or make an "on-the-record sentencing explanation." 141 S. Ct. at 1319-21. Unless the record affirmatively establishes otherwise, the sentencer "will be deemed to have considered the

relevant criteria, such as mitigating circumstances enumerated in the sentencing rules." *Id.*

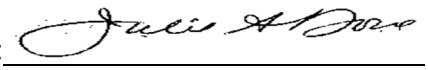
Furthermore, *Miller* does not require a certain development of the record or require the court to give a certain about of "constitutionally mandated weight" to Bassett's age. (9/13/17 PCR Pet at 5-6.) *Miller* only requires the sentencer consider "an offender's youth and attendant characteristics" before sentencing a juvenile to natural life, which the court did in this case. 567 U.S. at 483; *see also Soto-Fong*, 250 Ariz. at ¶¶ 19-23 ("a trial court must consider 'an offender's youth and attendant characteristics' before sentencing a juvenile to life without the possibility of parole") (quoting *Miller*, 567 U.S. at 483). Hence, Bassett is not entitled to an evidentiary hearing and his PCR petition should be dismissed.

III. CONCLUSION

Because the court had discretion to consider Bassett's "mitigating qualities of youth" and impose a lesser punishment of life with the possibility of release after 25 years, *Miller* is not applicable to Bassett's case. Even assuming *Miller* applies, *Miller*'s requirements were satisfied, and Bassett's natural life sentence is constitutional, because the trial court clearly considered Bassett's age and its hallmark features, how children are different than adults, and Bassett's potential for rehabilitation. Thus, Bassett is not entitled to an evidentiary hearing or postconviction relief based on *Miller* and *Montgomery*, because they do not constitute a significant change in the law applicable to his case that would probably overturn his natural life sentence and his PCR petition should be dismissed.

Respectfully Submitted August 30, 2021.

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

BY: 

Julie A. Done
Deputy County Attorney

EXHIBITS

Exhibit A Presentence Report

Exhibit B State's sentencing memorandum

Exhibit C RT 1/27/06 Sentencing Hearing

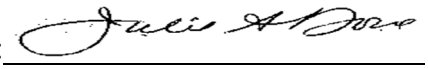
Exhibit D Defense sentencing memorandum

Copy mailed\delivered August 30, 2021, to:

The Honorable Katherine M. Cooper
Judge of the Superior Court

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APPENDIX 22

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. LONNIE ALLEN BASSETT, Defendant.	)	Case Number: CR2004-005097-001 **RESPONSE TO STATE'S MOTION TO VACATE EVIDENTIARY HEARING AND DISMISS PETITION FOR POST-CONVICTION RELIEF** Hon. Katherine Cooper

Petitioner, Lonnie Allen Basset, by and through undersigned counsel and hereby responds in opposition to the State's Motion requesting to withdraw from the evidentiary hearing to which the State conceded and to dismiss Mr. Bassett's Petition for Post-Conviction Relief. Mr. Bassett is before this Court, set for an evidentiary hearing pursuant to *Miller v.* Alabama, 567 U.S. 460, 132 S.Ct. 2455 (2012), *Montgomery v. Louisiana,* 577 U.S. 190, 136 S.Ct. 718 (2016), *Tatum v. Arizona,* 580 U.S. __, 137 S.Ct. 11 (Oct. 31, 2016)(mem.), the Eighth Amendment and Fourteenth Amendment to the United States Constitution, and the State of

Arizona's concession to an evidentiary hearing. Mr. Basset was deprived of a constitutional sentencing proceeding that adequately considered his age. The State now seeks to vacate the evidentiary hearing based upon a misinterpretation of the United States Supreme Court recent decision in *Jones v. Mississippi*, 593 U.S. __, 141 S.Ct. 1307 (2021). Petitioner requests this Court deny the State's Motion in its entirety. This Response is supported by the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 21st day of October, 2021.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of Relevant Facts and Procedural History

On June 16, 2004, Petitioner Lonnie Bassett was riding in the backseat of a vehicle driven by Ms. F. Tapia. Mr. J. Pedroza was seated in the front passenger seat. During the ride, Petitioner pulled out a shotgun and fatally shot J. Pedroza (Count 2). He then fired two shots, fatally wounding F. Tapia (Count 1). The vehicle crashed into a light pole. Petitioner and another passenger were able to get out of the vehicle and walk away but Mr. Bassett returned to retrieve the shotgun. The following day, officers apprehended Mr. Bassett who was sixteen years old when the incidents took place.

A Maricopa County Grand Jury indicted Petitioner on two counts of first-degree murder. A notice of intent to seek the death penalty was struck after the United States Supreme Court, in *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183 (2005), found imposition of

the death penalty on juveniles to be unconstitutional. Thereafter Mr. Bassett exercised his right to a jury trial where the jury convicted him of both counts. On January 27, 2006, the trial court sentenced Petitioner to a prison term of natural life relating to the death of F. Tapia (Count 1). Petitioner was sentenced to a consecutive life sentence with the possibility of parole after serving twenty-five years for the death of J. Pedroza (Count 2). Both convictions and sentences were affirmed on appeal.

Two Petitions for Post-Conviction Relief have previously been filed. Petitioner's first Post-Conviction action concluded after counsel filed a Notice of Review on July 15, 2008 and Mr. Basset declined to file a *pro se* Petition. On June 20, 2013, Petitioner filed a successive Notice of Post-Conviction Relief claiming a substantive change in the law, based upon *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012), entitled him to relief. The PCR court dismissed the action finding it untimely, successive, and that Petitioner's age was given "considerable weight" as a mitigating factor. The Arizona Justice Project filed a brief of *Amicus Curiae* in support of Petitioner's motion for reconsideration. The Court ordered supplemental briefing addressing the retroactivity of *Miller* as to *Count 2* only, the sentence of life with the possibility of release. The Court concluded *Miller* applied retroactively and prohibited mandatory life sentences, however, denied relief as it found Arizona laws enacted in 2014 resolved the "residual issues" of those sentenced to life imprisonment by establishing parole eligibility for offenses committed before 2014. A Petition for Review and Motion for Reconsideration were denied by the Court of Appeals, Division II and Petition for Review denied by the Arizona Supreme Court.

On January 18, 2017, Mr. Bassett filed a Notice of Post-Conviction Relief and subsequent Petition raising the unconstitutional imposition of a natural life sentence for *Count 1*

where the sentencing court failed to adequately consider Petitioner's age of minority, impulsivity and amenability to rehabilitation. The *Miller* requirements were not satisfied with the record silent in respect to key constitutional components necessary to survive scrutiny under *Miller, Montgomery, and Valencia.* Mere acknowledgment of Petitioner's minor age did not meet the constitutionally required findings of irreparable corruption and transient immaturity. The State conceded that Petitioner was entitled to an evidentiary hearing in its February 12, 2018 pleading. Petitioner, however, replied that a re-sentencing, not an evidentiary hearing, was warranted. The matter was originally set for a re-sentencing hearing but, through *Nunc Pro Tunc* Order, the setting was changed to an evidentiary hearing.

A stay of proceedings was granted June 4, 2019 while *Mathena v. Malvo* and *Jones v. Mississippi* were pending before the United States Supreme Court with issues germane to this case. *Mathena v. Malvo*, Docket No. 18-217, was dismissed by stipulation after state law was enacted allowing juveniles who were previously sentenced to life-without-parole to become eligible for parole after serving twenty years in prison. The Supreme Court decided *Jones v. Mississippi*, 593 U.S. __, 141 S. Ct. 1307 (2021), which addressed whether the Eighth Amendment required a sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. Following the Court's decision, the state filed a request that Petitioner's evidentiary hearing be vacated and his Petition be dismissed.

II. LEGAL ARGUMENT

Mr. Bassett is entitled to an evidentiary hearing to determine if the sentencing court complied with constitutional mandates when imposing a life-without-parole sentence upon a

juvenile homicide offender. The *Jones v. Mississippi* decision provides absolute clarity that Petitioner was deprived of a constitutional sentencing proceeding because the law in effect was not discretionary but required mandatory life sentences and the court failed to adequately consider Mr. Bassett's youth and attendant characteristics. 141 S.Ct. 1307 (2021).

1. Mr. Bassett's sentence of life-without-parole (Count 1) was imposed after Arizona had abolished parole making life sentences mandatory with any opportunity for parole illusory in direct violation of *Miller* and *Jones*

A sentencing scheme, such as that in effect when Mr. Bassett was sentenced, that fails to afford the court the discretion to impose a sentence that carries the possibility of parole fails to meet the constitutional requirements as recently set forth by the United States Supreme Court. *See Jones v. Mississippi*, 141 S.Ct. 1307 (2021). In 2006, when Mr. Bassett was sentenced, parole was an illusory concept in Arizona as it had been abolished for crimes committed after January 1, 1994, twelve years earlier[1]. Any sentence of life with the possibility of parole contained no opportunity or mechanism for parole. Both *Miller* and now *Jones* unequivocally require discretionary life sentencing schemes in order for a sentence of life-without-parole to comport with the constitutional guarantees of the Eighth Amendment.

a. *Mandatory* sentences of life-without-parole for juvenile homicide offenders have consistently been found to violate the Eighth Amendment of the United States Constitution

"The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions." *Miller*, 132. S.CT. 2455, 2464,

[1] "The State of Arizona had abolished parole for crimes committed after January 1, 1994. The abolition was done in two steps. First, the authority of the Board of Executive Clemency to grant paroles was abolished for crimes after January 1, 1994. Second, a system of earned release credit was enacted in its place. The system of earned release credits cannot be applied to a life sentence." (1-ER-12 to 1-ER-13 (*citing State v. Vera*, 334 P.3d 754, 758 (Ariz.Ct. App. 2014)))

567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183, 1192 (2005)). The United States Supreme Court declared, in *Roper v. Simmons*, that "[t]he Eighth and Fourteenth Amendments [to the United States Constitution] forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." 125 S. Ct. 1183 (2005). Thereafter, in *Graham v. Florida*, the Court held that the Eighth Amendment forbids "the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. 48, 82, 130 S. Ct. 2011, 2045 (2010).

The Court next decided *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012). Noting that "*Roper* and *Graham* establish[ed] that children are constitutionally different from adults for purposes of sentencing," *id.* at 471, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id*. at 479 (citing *Graham*, 560 U.S. at 75). While the Court still permitted *non*-mandatory life-without-parole sentences for juveniles, the Court "require[d the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

The *Miller* decision has twice since been upheld by the United States Supreme Court; first in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), followed by the most recent decision in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021). In *Montgomery v. Louisiana*, the Court concluded that the holding in *Miller* was a substantive rule of law that applied retroactively on collateral review. 136 S.Ct. 718, 735-736 (2016). *Montgomery* echoed *Miller's* language that consideration for diminished culpability and greater capacity for rehabilitation "underlay the Court's holding in *Miller* that mandatory life-without-parole sentences for children pose too great a risk of disproportionate punishment." *Id*. at 735 (*citing Miller*, 132 S.Ct. at 2460).

The Court, in *Jones v. Mississippi*, concluded the substantive rule, life-without-parole is a constitutionally impermissible sentence for children whose crimes reflect transient immaturity, was given sufficient constitutional effect if a sentencing judge has discretion to impose a lesser sentence of life-with-parole [2]. 141 S.Ct. 1307 (2021). "The key assumption of both *Miller* and *Montgomery* was that a discretionary sentencing scheme allows the sentencing judge 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." *Id.* at 1318. The Court specifically stated its decision in *Jones* "carefully follows both *Miller* and *Montgomery*," and did not implicitly overrule those decisions[3]. *Id.* at 1321. The Supreme Court did not retreat from *Miller*'s core holding, a sentence of life-without-parole imposed upon a juvenile convicted of homicide under a *mandatory* sentencing scheme violates the Eight Amendment. "*Miller* holds that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding." *Id.*

[2] In *Jones*, the defendant's original life-without-parole sentence had already been reversed in light of *Miller* with the matter remanded for re-sentencing. The re-sentencing judge had discretion to impose a sentence that was less severe than life-without-parole.

[3] *Miller:* "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S.Ct. at 2460 (emphasis added);
Montgomery: "Miller held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 136 S.Ct. at 724 (*citing Miller*, 132 S.Ct. at 2460) (emphasis added, cleaned up);
Jones: "And then in *Miller* in 2012, the Court allowed life-without-parole sentences for defendants who committed homicide when they were under 18, but only so long as the sentence is not mandatory—that is, only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment." 141 S. Ct. at 1314 (*citing Miller*, 132 S.Ct. at 2471) (*emphasis added*).

b. Arizona's sentencing laws in 2006 required Petitioner to serve mandatory life-without-parole sentences for first degree murder, even though the sentencing statute now allows for the possibility of "release" after serving 25 years

Arizona sentenced Mr. Bassett under a mandatory natural life sentencing scheme that *Jones* has clearly found that to be unconstitutional. In 1993 the Arizona legislature abolished the Arizona parole system "for all offenses committed on or after January 1, 1994." *Chaparro v. Shinn*, 248 Ariz. 138, 140, 459 P.3d 50, 52 (Ariz. 2020)(*citing* Ariz. Rev. Stat. § 41-1604.09). Despite the abolition, Arizona enacted law that provided for three potential sentences upon conviction of first degree murder: 1) death, 2) imprisonment for natural life without the possibility of commutation, parole … or release on any basis or 3) imprisonment for life without the possibility of release on any basis for a period of 25 years. A.R.S. §§ 13-703, 13-703.01 (2006).

In *Lynch v. Arizona*, the Court concluded the only kind "of release" available to a defendant sentenced to life with the possibility of "release after 25 years" was executive clemency. 136 S. Ct. 1818, 1819 (2016)(*per curiam).* The Supreme Court found the possibility of commutation was not a constitutionally adequate substitute for the possibility of parole. *See Solem v. Helm*, 463 U.S. 277, 303, 103 S.Ct. 3001, 3024 (1983)("we explicitly have recognized the distinction between parole and commutation in our prior cases. . . rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals."); *Graham v. Florida*, 130 S.Ct. 2011, 2020, 560 U.S. 48, 57(2010)("Because Florida has abolished its parole system...a life sentence gives a defendant no possibility of release unless he is granted executive clemency."); *id.* at 70 ("the remote possibility of [executive clemency] does not mitigate the harshness of the [life] sentence."). Accordingly, Mr. Bassett's sentencing judge did not have any discretion as a matter of state law to impose a sentence that carried any possi-

bility of parole whatsoever. A life sentence was mandatory under the statutory sentencing scheme at the time his sentence was pronounced.

The United States Supreme Court has acknowledged Arizona's mandatory sentencing scheme in cases such as Mr. Bassett. In *Miller*, the Supreme Court stated "29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court." 567 U.S. at 482, 132 S.Ct. at 2477. The Court furthered that "[o]f the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age." *Id.* at 486. Arizona was counted as one of the twenty-nine jurisdictions with mandatory life-without-parole sentences for such juvenile homicide offenders. *Id.* n.13.

Arizona has been identified as having had a mandatory, not discretionary, sentencing scheme for some juvenile homicide offenders by the United States Supreme Court. The *Jones* holding clearly requires a discretionary sentencing scheme for a life-without-parole juvenile sentence to meet constitutional muster. Mr. Bassett's sentencing judge could not have legally imposed a sentence that carried any possibility of parole. Because of that, the sentencing laws under which Mr. Bassett was sentenced were mandatory, not discretionary, as a matter of state law. Mr. Bassett was sentenced under a mandatory sentencing scheme that prevented the judge from pronouncing, after exercising discretion imparted by state law, a sentence that carried any actual possibility of parole; the sentences could not have been anything other than life-without-parole. Mr. Bassett's sentences ran afoul of the protections he is guaranteed in the Eighth Amendment

c. Mr. Bassett was not sentenced under a discretionary sentencing scheme in violation of the Eighth Amendment of the United States Constitution

The state contends the sentencing scheme in place when Mr. Bassett was sentenced was "discretionary" and therefore constitutional. In support of this erroneous argument, the state asserts a life-without-parole sentence is not "mandatory" under *Miller* if the sentencer is permitted to consider youth and attendant characteristics and if different sentences are possible. (Opening Brief, P16). The state claims, contrary to existing law, that the sentencing judge exercised discretion because "different sentences" were possible and he elected to impose two different sentences upon Mr. Basset, one a life sentence with the possibility of release after serving twenty-five years (Count 2) and the other a natural life sentence (Count 1). (*Id.* at 16-17). But the state fails to meaningfully engage with the constitutional implications of the Arizona Legislature's decision to abolish the parole scheme for all crimes, including those of Mr. Bassett, committed after January 1, 1994. The practical implication of either sentence the judge imposed was a natural life sentence as no parole system existed at the time of sentencing. The State has not provided any legal argument that counters the Supreme Court finding in *Miller* that found Arizona to be a state which had a mandatory sentencing scheme when Petitioner was sentenced.

The state asserts "**all that *Miller* requires**" is that a sentencer considering an offender's youth and attendant characteristics before imposing a discretionary sentence. (Opening Brief at 16). This, however, is only a portion of the *Miller* holding. The Court vacated the sentences imposed in *Miller* as the state law prevented the imposition of a sentence that allowed for the possibility of parole. In so doing, the Court held "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate the principal of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Miller*, supra at 2484. *Miller* also holds a state law cannot mandate that ju-

veniles convicted of murder will never be released from prison on parole and thereby require a judge to impose that sentence. In the instant case, Mr. Bassett was sentenced pursuant to an unconstitutional sentencing scheme. Even had his sentencer mistakenly believed parole was available, the sentence could not have been implemented. Arizona's law unconstitutionally prevented the imposition of a sentence that allowed for the possibility of parole.

Miller squarely established a life-without-parole sentence imposed where a judge lacks the discretion to impose any other sentence that would result in natural life violates the Eighth Amendment. Because a life with parole sentence would have been illusory as a matter of Arizona law, Mr. Bassett's sentence provided no discretion to the sentence to impose less than a natural life sentence which clearly violates the procedural rule announced in *Miller* and affirmed in the *Jones* holding as well as the Eighth Amendment guarantee to be free from cruel and unusual punishment.

d. Arizona's Miller-fix legislation (A.R.S. § 13-716) does not apply to Mr. Bassett nor cure the constitutional deficiency of the mandatory sentencing law in effect when he was sentenced

The state asserts Petitioner is not entitled to relief because the 2013 PCR court dismissed Mr. Bassett's Petition after concluding the sentencing court had discretion and exercised that discretion. In support of its assertion, the state cited to a July 15, 2013 Minute Entry, the state argues the judge's conclusion as to Count 1 that "the sentence of natural life without the possibility of parole was not statutorily mandated and the Court had the discretion to order life without the possibility of parole but chose not to…" (Opening Brief, P17 (*quoting* ME dated 7/15/13)). This reliance, however, is misplaced.

The state fails to provide the framework of the PCR court's ruling. While the PCR court initially dismissed the 2013 Petition (ME dated 7/15/13), after a motion for reconsideration and

the filing of an *Amicus Curiae* brief by the Arizona Justice Project, the court appointed counsel for the Rule 32 proceeding and ordered briefings on the issue of the retroactive applicability of *Miller* and any cognizable claims for relief. (ME dated 8/1/13). After briefing and oral argument, the PCR court determined that *Miller* applied retroactively and was a significant change in the law before declining to find Petitioner eligible for re-sentencing. (*Id.).* In so concluding, the PCR court discussed the enactment of HB 2593 (A.R.S § 13-716) and concluded it "closed the Miller gap" with the intent "to reinstate parole for juvenile offenders sentenced to life with the possibility of release, including those sentenced to before the law becomes effective." (ME dated 05/09/14). The 2013 PCR court further concluded "Arizona did not have mandatory life sentencing for juveniles at the time of sentencing and allowed for commutation or clemency" and denied relief. (*Id.* at P8).

The PCR court was wrong in its finding as is clearly illustrated in the *Miller* ruling that directly contradicted the PCR court, finding Arizona did in fact have a mandatory sentencing statute in effect. 567 U.S. at 2477, 2481 n.13. As recently as 2021, Arizona courts have been recognized for their errors when addressing the deceptive concept of parole and discretionary sentencing as to which Mr. Bassett's prior PCR court is included. "Despite the elimination of parole, prosecutors continued to offer parole in plea agreements, and judges continued to accept such agreements and impose sentences of life with the possibility of parole." *Viramontes v. Att'y General*, No. 4:16-cv-151-TUC-RM, 2021 WL 977170, at *1 (D. Ariz. Mar. 16, 2021). "This practice resulted from "an error so widespread among attorneys and judges that Arizona enacted new legislation… in response." *Viramontes v. Ryan*, No. 4:16-cv-151-TUC-RM, 2019 WL 568944, at *7 (D. Ariz. Feb. 12, 2019).

The PCR court erroneously denied relief as to Count 2 and failed to address the constitutional flaws of mandatory sentencing as it related to Count 1 when finding A.R.S. § 13-716 cured constitutional deficiencies and ordered a parole eligibility date be set as to Count 2. (Opening Brief, P11 (*citing* ME dated 5/14/14)). In 2014, two years after *Miller* was decided, the Arizona Legislature enacted A.R.S. § 13-716 that "appears to provide a juvenile parole eligibility for … juvenile offenders after their mandatory minimum terms have been served." *State v. Vera*, 235 Ariz. 571, 573, 334 P.3d 754, 756 (2014). This statute, however, only "validated the possibility of parole for those juveniles whose sentences illegally purported to allow parole." Mr. Bassett was sentenced on two matters; the first to a sentence that illegally purported to provide a mechanism for parole and the second, a natural life sentence that could not be made constitutionally sufficient under the legislative action resulting in A.R.S. § 13-716.

The *Jones* decision leaves no doubt that the sentencing judge must have the discretion to impose a parole eligible offense *at the time of* the sentencing hearing. ARS § 13-§ 716 did not make all juvenile homicide offenders eligible for parole as *Jones* mandates. ARS § 13-716 only applies to those sentences where a juvenile was sentenced to life *with* the possibility of parole after serving twenty-five years. Thus, A.R.S § 13-716 converts only otherwise lawful sentences into *Miller*-compliant sentences, not otherwise unlawful ones. As such, Petitioner is not precluded from bringing forth his argument to which *Jones, Miller,* and *Valencia* apply. *See Valencia*, 241 Ariz. 206, 210, 386 P.3d 392, 396 (Ariz. 2016) (A.R.S. § 13-716 did not cure any *Miller* violations for "inmates serving natural life sentences for murders committed by juveniles.").

e. Mr. Bassett is entitled to an evidentiary hearing to determine if his sentence is constitutional and failure to permit such hearing raises an Equal Protection violation

The Arizona Supreme Court held, in *State v. Valencia*, that those who were sentenced to natural life as juveniles are entitled to evidentiary hearings to determine whether their sentences are unconstitutional under *Miller*. 241 Ariz. 206 (2016); *State v. Cruz*, 218 Ariz. 149 (2008). The Court found *Miller* constituted a "significant change in the law for purposes of Rule 32.1(g)" and recognized that the U.S. Supreme Court in *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016), had summarily vacated and remanded several Arizona appellate courts' decisions who had rejected claims for post-conviction relief where the state asserted similar arguments as put forth today. 241 Ariz. at 209. *Valencia* recognized that in *Miller* and *Montgomery*, the U.S. Supreme Court had already held that a specific finding of incorrigibility was not required, but nevertheless held that an evidentiary hearing was required to determine whether a defendant's crime reflected "transient immaturity," in which case a natural life sentence would be unconstitutional. *Id.* at 209.

The Supreme Court in *Jones* did not address *Valencia* nor overrule the decision. Valencia remains binding precedent for this Court. "[L]ower courts are bound by [Arizona Supreme Court] decisions and [the Arizona Supreme] Court alone is responsible for modifying that precedent." *Sell v. Gama*, 231 Ariz. 323, 330 ¶ 31, 295 P.3d 421(Ariz. 2013) (citing *State v. Smyers*, 207 Ariz. 314, 318 ¶ 15 n.4, 86 P.3d 370 (Ariz. 2004)). The Court specifically admonished lower courts not to "depart from binding precedent anticipating that [the Supreme Court] will overrule existing case law," and held that "[t]rial courts are required to follow the decisions of a higher court." *Id.* It is the Arizona Supreme Court that must announce when its own decisions have been overruled. Because no such reversal has been pronounced by the Arizona Supreme Court, Mr. Basset is entitled to a re-sentencing or alternatively an evidentiary hearing to determine if his sentence violates the constitutional guarantees of the Eighth Amendment and *Miller*, *Valencia*, and *Jones* holdings.

Contrary to the State's assertion, *Valencia* has not been implicitly overruled. Such a holding would raise equal protection violations under both the U.S. Constitution and the Arizona Constitution. The equal protection clause of the Fourteenth Amendment guarantees like

treatment to all persons who are similarly situated ..." *State v. Beckerman*, 168 Ariz. 451, 814 P.2d 1388 (Ariz. App. 1991). Since *Valencia* was decided, defendants similarly situated to Mr. Bassett, juveniles at the time of the offense who received natural life sentences, have already been resentenced. *See, e.g., State v. Chambers*, Pima Cty. Super. Ct. No. CR060975; *State v. Healer*, Pima Cty. Super. Ct. No. CR048232-001; *State v. Jewitt*, Pima Cty. Super. Ct. No. CR044112; *State v. Odhinnson*, Mohave Cty. Super. Ct. No. CR-98-1243; *State v. Valencia*, Pima Cty. Super. Ct. No. CR051447.

If this Court were to find *Valencia* inapplicable to cases such as Mr. Bassett, the Court would divide those individuals who, as juveniles, were sentenced to life-without-parole into two distinct classes of individuals and treat them differently with no rational basis.[4] The court would create two categories of people; those who were fortunate to come before a court for re-sentencing before the U.S. Supreme Court issued its decision in *Jones*, and those like Mr. Bassett[5]. To satisfy constitutional sufficiency, however, such a classification must further a legitimate public purpose and be applied in an even-handed manner. *Church v. Rawson Drug and Sundry Co*., 173 Ariz. 342, 350, 842 P.2d 1355, 1363 (App.1992); *State v. Nguyen*, 185 Ariz. 151, 912 P.2d 1380 (Ariz. App. 1996); *McQueary v. Blodgett*, 924 F.2d 829, 835 (9th Cir. 1991)(emphasis original). While the state has a purpose to seek punishment for those that commit crimes, the application of the review and re-sentencing is not even handed with some prosecutorial agencies agreeing to resentencing, some cases having already proceeded, and others stalled in litigation. Such arbitrary discrimination in the application of the most severe penalty possible for this group of people cannot comport with the Eighth and Fourteenth Amendments of the U.S. Constitution nor the corresponding provisions of the Arizona Constitution.

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[5]*But see, Foster v. Wash Sta. Bd., Prison Terms Parole*, 878 F.2d 1233, 1235(9th Cir. 1989) (There is "no denial of equal protection in having persons sentenced under one system for crimes committed before [a certain date] and another class of persons sentenced under a different system

2. Mr. Bassett should be permitted an evidentiary hearing to determine if the sentencing Court appropriately considered his age and attendant characteristics in light of *Miller* and *Jones*

Mr. Bassett's sentencing was constitutionally deficient. He was not afforded the opportunity to have his youth meaningfully considered to determine whether he was among the "rarest of juvenile offenders." A judge is not constitutionally required to make a particularized factual finding that a juvenile homicide offender is permanently incorrigible or to provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible. *Jones supra,* 141 S.Ct. at 1311-1314, 1316, 1318-1321. However, the United States Supreme Court, in *Jones,* unambiguously stated this decision does not overrule either *Miller* or *Montgomery* which require youth to be meaningfully considered. 141 S.Ct at 1321-22. "A sentence [must] follow a certain process – considering an offender's youth and attendant characteristics – before imposing a life-without-parole sentence." *Id.* (*quoting Miller*, 132 S.Ct. at 2478). "A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather give effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery v. Louisiana,* 136 S.Ct. 738 (*citing Miller* 132 S.Ct. at 2450). Under these precedents, Petitioner is entitled to an evidentiary hearing to determine whether his sentence runs afoul of the holdings.

a. There is no evidence the court considered the attendant characteristics specifically associated with Mr. Bassett's youth and attendant characteristics

The sentencing judge did not consider Mr. Bassett's youth and his attendant circumstances in a meaningful sentencing hearing to sufficiently meet constitutional scrutiny. The sen-

tencing judge was not presented with essential evidence as to the age and specific attendant characteristics of Mr. Bassett for consideration. Rather generalized statements about youth were provided to the court by Petitioner's counsel. In a sentencing memorandum submitted prior to sentencing, counsel merely listed Petitioner's age and then quoted three paragraphs from *Roper v. Simmons* 543 U.S. 551, 125 S. Ct. 1183 (2005) that discussed generic statements about juvenile characteristics but offered nothing specific to Mr. Bassett's attendant characteristics.

Sentencing occurred on January 27, 2006. During the hearing, the state argued that Petitioner's age had already been given consideration as a mitigating factor because the Supreme Court declared juveniles like Mr. Bassett ineligible to receive the death penalty.

> "Judge, as you know, this was alleged as a death penalty case. The only reason it isn't is because the Supreme Court said that at 16, a defendant cannot be sentenced to death. That being said, that mitigating factor of age has been taken into account by the Supreme Court." (RT 01/27/2006, P16).

The state then asked the judge to look beyond Petitioner's chronological age and to find aggravating circumstances. (*Id.* at 27-28).

The defense presented letters of support to the court in addition to a defense sentencing memorandum. Petitioner's father-figure and a girlfriend addressed the court followed by counsel and Mr. Bassett himself. It is important to note what was not presented to the court regarding Lonnie Bassett to fully comprehend the unconstitutional inadequacies of the information the court was supplied when attempting to consider Petitioner's youth and attendant characteristics.

b. The sentencing court was not presented evidence specific to Mr. Bassett's age and the mitigating characteristics he possessed associated to his youth

Sentencing was completely devoid of any specific evaluation or discussion of Mr. Bassett's actual psychological age and attendant characteristics associated with that age, let alone those of a sixteen year old male. No professional psychological evaluations were ever conducted of Mr. Bassett nor presented to the court in anticipation of sentencing. The state even pointed out to the court that "[t]here is no current psychological evaluation." (RT 01/27/2006, P19).

Counsel failed to have any sort of forensic evaluation or assessment of Mr. Bassett to discuss his risk to reoffend and plan for risk management. Counsel failed to employ any sort of forensic mental health expert, forensic social worker, forensic psychiatrist or psychologist to examine Petitioner and make findings for the court about Petitioner's psychological age and characteristics he displayed that would mitigate his guilt. While a diagnosis of post-traumatic stress disorder from 2002 was discussed by both counsels, the impact of mental illness and Petitioner's cognitive development deficits were not evaluated and reported to the sentencing judge. Similarly, cognitive testing such as the Wechsler Intelligence Scale for cognition: Children-V was not administered nor reported. Neither were forensic tools used to evaluate the academic maturity, the emotional functioning and personality assessment of Mr. Bassett[6].

The American Academy of Child & Adolescent Psychiatry report any sentence review for a juvenile sentenced to life-without parole should included a comprehensive mental health evaluation, conducted by a child mental health professional, such as a child and adolescent psy-

[6] Academics: Wide Range Achievement Test-Fourth Edition (WRAT-4) or the Woodcock Johnson III Tests of Achievement (WJ-III). Personality and Emotional Functioning: the Minnesota Multiphasic Personality Inventory Adolescent (MMPI-A) (administered to youth from 14 to 18), or the Personality Assessment Inventory-Adolescent (PAI-A) (administered to youth from 12 to 18)

chiatrist. The mental health evaluation should include a family interview, prenatal history, developmental history, medical history, academic history, legal history, history of mental health interventions, history of treatment for substance use, social history and a psychological evaluation. No such information was provided to the court to assist in understanding Mr. Bassett's age and the hallmark features of the sixteen year old male. The sentencing procedure must insure the sentencer is afforded individualized "consideration: to, among other things, the defendant's "chronological age and its hallmark features." *Jones* supra at 1316. In the instant matter, the sentencing court was unable to give meaningful consideration of youth and attendant characteristics as no such information was provided.

At sentencing, counsel simply asked the court to consider that Mr. Bassett was 16 years old. "Judge, I'm asking to you consider the fact that Lonny Bassett was a child at 16 years old when he committed the crimes that we're here to sentence him for." (RT 01/27/2006, P27). He then said there were "numerous scientific studies" about brain adolescent development and cited to the wrong case, *Roper vs. Evans* instead of *Roper v. Simmons*, to again mention generalities associated with youth. (*Id*. at 29).

c. The sentencing court could not have anticipated the *Miller* decision and the considerations a court must Consider when imposing a sentence of life-without-parole on a juvenile offender

Petitioner's sentencing occurred in 2006, six years before *Miller* was announced, at a time when no precedent or rule suggested that the sentencing judge had to consider diminished culpability, heightened capacity for change, transient immaturity due to youth, or that defense counsel should offer evidence regarding youth and attendant characteristics. That the sentencing judge considered the defendant's age as a mitigating factor is insufficient; *Miller* requires that a

sentencing judge consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S.Ct. 2475.

Unlike *Jones*, Petitioner's sentencing judge did not have *Miller* to guide his decision-making and as a result there is no evidence he gave consideration to the "hallmark features [of youth]—among them immaturity, impetuosity, and failure to appreciate risks and consequences," *see Miller*, 132 S.Ct. at 2471-72. He was provided no evidence of such at sentencing.

The *Jones* majority reviewed a case in which the defendant had already been resentenced following *Miller* requirements. When reviewing the re-sentencing process, the *Jones* Court assumed that "[b]y now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*." 141 S. Ct. at 1317 n.4. This is emphatically not the case in Arizona, where the vast majority of juvenile defendants sentenced to life-without-parole sentences are still awaiting a re-sentencing hearing or an evidentiary hearing regarding whether they should be resentenced For these reasons, the assumptions underlying *Jones*, that at least one post-*Miller* hearing has occurred in which all of the relevant factors of youth and how children are different were considered, is simply not the situation in the Mr. Bassett's case. Thus, this court must still conduct further proceedings to comply with *Miller* in Petitioner's case.

REQUESTED RELIEF

For the foregoing reasons, Petitioner respectfully requests this Court find he is entitled to post-conviction relief and deny the State's request to vacate the previously ordered evidentiary hearing and dismiss the petition. Rather, Petitioner requests this Court affirm the evidentiary hearing or, in the alternative, set a new sentencing date in light of the clarifications offered by

the litany of *Jones, Miller, Valencia* and *Montgomery* as it relates to juvenile life-without parole sentencing.

RESPECTFULLY SUBMITTED on this 21st day of June 2019.

By: /s/ Amy Bain
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EXHIBITS

EXHIBIT A: Sentencing Transcript dated 01/27/2006

EXHIBIT B: Defendant's Sentencing Memorandum 01/25/2006

EXHIBIT C: Minute Entry dated 05/09/2014

EXHIBIT D: Minute Entry dated 08/01/2013

EXHIBIT E: Minute Entry dated 07/15/13

EXHIBIT F: Juvenile Life Without Parole: Review of Sentences, April 2011, Juvenile Justice Reform Committee

EXHIBIT G: Retaining a Forensic Mental Health Expert In *Miller* Cases, Dr. Antoinette Kavanaugh, www.DACDL.org

APPENDIX 23

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. LONNIE ALLEN BASSETT, aka LONNY ALLEN BASSETT Defendant.	CR2004-005097-001 **STATE'S REPLY TO LONNIE BASSETT'S RESPONSE TO STATE'S MOTION TO VACATE EVIDENTIARY HEARING AND DISMISS BASSETT'S PETITION FOR POSTCONVICTION RELIEF** **ORAL ARGUMENT REQUESTED** (Assigned to the Honorable Katherine Cooper, Div. CRJ16)

This Court should grant the State's motion to vacate the pending evidentiary hearing and dismiss inmate Lonnie Bassett's petition for postconviction relief (PCR) because *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), implicitly overruled *Valencia*'s interpretation of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), as clarifying *Miller* and entitling defendants like Bassett to an opportunity to establish that his crime reflected transient immaturity and not irreparable corruption. Consequently, the State's PCR response, filed

on February 12, 2018, that Bassett "is entitled to an evidentiary hearing pursuant to *State v. Valencia*, 241 Ariz. 206 (2016), and Rule 32.8," is no longer legally correct. Bassett is not entitled to an evidentiary hearing under the current state of the law and nothing in his response changes this.

A. *Miller* does not apply to Bassett's case.

Bassett's natural life sentence for Tapia's murder (Count 1) was not mandatory as prohibited by *Miller*. *Miller* consolidated the cases of 14-year-olds Kuntrell Jackson and Evan Miller where both defendants' life without the possibility of parole sentences were mandatory. 567 U.S. 460. Jackson was tried and convicted in an Arkansas adult court of capital felony murder and aggravated robbery. *Id*. at 466. Pursuant to Arkansas law, a defendant convicted of "capital murder … *shall* be sentenced to death or life imprisonment without parole." *Id*. (citing Ark. Code Ann. § 5-4-104(b) (1997) (emphasis added)). Miller was transferred from juvenile to adult court and charged as an adult with murder in the course of arson. *Id*. at 468. That crime, like capital murder in Arkansas, carried a "*mandatory* minimum punishment of life without parole" in Alabama. *Id*. at 469 (emphasis added). And in *Jones*, Mississippi's statute mandated a natural life sentence for Jones's crime: "Every person who shall be convicted of first-degree murder *shall* be sentenced by the court to *imprisonment for life* in the custody of the Department of Corrections." Miss. Code. Ann. § 97-3-21 (West) (emphasis added).

Here, unlike defendants Miller, Jackson, and Jones, when Bassett was sentenced, A.R.S. § 13-703 defined life as natural life or life without eligibility for release "until the completion of the service of twenty-five calendar years." The statute specifically provided

that if death is not sought or appropriate, "and the defendant is convicted of first-degree murder, the court shall determine whether to impose a sentence of life or natural life." The terms 'whether" and "or" denote a choice—demonstrating that the trial court *had discretion* to impose a sentence of natural life or the lesser sentence of life with the possibility of release (which the court interpreted as parole).

Although parole was abolished in 1994 the courts thereafter, including the Arizona Supreme Court, interpreted the alternative life sentences in § 13-703 as life with the possibility *of parole* and natural life. *See State v. Wagner*, 194 Ariz. 310, 313, ¶ 11 (1999) ("life in prison with the possibility of parole"); *State v. Fell*, 210 Ariz. 554, 558, ¶¶ 11, 14-15 (2005) ("life imprisonment with the possibility of parole"); *State v. Cruz*, 218 Ariz. 149, 160 ¶ 42 (2008) ("life with the possibility of parole after twenty-five years"). Indeed, the Arizona Supreme Court specifically found that while some statutes, *i.e.*, §§ 13–701 and 13–710, "provide that a specific sentence 'shall' be imposed for various felonies" (like Alabama, Arkansas, and Mississippi), "§ 13–703 contains no similar language" and "provides the superior 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).

Although *Miller* implied in footnote 13 that life without parole was mandatory in Arizona, that implication is dicta and wrong and therefore not binding on this Court. 567 U.S. at 486 n.13. Neither the United States Supreme Court, nor "any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). This Court is bound by the Arizona Supreme Court's repeated holdings that § 13-703 was a discretionary,

not mandatory, sentencing scheme that gave the court discretion to sentence a defendant to death, natural life, or life with the *possibility of parole*. *See Wagner*, *Fell*, and *Cruz*.

Justices Alito and Thomas recognized that Arizona did not mandate life without parole sentences, finding a "sentence of life without parole was imposed in [each of the *Tatum*] cases, not because Arizona law dictated such a sentence, but because a court, after taking the defendant's youth into account, found that life without parole was appropriate in light of the nature of the offense and the offender." *Tatum v. Arizona*, 137 S. Ct. 13 (2016) (Alito, J. joined by Thomas, J. dissenting from the decision to grant, vacate, and remand ("GVR")).

Likewise, in their concurrence in *Valencia* Justices Bolick and Pelander found that although *Miller*'s footnote "implied" that life without the possibility of parole was mandatory, a review of Arizona's statutes shows it was not. *State v. Valencia*, 241 Ariz. 206, 210, ¶ 23 (2016). Justice Bolick specifically noted that Arizona's sentencing scheme did not preclude the sentencer from considering a juvenile's age and attendant characteristics; it actually required that age be considered as a mitigating factor. *Id*. (citing A.R.S. § 13–701(E)(1) (1998) ("The court shall consider as [a] mitigating factor[] . . . [t]he defendant's age") and *State v. Greenway*, 170 Ariz. 155, 170 (1991) ("When addressing the issue of young age, we look at defendant's level of maturity, judgment and involvement in the crime.")) Justice Bolick concluded, Arizona "does not mandate life sentences without parole for such offenses" and affirmed that for "decades" Arizona laws have "required the mitigating consideration circumstances of age, maturity, and responsibility." *Id*. at ¶ 30.

As set forth in detail in the State's motion, the trial court had discretion, and the court and the parties believed the court had discretion, to impose a sentence less than

natural life in Bassett's case. (*See* State's motion at 16-17.) Indeed, Bassett's sentence of life with the possibility of *parole*[1] after 25 years for Pedroza's murder clearly illustrates that the trial court believed it had discretion to impose a sentence of life with the possibility of *parole*. Bassett's argument that the trial court did not have discretion and that either sentence the judge imposed was a natural life sentence as a matter of state law[2] fails because it ignores what actually happened in this case and how everyone, including the Arizona Supreme Court, viewed the alternative life sentences in § 13-703 as natural life and life with the possibility of parole after 25 years. (Resp. at 8-13.) For the same reasons, *Lynch v. Arizona*, 136 S. Ct. 1818 (2016), does not support Bassett's argument.

Furthermore, Bassett's argument that the statutory scheme alone is dispositive incorrectly exalts form over substance. The reasoning underlying *Miller* demonstrates that Bassett's natural life sentence was not mandatory because he received an individualized discretionary sentence after the trial court considered his youth and attendant characteristics. *See Miller*, 567 U.S. at 477 (mandatory life without parole for a juvenile is unconstitutional because it precludes a sentencer from providing individualized

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[1] Throughout his response, Bassett states that his sentence for Count 2 was life with the possibility of release. But Bassett was not sentenced to life with the possibility of *release* on Count 2 and has not asserted such in previous pleadings. At sentencing, the trial court specifically sentenced Bassett to "life with the possibility of parole after 25 years" on Count 2. (Exh. C at 39-40.) Likewise, the sentence of imprisonment minute entry lists Bassett's sentence on Count 2 as "natural life with the possibility of parole after 25 years." (Exh. E.)

[2] To any extent Bassett contends that his sentence for life with the possibility of parole after 25 years for Count 2 is unconstitutional or that the PCR court erroneously denied relief as to Count 2, that claim is not before this Court and should not be considered. (Resp. at 13.) Moreover, *Miller* does not apply to Bassett's sentence in Count 2.

sentencing—considering a juvenile's chronological age and its hallmark features.)

Finally, that several other Arizona defendants received a parole-eligible sentence at the time Bassett was sentenced further demonstrates that Arizona courts believed that sentence—a lesser sentence—was available.[3] Even *Valencia* found that Healer and Valencia's natural life sentences were not mandatory, though they amounted to life without the possibility of parole.[4] Indeed, Bassett agrees, as he must because of his parole-eligible sentence on Count 2, that if he had been sentenced to life with the possibility of parole after

[3] *See, e.g., State v. Marshall*, No. 1 CA–CR 14–0501 PRPC, 2016 WL 4045368, at *1, ¶ 2 (Ariz. App. July 28, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after twenty-five years" for 1998 first-degree murder); *State v. Beltran*, No. 1 CA–CR 14–0494 PRPC, 2016 WL 3463308, at *1, ¶ 2 (Ariz. App. June 21, 2016) (mem.) (sentence of "life in prison with the possibility of parole after twenty-five years" for a first-degree murder originally sentenced in 1999); *State v. Hooks*, No. 1 CA–CR 14–0500 PRPC, 2016 WL 4394530, at *1, ¶ 2 (Ariz. App. Aug. 18, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after 25 years" for 1999 first-degree murder); *State v. Nouan*, No. 1 CA–CR 14–0503 PRPC, 2016 WL 4761928, at *1, ¶ 2 (Ariz. App. Sept. 13, 2016) (mem.) (sentence of "life imprisonment with the possibility of parole after 25 years" for a first-degree murder; Nouan was convicted of murder in 1999, as noted in *Nouan v. Ryan*, CV–17–02743–PHX–GMS–ESW, 2018 WL 7570286, at *1 (D. Ariz. Oct. 19, 2018)); *State v. Lee*, No. 1 CA–CR 14–0496 PRPC, 2016 WL 3854436, at *1, ¶ 2 (Ariz. App. July 12, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after twenty-five years" for 2004 first-degree murder); *State v. Agboghidi*, 1 CA–CR 15–0123 PRPC, 2017 WL 4247961, at *1, ¶ 2 (Ariz. App. Sept. 26, 2017) (mem.) (sentence of "life with the possibility of parole after 25 years" imposed for 2004 first-degree murder); *State v. Jara*, 2 CA–CR 2016–0149–PR, 2016 WL 3188911, at *1, ¶¶ 1–2 (Ariz. App. June 7, 2016) (mem.) (two "life terms of imprisonment with the possibility of parole after twenty-five years" imposed in 2007); *State v. Coleman*, No. 1 CA–CR 14–0495 PRPC, 2016 WL 3944541, at *1, ¶ 2 (Ariz. App. July 19, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after 25 years" for 2009 first-degree murder).

[4] Additionally, the Arizona Supreme Court recently found that if a trial court sentenced a defendant to life with the possibility of release after 25 years, even if technically illegal, Arizona courts are bound by that sentence if the State does not timely appeal the illegal sentence. *Chaparro v. Shinn*, 248 Ariz. 138 (2020).

25 years on Count 1, that sentence would have become viable in 2014 with the passage of A.R.S. § 13-716. (Resp. at 13.) Bassett nonetheless argues that while § 13-716 can convert an otherwise lawful sentence into a *Miller*-compliant sentence, it cannot convert an otherwise unlawful sentence. (*Id*.) But this argument makes no sense because § 13-716 shows that Bassett could have received (and did receive) a parole-eligible sentence under Arizona's statutory scheme, demonstrating that Arizona's sentencing scheme was discretionary.

Because Bassett's sentencer had the sentencing options of life, which the courts viewed as natural life or life with the possibility of *parole*, *see Wagner*, *Fell*, and *Cruz*, Bassett's natural life sentence for Tapia's murder was not "mandatory" as forbidden by *Miller*. *Jones* essentially put Bassett's case back in the position it was *before Tatum* and *Valencia* incorrectly interpreted *Montgomery* as broadening *Miller*. Thus, the PCR court's dismissal of Bassett's PCR petition in 2013, after finding that Bassett's "*sentence of natural life* without the possibility of parole was *not statutorily mandated* and *the Court had the discretion* to order life with the possibility of parole but *chose* not to" and that Bassett "has failed to demonstrate that *Miller* is a significant change in the law as applied to his case," was and is correct. (7/15/13 ME, emphasis added.)

B. *Jones* implicitly overruled *Tatum* and *Valencia*.

The State agrees with Bassett that this Court is bound by higher court's decisions and does not have the authority to "overrule, modify, or disregard them." *See State v. Sullivan,* 205 Ariz. 285, 288, ¶ 15 (App. 2003) (quoting *City of Phoenix v. Leroy Liquors,* 177 Ariz. 374, 378 (App. 1993)). (Resp. at 14.) But this Court does not have to because

Jones already did that.[5] *Jones* implicitly overruled *Valencia*'s holding that "*Miller*, as clarified by *Montgomery*" gives juveniles like Bassett "an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity."[6] *Valencia*, 241 Ariz. at 209, 210, ¶¶ 15, 18. *Jones* likewise implicitly overruled *Tatum* and its interpretation of *Montgomery* as broadening *Miller*. *Jones* clarified that *Montgomery* only made *Miller* retroactive to cases on collateral review, that *Miller* requires *only* that "a sentencer must have discretion to consider youth before imposing a life-without-parole sentence," and that "*Montgomery* did not purport to add to *Miller*'s requirements." *Jones*, 141 S. Ct. at 1314, 1316, 1321. *Jones* is simply irreconcilable with *Valencia* and *Montgomery*'s broadened interpretation of *Miller*, and

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[5] This Court can find that a higher court implicitly overruled another higher court's decision. For example, in *State v. Machado*, 224 Ariz. 343, 356, ¶ 32 (App. 2010), the Arizona court of appeals found *State v. Gibson*, 202 Ariz. 321, 324 ¶ 19 (2002) and *State v. Prion,* 203 Ariz. 157, 161 ¶ 22 (2002), "had implicitly overruled" *State v. Tankersley,* 191 Ariz. 359, 369 ¶ 39 (1998), "to the extent it holds such evidence may be precluded based on application of Rule 404(b)." On review, the Arizona Supreme Court agreed and made "explicit today what the court of appeals found implicit in *Gibson* and *Prion*." *See also Day v. Apolonia*, 496 F.3d 1027, 1031 (9th Cir. 2007) (although the lower federal district court is bound by decisions from the Ninth Circuit Court of Appeals, where "'intervening Supreme Court authority is clearly irreconcilable with . . . prior circuit authority,'" "'district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit] as having been effectively overruled.'" (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)); *accord Human Life of Wa. Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010).

[6] While not binding on this Court, the State gives notice that several superior courts have recently ruled that *Jones* implicitly overruled *Valencia* and disavowed *Valencia*'s interpretation of *Montgomery* as clarifying or broadening *Miller* and dismissed defendants' PCR petitions based on similar motions filed by the State. *See State v. Conley*, CR2004-035015; *State v. Wagner*, CR1994-092394; *State v. Odom*, CR2010-121445; *State v. Cabanas*, CR1999-006656-A. *See also State v. DeShaw*. CR1994-011396 (one of the *Tatum* defendants—court vacated the resentencing based on the State's motion).

abrogated the need for an evidentiary hearing in this matter.

The concurrence and dissent in *Jones* confirm that *Jones* implicitly overruled *Tatum* and *Valencia*. In his concurrence, Justice Thomas found the majority overruled "*Montgomery* in substance but not in name." *Jones*, 141 S. Ct. at 1327. In her dissent, Justice Sotomayor found the majority "gut[ted] *Miller v. Alabama*, . . . and *Montgomery v. Louisiana*, and reprised "Justice SCALIA's dissenting view in *Montgomery* that *Miller* requires only a 'youth-protective procedure.' 577 U.S. at 225." *Id.* at 1328. Justice Sotomayor further noted that all petitioner Brett Jones sought was what the Court ordered in *Tatum v. Arizona*, 580 137 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 (quoting Sotomayor, J., concurring in decision to grant, vacate, and remand in *Tatum*.) Justice Sotomayor's recognition that Brett Jones was denied what was ordered in *Tatum*, demonstrates that the majority in *Jones* implicitly overruled *Tatum*, and conversely *Valencia*, which relied on Justice Sotomayor's concurrence in *Tatum* and the same broadened interpretation of *Miller*.

Further, although *Jones* recognized that states may impose additional sentencing limits for juvenile defendant, Arizona has not. *Id*. at 1323. If there is any doubt about *Jones*'s impact on Arizona, *State v. Soto-Fong*, 250 Ariz. 1, ¶ 19 (2020), decided on October 9, 2020, demonstrates that Arizona did not independently expand *Miller* beyond its holding that "a trial court must consider 'an offender's youth and attendant characteristics' before sentencing a juvenile to life without the possible of parole." *Soto-*

Fong confirms *Jones*'s narrow interpretation of *Miller*. *Soto-Fong* agreed with 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*. at ¶¶ 22-23 (emphasis in original) (citations omitted). This Court is bound by *Jones* and *Soto-Fong* and their narrow view of *Miller*.

Contrary to Bassett's assertion, a finding that *Jones* implicitly overruled *Valencia* does not "raise equal protection violations" because some juvenile defendants were resentenced before *Jones* was decided. (Resp. at 14-15.) The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Bassett is not being denied equal protection of the laws because those defendants obtained relief under *different* law—*Valencia* **before** *Jones* implicitly overruled *Valencia*. As Bassett recognizes, "[t]here is 'no denial of equal protection in having persons sentenced under one system for crimes committed before [a certain date] and another class of persons sentenced under a different system.'" *See State v. Nguyen*, 185 Ariz. 151, 154 (App. 1996) (quoting *Foster v. Washington State Bd. of Prison Terms & Parole*, 878 F.2d 1233, 1235 (9th Cir. 1989)). *See also State v. Ferrell*, 126 Ariz. 1, 2 (1980) (no equal protection violation when defendant received a much harsher sentence because he was sentenced under a different criminal code). Bassett received "equal protection of the laws" when he was able to *seek* review as a result of *Montgomery*. *See Jones*, 141 S. Ct. at 1317 n. 4 ("offenders who *could seek* collateral review as a result of *Montgomery* have done so.") But *Jones* changed the law. There is a

difference between a defendant having the opportunity to seek review and getting relief.

Under Bassett's theory of equal protection, laws could never be changed because this would necessarily treat defendants differently depending on whether their cases were decided before or after the change in law. But equal protection does not guarantee that laws will never be changed. *See Montgomery*, 136 S. Ct. at 741 ("No principle of equal protection requires the criminal law of all ages to be the same") (Scalia, J., dissenting.)

And even if Bassett is viewed as similarly situated as the defendants already resentenced, equal protection requires only that laws treating similarly situated persons differently have a rational basis. Here, *Jones*'s implicit overruling of *Valencia* provides a rational basis to treat Bassett differently from those defendants who already obtained relief under *Valencia*. And to any extent superior courts come to different conclusions about *Jones*'s impact on defendants in Arizona, this "does not implicate the equal protection clause." *See State v. Jensen*, 193 Ariz. 105, 109 (App. 1998) (citing *State v. Castano,* 89 Ariz. 231, 234 (1961). *Cf. Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) ("No court has ever held that the mere existence of a circuit split on an issue of statutory interpretation violates due process or equal protection.").

Furthermore, Bassett has not established that different treatment of the defendants or conclusions of the superior courts are arbitrary. Even had he, disparate treatment alone is insufficient to prove an equal protection violation. Bassett must establish the "existence of purposeful discrimination." *See McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("[A] defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'") (citations omitted). Bassett has not and cannot.

Thus, Bassett's suggestion of an equal protection violation is unavailing.

C. Bassett is not entitled to an evidentiary hearing to determine if the court appropriately considered his age and attendant characteristics.

Bassett next asserts that he should be permitted an evidentiary hearing because he was not afforded the opportunity to have his youth "appropriately," "meaningfully," or "adequately" considered to determine whether he was among the rarest of juvenile offenders. (Resp. at 4, 16-20.) This contention fails because it implies that a certain amount of information must be considered by the sentencer, that the sentencer must make particular findings, and that a juvenile cannot be sentenced to natural life unless there is a determination that he is among the rarest of juvenile offenders. But that is not what *Miller*, *Montgomery*, or *Jones* held or requires.

"In *Miller*, the Court 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 (quoting *Miller*, 567 U.S. at 483.) *Jones* affirmed this holding multiple times throughout its opinion. *Id*. at 1311, 1314, 1316, 1317. And the Arizona Supreme Court affirmed *Miller*'s narrow holding before *Jones* was even decided. *See Soto-Fong*, 250 Ariz. at ¶¶ 22-23 (agreeing with 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.'") (emphasis in original) (citations omitted).

Jones held a court is not constitutionally required to find a defendant was permanently incorrigible, make specific findings, or provide "an on-the-record sentencing

explanation" to ensure the sentencer considers all relevant mitigation. *Id*. at 1319-20. Nor is the sentencer required to use magic words or provide a checklist of its findings, including a finding of transient immaturity. *Id*. at 1321 (no "formulaic checklist of topics or a magic-words requir[ed for] particular mitigating circumstances"). Analogizing the Court's review of death penalty cases over the past 45 years, *Jones* found no on-the-record sentencing explanation is required. *Jones*, 141 U.S. at 1316, 1320 ("[T]he Court has *never* required an on-the-record sentencing explanation or an implicit finding regarding those mitigating circumstances.")

Unless the record affirmatively reflects otherwise, the "court will be deemed to have considered the relevant criteria, such as mitigating circumstances enumerated in the sentencing rules." *Id*. at 1321 (citation omitted). *Jones* held, "because a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth, we should not now add still more procedural requirements." *Id*. at 1316, 1321. Natural life sentences are constitutional if the sentencer has discretion to consider "'an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Jones*, 141 S. Ct. at 1316 (quoting *Miller*, 567 U.S. at 483). *See also State v. Soto-Fong*, 474 P.3d 34, 40, ¶¶ 19, 22-23 (2020) (agreeing with Justice Scalia's dissent in *Montgomery* that *Miller* merely mandated that trial courts "follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty").

Further, Bassett's assertion that he is entitled to a hearing or sentencing that "appropriately," "meaningfully," or "adequately" takes into account youth and attendant

characteristics conflicts with the principles of finality. The principle of finality "is essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (O'Connor, J., concurring). If there is no finality, "the prime goal of the judicial process will be proportionately defeated." *State v. Waldrip*, 111 Ariz. 516, 518 (1975) (quoting *Tucson Gas & Electric Company v. Superior Court*, 9 Ariz. App. 210, 212-13 (1969)). If we were to accept Bassett's arguments, his case would go on indefinitely." *Mata*, 185 Ariz. at 337. Bassett received a constitutionally individualized sentencing that complied with *Miller* and is not entitled to hearing to present what he deems appropriate or adequate or a hearing or sentencing for a determination of whether he is among the rarest of juvenile offenders. After *Jones*, nothing in *Miller*, *Montgomery*, or *Valencia* requires this.

D. Bassett received a discretionary, individualized sentencing proceeding as contemplated by *Miller*.

Instead of acknowledging what was presented to the trial court, Bassett focuses on what he thinks should have been presented. (Resp. at 18-19.) But *Miller* and *Valencia* do not entitle Bassett to a hearing to present more or fully develop a record of his youth and attendant characteristics based what a report from the American Academy of Child & Adolescent Psychiatry says should be presented. *Cf. State v. Amaral*, 239 Ariz. 217, 222, ¶¶ 17-20 (2016) (Amaral not entitled to a hearing to present scientific advances in juvenile psychology and neurology; "trial judge contemplated Amaral's youth and attendant characteristics when he considered Amaral's age, immaturity, and personal idiosyncrasies at the sentencing hearing."). The issue is whether the sentencer considered Bassett's youth and attendant characteristics before imposing a particular penalty, *Jones*, 141 S. Ct. at

1316, not what Bassett thinks should have been presented or considered differently.

Here, unlike the defendants in *Miller*, and originally in *Jones*, Bassett received a discretionary individualized sentencing where the sentencer heard information about his youth and attendant characteristics. Bassett acknowledges that his counsel cited *Roper* but argues he "offered nothing specific to Mr. Bassett's attendant characteristics." (Resp. at 17.) Bassett's argument is wrong and completely ignores the State's detailed recitation of Bassett's mitigation presentation, including how children are different and information about Bassett's age, maturity level, impulsivity, potential for rehabilitation, Pedroza's negative influence on Bassett, Bassett's past conduct with police and criminal history, Bassett's dysfunctional family background, kidnapping, and abandonment. (*See* Mtn. at 18-22.) Indeed, because Bassett's mitigation was presented through the lens of *Roper*, which provides the basis for *Miller*'s hallmark features, this undisputedly satisfied *Miller*. *See Miller*, 567 U.S. at 469-78.

Likewise, Bassett's assertion that because his sentencing occurred years before *Miller* it could not have complied with *Miller* also fails. (Resp. at 19-20.) Although the trial court did not have the benefit of *Miller* to guide his decision-making, he did not need it to comply with *Miller*. The trial court was statutorily required to consider Bassett's age in mitigation. Arizona law, at the time Bassett was sentenced, required a court, "[w]hen addressing the issue of young age," to "look at defendant's level of maturity, judgment and involvement in the crime." *Greenway*, 170 Ariz. at 170. Thus, Arizona already provided for a *Miller*-type analysis in considering a juvenile's age at sentencing.

Lastly, contrary to Bassett's assertion, there is no assumption underlying *Jones* that

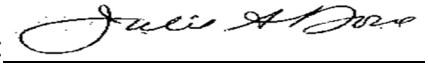
at least one post-*Miller* hearing would have already occurred. (Resp. at 20.) The assumption in *Jones* footnote 4 is that a defendant's life without parole sentence was mandatory. *See Jones*, 141 S. Ct. at 1317 n. 4 ("By now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*."). But as clearly set forth in the State's motion and *supra*, Bassett's natural life sentence was discretionary, not mandatory.

E. Conclusion.

Because the court had discretion to consider Bassett's "mitigating qualities of youth" and impose a lesser punishment of life with the possibility of release after 25 years, which it did for Pedroza's murder in Count 2, *Miller* is not applicable to Bassett's case. Even assuming *Miller* applies, *Miller*'s requirements were satisfied, and Bassett's natural life sentence is constitutional, because the trial court considered Bassett's chronological age and its hallmark features, how children are different than adults, and Bassett's potential for rehabilitation. Thus, Bassett is not entitled to an evidentiary hearing or postconviction relief (and certainly not resentencing) based on *Miller* and *Montgomery*, because after *Jones* they do not constitute a significant change in the law applicable to his case that would probably overturn his natural life sentence and his PCR petition should be dismissed.

Respectfully Submitted November 15, 2021.

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

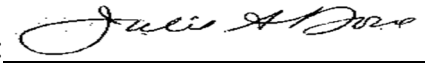
BY: 
Julie A. Done
Deputy County Attorney

Copy mailed\delivered November 15, 2021, to:

The Honorable Katherine M. Cooper
Judge of the Superior Court

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JD

EXHIBIT E

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 01/27/2006

HONORABLE BRIAN R. HAUSER

CLERK OF THE COURT
E. Morgenstern
Deputy

FILED: JAN 31 2006

STATE OF ARIZONA

JEANNETTE GALLAGHER

v.

LONNIE ALLEN BASSETT (001)

DOB: 11/18/1987

JOHN CANBY
JOHN RONAN CURRY

APO-SENTENCE IMPRISON-CCC
APPEALS-CCC
DISPOSITION CLERK-CSC
RFR
VICTIM SERVICES DIV-CA-CCC

SENTENCE OF IMPRISONMENT

8:58 a.m.

State's Attorney:	above-named counsel
Defendant's Attorney:	above-named counsel
Defendant:	Present
Court Reporter:	Melody O'Donnell

Several members of the victims' families address the court.

Several members of defendant's family address the court.

Count(s) 1:The Defendant was found guilty after a trial by jury.

Count(s) 2:The Defendant was found guilty after a trial by jury.

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

OFFENSE: Count 1: First Degree Murder

Class 1 dangerous felony
A.R.S. § 13-1101; 1105; 703; 702; 604(P); and 801
Date of Offense: June 16, 2004
Dangerous pursuant to A.R.S. § 13-604 - Non Repetitive

OFFENSE: Count 2: First Degree Murder
Class 1 dangerous felony
A.R.S. § 13-1101; 1105; 703; 702; 604(P); and 801
Date of Offense: June 16, 2004
Dangerous pursuant to A.R.S. § 13-604 - Non Repetitive

AS PUNISHMENT, IT IS ORDERED Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

Count 1: natural life without the possibility of parole from January 27, 2006
Presentence Incarceration Credit: 588 day(s)
Aggravated

Count 2: natural life with the possibility of parole after 25 years have been served from January 27, 2006
Presentence Incarceration Credit: 0 day(s)
Aggravated
This sentence is to be consecutive to sentence imposed as to Count 1.

IT IS ORDERED the Defendant shall pay through the Clerk of the Superior Court:

RESTITUTION: Count 1 and 2 - $22,534.13 to the following victim(s) in the following amounts:

Trina Trumball	(Individual)	$268.18
Antonio Tapia	(Individual)	$2,749.95
Ruth Stevens	(Individual)	$14,516.00
Victims Compensation Fund	(Business)	$5,000.00

Restitution ledger provided; priority of payment as stated in the restitution ledger.

Payment shall be 30% of Defendant's earnings while incarcerated at the Arizona Department of Corrections.

Community Supervision: Count - Waived due to length of imprisonment in this case.

IT IS ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

IT IS ORDERED the Clerk of the Superior Court remit to the Arizona Department of Corrections a copy of this order together with all presentence reports, probation violation reports, and medical and psychological reports that are not sealed in this cause relating to the Defendant.

Restitution shall be paid to the individual victims first in the order listed in the ledger, then to the victims compensation fund.

10:01 a.m. Matter concludes.

cc: DOC - Certified Copy via Certification Desk

cc: MCSO-DIS - Certified Copy via Certification Desk

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

BRIAN R. HAUSER

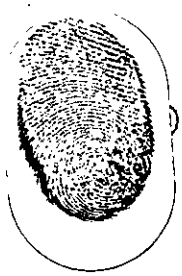
CLERK OF THE COURT
FORM TH1
Deputy

Date: 1-27-06

No. CR2004-005097

STATE v. Bassett

Let the record reflect that the Defendant's thumbprint is permanently affixed to this sentencing order in open court.



JUDICIAL OFFICER OF THE SUPERIOR COURT

1651-026 (5lod)

APPENDIX 24

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MARICOPA COUNTY ATTORNEY

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Jessi Wade
Deputy County Attorneys
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MCAO Firm #: 00032000
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. LONNIE ALLEN BASSETT, aka LONNY ALLEN BASSETT Defendant.	CR2004-005097-001 **STATE'S MOTION FOR RECONSIDERATION OF THE DENIAL OF STATE'S MOTION TO VACATE THE EVIDENTIARY HEARING AND DISMISS LONNIE BASSETT'S SUCCESSIVE PETITION FOR POSTCONVICTION RELIEF** (Assigned to the Honorable Katherine Cooper, Div. CRJ16)

The State respectfully moves this Court to reconsider its ruling denying the State's motion to vacate the pending evidentiary hearing and dismiss inmate Lonnie Bassett's successive petition for postconviction relief (PCR). The State requests that this Court stay the proceedings in this case until all avenues of reconsideration or review are exhausted. Good cause to reconsider exists under Arizona Rule of Criminal Procedural 16.1(d) because

this Court's ruling, that Bassett is entitled to an evidentiary hearing to determine whether the sentencing court adequately considered Bassett's youth and attendant characteristics as required by *Miller*, exceeds this Court's authority under Rule 32 and is not supported by the record in this case or by *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 577 U.S. 190 (2016), *State v. Valencia*, 241 Ariz. 206 (2016), or *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).[1] Additionally, this Court did not indicate if it considered the State's notice of supplemental authority of *Jessup v. Shinn*, 31 F. 4th 1262 (2022), that was filed before this Court issued its 4/28/22 ruling, that supports the State's motion to vacate the evidentiary hearing and dismiss Bassett's successive PCR petition.

First, this Court exceeded its authority when it found Bassett asserted a colorable claim based on a significant change in the law pursuant to Rule 32.1(g), entitling him to an evidentiary hearing to determine if the sentencing court adequately considered his age pursuant to *Miller*, because Bassett's PCR claim based on *Miller* was previously denied. A defendant is precluded from relief under Rule 32.1(g) if that claim was "finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding." Ariz. R. Crim. P. 32.2(a)(2), (b). Rule 32 provides for preclusion of certain claims "to prevent endless or nearly endless reviews of the same case in the same trial court." *Stewart*

[1] The State acknowledges the recent Court of Appeals opinion in *State v. Wagner*, --- P.3d ---, 2022 WL 1463719 (May 10, 2022), but notes that the opinion does not support this Court's finding that Bassett's natural life sentence was mandatory because Bassett was sentenced to life with the possibility of parole on Count 2, demonstrating that the sentencing court specifically believed a lesser sentence with the possibility of parole was available, and thus, *Miller* is inapplicable to Bassett's case. Further, to the extent *Wagner* is applicable to Bassett, the State disagrees with the *Wagner* opinion and will be petitioning for review of *Wagner*.

v. Smith, 202 Ariz. 446, ¶ 11 (2002). Thus, Bassett is precluded from raising a successive Rule 32.1(g) claim, or receiving an evidentiary hearing, based on *Miller* alone.

On June 20, 2013, Bassett filed a *pro per* PCR notice arguing that Miller was a "significant change in the law that would probably overturn [his] conviction or sentence." On July 2, 2013, the court dismissed Bassett's PCR notice as untimely and successive, finding that even assuming *Miller* constituted a significant change in the law, *Miller* did not apply to Bassett's case. Specifically, the court found:

> in *Miller*, the Supreme Court ruled that a mandatory life sentence without the possibility of parole was unconstitutional. Hence, the judge or jury must have the opportunity to consider mitigating circumstances such as age prior to imposing either life with the possibility of parole or the harshest sentence possible for a juvenile, that being natural life without the possibility of parole.
>
> In the instant case, the record demonstrates that the age of the Defendant was given "considerable weight" as a mitigating factor. Even after considering defendant's age as a mitigating factor, the Court chose to sentence him to the term of his natural life pursuant to A.R.S. § 13-752. Since the sentence of natural life without the possibility of parole was not statutorily mandated and the Court had the discretion to order life with the possibility of parole but chose not to, defendant has failed to demonstrate that *Miller* is a significant change in the law as applied to his case.

(7/15/13 ME.)

Bassett moved for rehearing with the support of amicus. The court denied the motion, reasoning that even if *Miller* applied retroactively "[the *Miller*] *requirements regarding mitigation have been met in this matter* and there is no basis for defendant to be relieved from the natural life sentence that was imposed upon him." (8/5/13 ME, emphasis added.) Bassett's subsequent petition for review by the Court of Appeals was also denied. Consequently, Bassett is precluded from raising a successive Rule 32.1(g) claim under

Miller alone or from receiving an evidentiary hearing based on *Miller* alone.

In his 2017 PCR petition, which is the subject of the current ruling, Bassett argued that *Miller* and *Montgomery*, constituted a significant change in the law entitling him to relief and resentencing. (9/13/17 PCR Pet.) Bassett contended that *Miller* "as expanded by *Montgomery*" instructs how sentencing courts are supposed to consider a juvenile defender's age and whether a juvenile's crime reflects "permanent incorrigibility." (*Id*. at 4-5.) Bassett argued that although the 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.'" (*Id*.) Bassett asserted that the record in his case was insufficient and 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*.)

Because *Jones* overruled this expanded interpretation of *Miller*, based on *Montgomery*, and clarified that *Miller* held a natural life sentence for juveniles is constitutional "only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment," there was no change in the law subsequent to *Miller* upon which Bassett could base a successive PCR claim or this Court could grant an evidentiary hearing. 141 S. Ct. at 1314 (quoting *Miller*, 567 U.S. at 476.) Therefore, this Court exceeded its authority under Rule 32 in ruling that Bassett is entitled to a hearing to determine if the sentencing court considered his youth and attendant characteristics according to *Miller* when this PCR claim was denied in 2013 and is now precluded.

For the same reasons, this Court exceeded its authority in finding that Bassett's natural life sentence was mandatory under *Miller* because the 2013 PCR court expressly found 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 had the discretion to order life with the possibility of parole but chose not to." Bassett did not petition for review of this finding. Indeed, Bassett did not argue that his natural life sentence was mandatory, as prohibited by *Miller*, in his 2017 PCR petition, likely because the PCR court already expressly found that it was not. Because there was no change in the law subsequent to *Miller* affecting the 2013 PCR court's express finding that Bassett's natural life sentence was not mandatory, this Court is without authority to revisit that decision that was finally adjudicated on the merits and is now precluded under Rule 32.2(a)(2).[2]

Second, preclusion notwithstanding, this Court should reconsider its ruling that "Bassett was sentenced under a mandatory natural life sentencing scheme that *Miller* and *Jones* found to be unconstitutional" because the record in this case contradicts that finding and the law does not support it. (5/2/22 ME at 4.) Bassett was convicted of two counts of first degree murder and specifically sentenced to "natural life" for Count 1 and to "life with the possibility of parole after 25 years" for Count 2. (Exh. C RT 1/27/06 at 39-40; Sent. ME 1/27/06 (attached)). The sentencing court believed it had discretion to sentence Bassett

[2] To the extent this Court references *Valencia*, that case was not a significant change in the law subsequent to *Miller* affecting the 2013 PCR court's express finding that Bassett's natural life sentence was not mandatory because *Valencia* specifically found that the defendants natural life sentences "were not mandatory." *Valencia*, 241 Ariz. at 208, ¶ 11.

to a sentence less than natural life and *did* sentence Bassett to life with the possibility of *parole* after conducting an individualized sentencing hearing. This clearly establishes that the Court believed it had discretion and exercised that discretion and Bassett's natural life sentence was not mandatory. Thus, Bassett was not sentenced under a "mandatory" sentencing scheme within the meaning of *Miller*, 567 U.S. 460, but instead received an "individualized sentencing hearing," that complied with *Miller*.

The recent Arizona federal case of *Jessup v. Shinn*, 31 F. 4th 1262 (2022), further supports that Bassett's natural life sentence was not mandatory. The Court rejected Jessup's argument that his natural life sentence was mandatory because parole was abolished in 1994 and there was no practical difference between a natural life sentence and a sentence of life with the possibility of release. *Id*. at 1265-67. Like Bassett, "[a]t the sentencing hearing, the parties debated whether [Jessup] warranted a sentence of life without the possibility of parole or a sentence of life with the possibility parole after 25 years." *Id*. at 1264. *Jessup* found Alabama and Arkansas's sentencing statutes, for the defendants consolidated in *Miller*, "addressed situations in which the sentencing authority imposed a sentence of life without parole *automatically*, with no individualized sentencing considerations whatsoever," which is not what happened in Jessup's or Bassett's case. *Id*. at 1267.

Like Jessup, nothing in Bassett's case suggested "that the precise form of potential release at issue had any effect on the sentencing judge's exercise of discretion," and instead "the record makes clear that the sentencing judge (and everyone else involved) genuinely, if mistakenly, thought that he was considering a sentence of life with the possibility of

parole." *Id*. at 1267. As *Jessup* noted, 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." *Id*. at 1267 n.1.

Furthermore, *Jessup* found that "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." *Id*. at *6 (citing A.R.S. § 13-716 (enacted in 2014) (providing for the possibility of parole for a juvenile sentenced to "life imprisonment with the possibility of release" "regardless of whether the offense was committed on or after January 1, 1994"); *State v. Vera*, 235 Ariz. 571 (App. 2014); *Chaparro v. Shinn*, 248 Ariz. 138 (2020); and A.R.S. § 718(A)).

This is precisely the case here where the trial 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. *State v. Bassett*, 2016 WL 3211766, ¶¶ 4,6 (App. 2016) (citing *Vera*, 235 Ariz. 571). Unlike Jessup's and Bassett's cases, "*Miller* addressed situations in which the sentencing authority imposed a sentence of life without parole *automatically*, *with no individualized sentencing considerations whatsoever*." *Jessup*, at 1267.

Third, this Court should reconsider its ruling that Bassett established a colorable claim that his sentencer did not give "Bassett's youth and attendant characteristics the weight required by *Miller*" or "adequately consider Bassett's youth and attendant characteristics" because, as set forth above, that ruling, based on *Miller* alone, is precluded.

(5/2/22 ME at 4-5.) Indeed, the Arizona Court of Appeals noted that the PCR court already found "that even if *Miller* applied retroactively, its requirements had been met because the sentencing court adequately considered Bassett's age 'as part of the sentencing determination.'" *State v. Bassett*, No. 2 CA-CR 2016-0151-PR, 2016 WL 3211766, at *1 (Ariz. Ct. App. June 9, 2016).

Moreover, preclusion notwithstanding and even assuming *Miller* applies to Bassett's case, this Court's findings are not supported by *Miller*. Nothing in *Miller* prescribes what weight should be given to a juvenile offender's youth and attendant characteristics or what constitutes adequate consideration of youth and attendant characteristics. Nor does *Miller* prescribe what, or how much, information must be presented when sentencing a juvenile offender. Rather, *Miller* 567 U.S at 483, "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."

Both *Jones* and *Soto-Fong* confirm this is all that *Miller* requires. *See Jones*, 141 S. Ct. at 1316 ("*Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence."); *State v. Soto-Fong*, 474 P.3d 34, 40, ¶¶ 19, 22-23 (2020) (confirming *Jones*'s narrow interpretation of *Miller*, that a sentencer must only "consider 'an offender's youth and attendant characteristics' before sentencing a juvenile to life without the possible of parole," and agreeing 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.'").

That is precisely what happened here. At the time Bassett was sentenced, Arizona law required a court to consider aggravating and mitigating circumstances listed in § 13-703, which included the age of the defendant. Arizona law further provided, "[w]hen addressing the issue of young age," courts must "look at defendant's level of maturity, judgment and involvement in the crime." *State v. Greenway*, 170 Ariz. 155, 170 (1991).

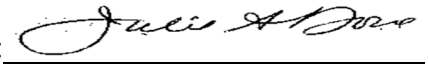
Indeed, it is undeniable that Bassett received the kind of individualized sentencing contemplated by *Miller* because Bassett was sentenced through the lens of *Roper*, which provides the basis for *Miller*. 567 U.S at 477, 483. In fact, *Miller* found its decision "flows straightforwardly from" the precedents and principles of "*Roper*, *Graham*, and their individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments." 567 U.S at 483.

In his sentencing memorandum and at sentencing, Bassett cited *Roper v. Simmons*, 543 U.S. 55 (2005), and noted the "profound differences between adults and juveniles and the ramifications those difference[s] makes when addressing juvenile crime," and pointed to three general differences between juveniles and adults. Counsel referenced the sentencing memorandum, in arguing *Roper*'s prohibition on the death penalty for juveniles was due, in part, to poor impulse control of people Bassett's age. (*Id*. at 29.) Counsel argued that Bassett's PTSD compounded his impulsivity. (*Id*.) Counsel emphasized that *Roper* determined juveniles are more susceptible to negative influences than adults, like what occurred here with Bassett and Pedroza. (*Id*. at 30.) Counsel quoted Justice Kennedy's *Roper* opinion in arguing that a juvenile's character is not fully formed at age 16. (Exh. C: RT 1/27/06 at 28-30; Exh. D: Sentence memo at 7-8.)

Bassett is not entitled to an evidentiary hearing under Rule 32.1(g) pursuant to *Miller* simply because more could have been presented at sentencing. Nothing in *Miller* provides for that. Nor does *Montgomery*, which merely made *Miller* retroactive. Nor does *Miller* require the court to 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 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.* Therefore, the State respectfully requests this Court reconsider its May 2, 2022 ruling granting an evidentiary hearing and instead grant the State's motion to vacate the evidentiary hearing and dismiss Bassett's successive PCR petition.

Respectfully Submitted May 17, 2022.

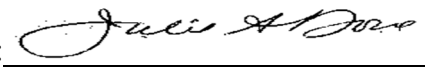
RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

BY: 
Julie A. Done
Deputy County Attorney

Copy mailed\delivered May 17, 2022, to:

The Honorable Katherine M. Cooper
Judge of the Superior Court

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APPENDIX 25

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. LONNIE ALLEN BASSETT, Defendant.	Case Number: CR2004-005097-001 **RESPONSE IN OPPOSITION TO STATE'S MOTION FOR RECONSIDERATION** Hon. Katherine Cooper

Petitioner, Lonnie Allen Basset, by and through undersigned counsel and hereby responds in opposition to the State's motion for reconsideration of the Court's ruling that denied the State's Motion To Vacate Evidentiary Hearing And Dismiss Bassett's Petition For Post-Conviction Relief. This Response is supported by the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED on this 25th day of May 2022.

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

MEMORANDUM OF POINTS AND AUTHORITIES

The State has asserted that this Court lacks authority to issue a ruling on Petitioner's Post-Conviction Relief action. The State filed motion requesting the Court vacate Mr. Bassett's pending evidentiary hearing and dismiss his Petition for Post-Conviction Relief. The Court denied this motion after briefing and oral argument on the merits. In support of its motion for reconsideration, the State claims the issue raised in Petition has previously been adjudicated in a 2013 action. Additionally, the State claims this Court exceeded its authority to issue a ruling because there "has not been a change in the law subsequent to *Miller* upon which Bassett could base a successive PCR claim or upon which the Court could grant an evidentiary hearing." (State's Motion, p4). What the State fails to include in its motion is that the 2013 post-conviction relief ruling it cited, Minute Entry dated 07/02/2013, was an initial ruling by the Court that was clarified after a further motion for rehearing and briefing by interest parties. (Minute Entries, 07/02/13; 08/01/13; 05/09/14; Attachment 1). The analysis the Court made in its May 9, 2014, ruling applied to Count 2, Petitioner's life sentence with the possibility of parole. Much of the Court's decisions contained in the Minute Entry are contrary to subsequent United States Supreme Court decisions regarding juveniles sentenced to life without the possibility of parole. The issues presently raised have not been litigated as to Count. 1, Petitioner's natural life sentence. Accordingly, this issue is ripe for the Court's ruling and Mr. Bassett is not precluded from litigating these issues.

Procedurally and on June 20, 2013, Petitioner filed a successive Notice of Post-Conviction Relief claiming a substantive change in the law, based upon *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012), entitled him to relief. The Honorable Bruce Cohen dismissed the action finding it untimely, successive, and that Petitioner's age was given "considerable

weight" as a mitigating factor. (Minute Entry 07/02/13). The Arizona Justice Project filed a brief of *Amicus Curiae* in support of Petitioner's motion for reconsideration. Thereafter the Court ordered supplemental briefing addressing the retroactivity of *Miller* as to Count 2 only, the Court then assumed *Miller might* apply retroactively and prohibit mandatory life sentences for juvenile offenders, however, the Court denied any relief as it found Arizona laws enacted in 2014, A.R.S. §§ 13-716 and 41-1604.09(I), resolved the "residual issues" of those sentenced to life imprisonment by establishing parole eligibility for offenses committed before 2014. A Petition for Review and Motion for Reconsideration were denied by the Court of Appeals, Division II on February 6, 2017, and a Petition for Review was denied by the Arizona Supreme Court.

In its present motion, the State claims Petitioner's argument is precluded as the *2013* Court found Mr. Bassett "failed to demonstrate that *Miller* is a significant change in the law as applied to this case." (State's Motion, p5). Importantly, when the Court came to its conclusion, it was addressing Count 2 and relied upon the premise that "the sentence of natural life without the possibility of parole was not statutorily mandated and the Court had the discretion to order life with the possibility of parole but chose not to…". The State's argument fails. Recent litigation regarding the issues the State pled were recently decided in the Arizona Court of Appeals, Division 1 case, *State v. Wagner*, where the State's arguments were squarely rejected. (1 CA-CR 21-0492 PRPC, Filed 05-10-2022). While the State acknowledges this case decision in its pleading, it "disagrees with the conclusion," however, the case law is controlling. (State's Motion, p2, footnote 1).

Fifteen days ago, in *State v. Wagner* (1 CA-CR 21-0492 PRPC, filed 05-10-2022), the Arizona Court of Appeals, Division 1, addressed many of the State's same arguments. In

Wagner, the superior court granted the State's motion to vacate his evidentiary hearing and dismiss his Petition for Post-Conviction Relief. On appeal, the Court of Appeals reversed the decision of the superior court. (Attachment 2). The Court found *Valencia* to be Arizona's controlling law and that *Miller* sentencing considerations were implicated because he was sentenced under a mandatory sentencing scheme. The Court of Appeals found the superior court judge abused her discretion in two ways; first when concluding *State v. Valencia*, 241 Ariz. 206 (2016), was overruled by *Jones,* and secondly when finding the sentencing judge had discretion in sentencing options, rejecting the State's argument that the judge had the option of choosing between a natural life sentence and that of life without the possibility of parole. Accordingly, the dismissal of the Petition for Post-Conviction Relief was vacated, and the matter has been remanded for further proceedings consistent with *Valencia*.[1]

---

[1]The Court of Appeals summarized recent litigation relating to those juveniles sentenced to life without the possibility of parole. In 2012, the United States Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments." *Miller v. Alabama*, 567 U.S. 460, 465 (2012). In 2016, the United States Supreme Court declared *Miller* retroactive. *See Montgomery v. Louisiana*, 577 U.S. 190 (2016). The Arizona Supreme Court, in *Valencia*, held that *Miller* and *Montgomery* established a significant change in the law that must be given retroactive effect. Id. at 209, ¶ 15. The court further determined that *Miller* and *Montgomery* applied even though the superior court had discretion to impose a more lenient sentence than natural life in each case and even though the court had considered the defendants' youth before imposing sentence. Id. at 208-10, ¶¶ 11-12, 17-18.

The *Valencia* court observed that because the defendant had committed murder after the elimination of parole, the natural life sentences, though not mandatory, "did amount to sentences of life without the possibility of parole." Id. at 208, ¶ 11. The court rejected the State's argument that the superior court's consideration of the defendants' youth before imposing sentence met the requirements of Miller. Id. at 209, ¶ 16. The court reasoned that argument was refuted by *Montgomery*, and it further referred to the United States Supreme Court's decision to grant, vacate, and remand the cases of similarly situated defendants in *Tatum*. Id. Concluding that a colorable claim for post-conviction relief under Rule 32.1(g) was established, the *Valencia* court ruled he was entitled to an evidentiary hearing with "an opportunity to establish, by a preponderance of the evidence, that [their] crime[s] did not reflect irreparable corruption but instead transient immaturity." Id. at 210, ¶ 18.

In its decision, the Court of Appeals recognized that both the Maricopa County Superior Court and the Court of Appeals are bound by the decisions of the Arizona Supreme Court and cannot "overrule, modify, or disregard them" *Wagner* at ¶ 19. Courts are further bound to follow the federal constitutional decisions of the United States Supreme Court over that of a prior state supreme court decision "if the federal decision has 'rendered the position of the Arizona Supreme Court untenable.'" Id.; *State v. Casey*, 10 Ariz. App. 516, 517 (1969); *see also Hernandez-Gomez v. Volkswagen of Am., Inc.*, 201 Ariz. 141, 143-44, ¶ 8 (App. 2001).

The Court found the decision in *Jones* did not render *Valencia* untenable and therefore was applicable law. In so concluding, the Court found *Valencia* was grounded in the rulings of *Miller* and *Montgomery,* cases that the United States Supreme Court, in *Jones,* explicitly stated it was not overruling. Wagner at ¶ 20. The Court examined the *Jones'* interpretations of *Miller* and *Montgomery,* (1) that a judge is not obligated to make a finding of "permanent incorrigibility" before imposing a life sentence and (2) that a judge need not make specific findings about "permanent incorrigibility" or "transient immaturity" when determining parole-eligible sentences. From this examination, the Court deduced the interpretations were not incompatible with *Valencia.* Id. The Court further determined that *Jones* did not "implicitly overrule" the *Valencia* court's application of *Miller* and *Montgomery* for those juveniles who have been sentenced to life terms under a sentencing scheme that could not allow for the possibility of parole. Id. at ¶ 21.

In its analysis, the Court emphasized that the "crux" of *Miller* requires (1) the option of imposing a parole-eligible sentence to a juvenile offender who is required to serve a life term, and (2) the court consider youth in determining whether to impose a parole-eligible sentence. Id. at ¶ 22. Because the superior court had no discretion to impose "alternative non-parole-

eligible penalties" to those juveniles who have been sentenced to life terms under a sentencing scheme that could not allow for the possibility of parole, the principles of *Miller* apply. Id. The Court struck down any argument that a life sentence with the possibility of "release by executive clemency," the only option available to Wagner and Mr. Bassett, was not the equivalent of a life sentence with the possibility of parole. Id. at ¶ 22, 23. The Court of Appeals recognized that some courts had mistakenly sentenced defendants to parole-eligible terms in violation of state law, or erroneously described a non-parole-eligible sentence as parole eligible and found the sentencing procedure did not comport with *Miller*. Id.

Applying the reasoning of *Wagner*, the principles of *Miller* apply in this matter. Mr. Bassett was sentenced under a mandatory sentencing scheme because the crimes for which he was convicted occurred after the elimination of parole, the natural life sentences did amount to sentences of life without the possibility of parole. The court did not meaningfully consider youth in determining whether to impose a parole-eligible sentence sufficient to comport with constitutional muster. Mr. Bassett has presented a colorable claim for post-conviction relief under Rule 32.1(g) and is entitled to an evidentiary hearing with "an opportunity to establish, by a preponderance of the evidence, that his crime[s] did not reflect irreparable corruption but instead transient immaturity.

The State claims the federal case of *Jessup v. Shinn*, 31 F. 4th 1262 (2022), supports the proposition that Mr. Bassett was not sentenced under a mandatory sentencing scheme. State's Motion p6. (Attachment 3). The *Jessup* court limited its findings to Mr. Jessup's case. Id. at *5("We hold that the state court reasonably concluded that, despite this practical result, *Miller* does not mandate a resentencing in the circumstances of his case."). There the Court found Jessup's natural life sentence did not violate *Miller* principles because Jessup received an

individualized sentencing hearing. In *Jessup,* the Court placed great weight on the trial court's review of extensive mitigation that was considered before the imposition of sentence, stating it "thoughtfully considered whether Petitioner warranted a sentence of life with the possibility of any form of release, took into account and fully considered Petitioner's youth and the characteristics of young people, and concluded that Petitioner warranted a sentence of life without the possibility of release." *Jessup* at **3, 13. The Court stressed the attention and detail of the sentencing court's thought process and reflection upon information presented at sentencing. Id. ("given the sentencing judge's extensive deliberation here as to whether Petitioner warranted the possibility of release."). The Court found the sentencing judge held an "individualized sentencing hearing." Id. at **1-5.

At Jessup's sentencing hearing, the parties debated the appropriate sentence with Jessup's attorney presenting in-depth and comprehensive information for the Court's consideration. Id. at *6. Unlike, Mr. Basset, Jessup's attorney presented testimony of a psychologist who studied Jessup, emphasizing his age and age-related characteristics. This included presentation of his delayed emotional age. A twenty-four-page, single-spaced report was presented to assist the Court that compared the psychologist's findings of Jessup as compared to those of other youthful offenders. A description of Jessup's maturity level, impulse control abilities, and an explanation as to why his maturity was stunted was provided to the court. Id. Jessup's lawyers addressed the sentencing court, stressing the characteristics of his youth and discussed his ability and potential to reform. This was reinforced by the psychologist's opinion. Id. at **2, 3.

Unlike the vast presentation of information regarding Jessup's age/youth that was presented at the sentencing hearing of in *Jessup*, Mr. Bassett's sentencing hearing was

constitutionally void and deficient. He was not afforded the opportunity to have his youth meaningfully considered by the judge to determine whether he was among the "rarest of juvenile offenders." The sentencing judge did not consider Mr. Bassett's youth and his attendant circumstances in a meaningful sentencing hearing to sufficiently meet constitutional scrutiny. The sentencing judge was not presented with essential evidence as to the age and specific attendant characteristics of Mr. Bassett for consideration. Rather generalized statements about youth were provided to the court by Petitioner's counsel. In a sentencing memorandum submitted prior to sentencing, counsel merely listed Petitioner's age and then quoted three paragraphs from *Roper v. Simmons* 543 U.S. 551, 125 S. Ct. 1183 (2005) that discussed generic statements about juvenile characteristics but offered nothing specific to Mr. Bassett's attendant characteristics. This falls far short of the sentencing presentation of Mr. Jessup.

Sentencing was completely devoid of any specific evaluation or discussion of Mr. Bassett's actual psychological age and attendant characteristics associated with that age, let alone those of a sixteen year old male or comparisons drawn between the two. No professional psychological evaluations were ever conducted of Mr. Bassett nor presented to the court in anticipation of sentencing. The state even pointed out to the court that "[t]here is no current psychological evaluation." (RT 01/27/2006, P19). In a double homicide case, counsel failed to have any sort of forensic evaluation or assessment of Mr. Bassett to discuss his risk to reoffend and plan for risk management. Counsel failed to employ any sort of forensic mental health expert, forensic social worker, forensic psychiatrist, or psychologist to examine Petitioner and make findings for the court about Petitioner's psychological age and characteristics he displayed that would mitigate his guilt. While the *Jessup* Court completed a meaningful and thoughtful deliberation upon the information presented before imposing sentence, Mr. Bassett's sentencing

judge was unable to do so as the information was never presented to the court for consideration. Accordingly, the *Jessup* decision is distinguishable from that of Mr. Bassett.

As reiterated in *Jessup, Miller* requires, for a juvenile offender sentenced to life without the possibility of parole, an individualized sentencing hearing during which the sentencing judge assesses whether the individual juvenile defendant warrants a sentence of life with the possibility of parole. Id. at *5. Mr. Bassett was deprived of such considerations. As such, he is entitled to an evidentiary hearing. The Court did not err when reaching her decision that Mr. Bassett is entitled to an evidentiary hearing to establish that his crime[s] did not reflect irreparable corruption but instead transient immaturity. As such, counsel requests this Court deny the State's Motion for Reconsideration.

REQUESTED RELIEF

For the foregoing reasons, Petitioner respectfully requests this Court deny the State's Motion for Reconsideration and set a status conference to discuss the evidentiary hearing.

RESPECTFULLY SUBMITTED this 25th day of May 2022.

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

ORIGINAL efiled this 25th
day of May 2022 with:

The Clerk of Court
Maricopa County Superior Court
201 W Jefferson Street
Phoenix AZ 85003

The Honorable Katherine Cooper
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201 W Jefferson Street
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225 W. Madison Avenue
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Mr. Lonnie Bassett
ADC # 202441
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ATTACHMENT 1

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
07/15/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT

07/02/2013

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
T. Henninger
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

LONNIE ALLEN BASSETT (001)

LONNIE ALLEN BASSETT
#202441 ASPC EYMAN/BROWNING
P O BOX 3400
FLORENCE AZ 85132

COURT ADMIN-CRIMINAL-PCR

POST-CONVICTION RELIEF DENIED

The Court has reviewed Defendant's *Notice of Post-Conviction Relief* filed on June 20, 2013.

The procedural history of this case is noteworthy. Following a jury trial, Defendant was convicted of two counts of First Degree Murder, both Class 1 Felonies. The Court sentenced the Defendant on January 27, 2006, to natural life without the possibility of parole on one count, and natural life with the possibility of parole after 25 years have been served on the second count. The sentences were to run consecutively. Defendant later sought Rule 32 relief, which was dismissed on June 15, 2009.

This is the Defendant's second Rule 32 proceeding. It is both untimely and successive. Notwithstanding that fact, the Court shall address the legal issues raised in the Peititon.

Defendant is claiming, pursuant to Ariz. R. Crim. P. 32.1(g), that there has been a significant change in the law that if applied retroactively to the defendant's case, would probably affect the outcome. Specifically, Defendant cites *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

The Defendant claims *Miller* constitutes a significant change in the law that applies to his case. For the purpose of this order only, the Court shall consider that *Miller* could be a significant change in the law. Defendant asserts that under *Miller,* a juvenile could not be sentenced to life imprisonment. This is a misreading of *Miller* which does not place a categorical ban on juvenile life sentences without the possibility of parole. Rather, in *Miller*, the Supreme Court ruled that a mandatory life sentence without the possibility of parole was unconstitutional. Hence, the judge or jury must have the opportunity to consider mitigating circumstances such as age prior to imposing either life with the possibility of parole or the harshest sentence possible for a juvenile, that being natural life without the possibility of parole.

In the instant case, the record demonstrates that the age of the Defendant was given "considerable weight" as a mitigating factor. Even after considering defendant's age as a mitigating factor, the Court chose to sentence him to the term of his natural life pursuant to A.R.S. § 13-752. Since the sentence of natural life without the possibility of parole was not statutorily mandated and the Court had the discretion to order life with the possibility of parole but chose not to, defendant has failed to demonstrate that *Miller* is a significant change in the law as applied to his case.

IT IS THEREFORE ORDERED dismissing defendant's Notice of Post-Conviction Relief.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/05/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT

08/01/2013

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
T. Henninger
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

LONNIE ALLEN BASSETT (001)

LONNIE ALLEN BASSETT
#202441 ASPC EYMAN/BROWING UNI
P O BOX 3400
FLORENCE AZ 85132
APPEALS PUBLIC DEFENDER
ANDREW S HACKER

COURT ADMIN-CRIMINAL-PCR

RULING ON MOTION FOR RECONSIDERATION
BRIEFING SCHEDULE

The Court has reviewed Defendant's "Motion for Rehearing (Rule 32.9(A))" filed July 17, 2013. The Court has also reviewed the "Motion for leave to File Brief of Amicus Curiae in Support of Petitioner's Motion for Reconsideration" and "Brief of Amicus Curiae in Support of Petitioner's Motion for Reconsideration" both filed July 18, 2013.

Following a jury trial, Defendant was convicted of two counts of First Degree Murder, both Class 1 Felonies. The Court sentenced the Defendant on January 27, 2006, to natural life without the possibility of release on one count, and natural life with the possibility of release after 25 years have been served on the second count. The sentences were to run consecutively. The two sentences must be analyzed individually as to whether *Miller* applies.

Natural Life <u>without</u> the Possibility of Release

Assuming it is determined that *Miller* has retroactive application, which has not yet been determined by this Court or in Arizona, there is a threshold legal issue that must be addressed. In

this matter, Defendant was sentenced to life without the possibility of release on one of the murder counts. The *Miller* court did not foreclose the court's authority to enter a sentence of natural life. Rather, *Miller* mandated that mitigating factors such as age must be considered by the Court before it may impose the "harshest sentence" on juvenile offenders.

The record in this matter is clear that the sentencing judge took into account the age of the defendant as part of the sentencing determination (page 41 of sentencing transcript). Therefore, if *Miller* has retroactive application, its requirements regarding mitigation have been met in this matter and there is no basis for defendant to be relieved from the natural life sentence that was imposed upon him.

Natural Life with the Possibility of Release After 25 Years Have Been Served

Under Rule 32, an exception to the preclusion rule exists when "there has been a *significant change in the law* that *if determined to apply* to the defendant's case would probably overturn the defendant's conviction *or sentence*." Rule 32.1(g) (emphasis added). Defendant relies upon Miller as a basis for his relief. Defendant's request for relief presupposes that *Miller* applies retroactively, which, as noted above, has not yet been made by this Court or under Arizona law.

Assuming it is determined that *Miller* has retroactive application, there is an additional legal issue that must be addressed. In this matter, Defendant was sentenced to life with the possibility of release after 25 years. He was sentenced on January 27, 2006, and has not yet served the 25 years required before he would be eligible for release. While there is an argument to be made that there is no system for release in Arizona at this time and that commutation or pardon is not the functional equivalent, Defendant must demonstrate that he has a presently cognizable claim in advance of the 25 year minimum sentence imposed upon him.

The defendant makes several arguments, but none can be addressed if the Court does not find *Miller* to be retroactively applicable. The retroactive application is not briefed in the instant motion. Further, Defendant has not yet established that there is a presently cognizable claim that could be brought by Defendant if *Miller* does have retroactive application.

The Court therefore finds that before the Court can address the Motion For Reconsideration and the underlying Petition For Rule 32 Relief only on the sentence of life with possibility of release, these issues of retroactive application of *Miller* and whether there is a presently cognizable claim for relief must be briefed and considered by the Court. This allowance does not constitute any expression of opinion on the merits of any of defendant's claims raised in the motion for reconsideration or as to the issues raised herein.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT 08/01/2013

IT IS ORDERED deferring determination of the Motion For Reconsideration on the life sentence with the possibility of release and allowing for additional briefing as follows:

1) Appointing the Office of the Public Defender to represent the defendant in this Rule 32 proceeding.

2) By no later than September 20, 2013, counsel for Defendant shall file a brief on the issues of retroactive applicability of *Miller* and whether there is a presently cognizable claim for relief.

3) The State shall file its Response within 21 days of the filing of Defendant's brief.

4) If appropriate, Defendant shall file his Reply no later than 10 days after the filing of the State's Response.

5) A copy of all pleadings filed in this matter shall be served only upon the Rule 32 Management Unit until this matter is assigned to a judge for ruling.

6) When all pleadings have been filed the case will be assigned to the Honorable Bruce R. Cohen for further proceedings and ruling.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
05/14/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005097-001 DT

05/09/2014

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
T. Gatz
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

LONNIE ALLEN BASSETT (001)

TENNIE BETH MARTIN
MIKEL PATRICK STEINFELD
KATHERINE A PUZAUSKAS

AZ DOC
COURT ADMIN-CRIMINAL-PCR
RULE 32 UNIT COUNSEL

ORDER RE: RULE 32 RELIEF UNDER *MILLER*

Oral Argument was conducted on May 2, 2014. The arguments and pleadings present common legal and factual issues among numerous defendants and were handled jointly for the purposes of consistency in ruling and judicial economy. Having taken the matters under advisement, the Court makes the following findings, conclusions, and orders:

The Miller Decision

In these consolidated Post-Conviction Relief proceedings, each of the Defendants raise a challenge to their sentences based on the United States Supreme Court opinion in *Miller v. Alabama,* 567 U.S. ——, 132 S.Ct. 2455, 183. L.Ed. 2d. 407 (2012). They assert that *Miller* applies retroactively and that, as applied, the *Miller* decision renders their life sentences unconstitutional. For each of these defendants, the sentence was life with the possibility of release.

The Supreme Court in *Miller* addressed the sentencing of Evan Miller and Kuntrell Jackson, two juvenile offenders who were convicted of murder. Both were sentenced to life imprisonment without the possibility of parole. In both cases, a sentence of life without the possibility of parole was mandatory as both sentencing courts lacked discretion to enter a sentence that allowed for the possibility of parole.

The *Miller* Court held that the Federal Constitution's ban against cruel and unusual punishment forbids a *mandatory* sentence of life imprisonment without the possibility of parole upon offenders who were under the age of 18 years at the time of their offense. They wrote: "[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Miller,* 132 S.Ct. at 2475.

The Supreme Court relied in part on its earlier decisions in *Roper v. Simmons,* 543 U.S. 551 (2005), and *Graham v. Florida,* 560 U.S. 48 (2010), declaring unconstitutional the sentencing of a minor either to death or life imprisonment without parole for a non-homicide offense. The Supreme Court in *Miller* specifically stated that "*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult" because a mandatory sentence "precludes consideration of [the offender's] chronological age and its hallmark features-among them, immaturity, impetuosity, and failure to appreciate risks and consequences." 132 S.Ct. at 2468.

It must be noted that the Supreme Court refused to categorically declare that a juvenile can never receive a life sentence without the possibility of parole/release for a homicide offense. They did suggest, however, that a natural life sentence should be the exception and not the rule. They wrote that "[G]iven all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller,* 132 S.Ct. at 2469.[1]

The Court concluded by holding "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller,* 132 S.Ct. at 2469. While "[a] State is not required to guarantee eventual freedom" it "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller,* 132 S.Ct. at 2469 (quoting *Graham,* 130 S.Ct. at 2030).

Need for Review of *Miller*

It can be argued that *Miller's* application to Arizona law ends with a very simple conclusion, regardless of whether it applies retroactively. *Miller* proscribes a sentencing scheme

[1] Defense counsel argued that contrary to assumptions made in *Miller*, life without the possibility of parole (harshest possible sentence for a juvenile) has been imposed in nearly 50% of the cases involving juveniles convicted of murder. He maintains that this is far greater than the *Miller* proclamation that it should be "uncommon." This court is specifically not addressing this issue nor does it adopt as fact the percentage suggested by defense counsel.

that mandates life imprisonment without the possibility of release for a juvenile offender convicted of murder. Under Arizona law, there was no such mandate and the option has existed for the sentencing judge to impose life with or without the possibility of release.

It is therefore a viable argument to maintain that *Miller* applies only to States that did not allow the sentencing judge this discretion, with Arizona not being one of those States. However, for a myriad of reasons, this Court does not believe that such a simplistic approach can be taken, particularly given the statutory amendments made to Arizona's sentencing laws in 1994 regarding parole and the fact that *Miller* requires a "meaningful opportunity" for release.

Retroactivity of *Miller*

There is no dispute herein that this matter comes before this Court on a collateral (Rule 32) review. Defendant's sentence was final well before *Miller* was decided. Generally, new constitutional rules are not applicable to cases already final when the rule is announced. *See State v. Febles*, 210 Ariz. 589, 115 P.3d. 629 (2005). However, there are exceptions to this concept and those exceptions are the focus of this review.

Defendant asserts that the decision in Kuntrell Jackson's case[2] served to establish that the Supreme Court intended *Miller* to apply retroactively. However, it is not clear that Jackson's case was a true collateral review and there is nothing within *Miller* to show that the issue of retroactivity was addressed by the Court.

Since *Miller* was handed down, courts around the country have addressed *Miller* and there is by no means a consensus as to whether *Miller* is to have retroactive application on collateral review. Published opinions giving *Miller* retroactive application have been issued in Illinois and Iowa, as well as the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota). Prospective only application of *Miller* has been found in Louisiana, Michigan, as well as the Fifth Circuit (Louisiana, Mississippi, Texas) and Eleventh Circuit (Alabama, Florida and Georgia) Courts. For those courts that have held *Miller* not to be retroactive in its application, the common reasoning was that the new rule in Miller was procedural, not substantive.[3] One court denied retroactive application, at least in part, because "[a]pplying *Miller* retroactively would undoubtedly open the floodgates for post-conviction motions where at the time of conviction and sentencing, the judge did not have an affirmative duty to consider mitigating factors of youth."[4] While this Court respects the notion of finality of judgments, such a policy cannot be applied against a fundamental constitutional right raised herein.

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[2] Jackson's case has been characterized as coming before the Court through a collateral appeal.
[3] See, for example, *In re Morgan*, _ F.3d _, 2013 WL 1499498 (11th Cir. 2013)
[4] *Geter v. State*, No. 3D12-1736, ___ So.3d ___, 2012 WL 4448860 (Fla.Ct.App.3d Dist. Sept. 27, 2012)

Arizona courts have adopted and followed the United States Supreme Court's retroactivity analysis under *Teague* (addressed below). *State v. Slemmer*, 170 Ariz. 174, 823 P.2d 41 (1991). Historically, retroactive application of a Supreme Court decision turned on whether the case was being decided on direct appeal rather than through a collateral review. That has been expanded to cases that involve a new rule of criminal procedure.

Neither party herein suggested that *Miller* is not a new rule. Even Courts that have held that *Miller* does not have retroactive application have conceded that the *Miller* decision represents a "new rule."[5]

Miller is a new rule and it must be determined whether it represents a procedural or substantive new rule. This is an "important" distinction in collateral review cases[6] and there is a long-standing recognition that classification of cases as procedural versus substantive is not simple to resolve.[7] If procedural, it is generally accepted that the new rule is to have prospective application only. If substantive, it may be applied retroactively. A substantive new rule is not limited to those defendants who stand convicted of an act that the law does not make criminal. It also includes defendants who face a punishment that the law cannot impose because of his status or offense. *Schiro v Summerlin,* 542 U.S. 348 at 352, 124 S.Ct. 2519 (2004).

A second relevant analysis is whether the new rule is a "watershed rule of criminal procedure" that impacts fundamental fairness. If so, it may be given retroactive application in a collateral review. *Teague v Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d. 334 (1989). The Court in *Teague* held:

> "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Id. At 311-312

In *Whorton v Bockting*, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed. 2d 1 (2007), the Court elaborated on *Teague*, and defined a new rule as a rule that was not "dictated by precedent existing at the time the defendant's conviction became final." Before *Miller*, no court had addressed the issue of a mandatory life sentence for juvenile homicide offenders. In addressing

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[5] See, for example, *People v Carp*, 298 Mich. App. 472, 828 N.W. 2d 686 (2012)
[6] *Bousley v U.S.* 523 U.S. 614, 188 S.Ct. 1604 (1998)
[7] *Robinson v Neil*, 409 U.S. 505, 93 S.Ct. 876 (1973)

whether it is a watershed rule of criminal procedure, the *Whorton* Court noted that "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id* at 417-418.

This Court must consider whether Defendant is entitled to relief under Rule 32.1(g), which provides grounds for relief when there has been a "significant change in the law." Rule 32 does not define what constitutes a significant change in the law, but for it to qualify as significant, there must be "some transformative event, a clear break from the past." *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991).

In *State v. Shrum*, 220 Ariz. 115, 203 P.3d 1175 (2009), the court provided the rationale for this exception to preclusion. The *Shrum* Court stated the following:

> Because the general rule of preclusion serves important societal interests, Rule 32 recognizes few exceptions. See Ariz. R.Crim. P. 32.2(b) (listing exceptions). At issue in this case is the provision allowing a "successive or untimely post-conviction relief proceeding" to raise a claim for relief based on Rule 32.1(g). Id. Rule 32.1(g) 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." (emphasis added)
>
> The rationale for the Rule 32.1(g) exception is apparent: A defendant is not expected to anticipate significant future changes of the law in his of-right PCR proceeding or direct appeal. Nor should PCR rules encourage defendants to raise a litany of claims clearly foreclosed by existing law in the faint hope that an appellate court will embrace one of those theories. In those rare cases when a "new rule" of law is announced, Rule 32.1(g) provides a potential avenue for relief.

From this Court's perspective, *Miller* is a substantive new rule. Not only does it preclude a mandatory life sentence without the possibility of a meaningful opportunity for release, it also suggests that the special class of defendants (juvenile offenders) should be given additional consideration at sentencing that goes well beyond what is considered for a similarly situated adult defendant.

This Court further concludes that *Miller* is watershed rule of criminal procedure. Before *Roper, Graham* and *Miller* were decided, juvenile offenders could be put to death, could be sentenced to life imprisonment for non-homicide offenses and could be mandated to life imprisonment without any possibility of release. All three cases create a clear demarcation of how the Eighth Amendment is applied to juvenile offenders and go to the heart of fundamental fairness in

our treatment of juvenile offenders. *Miller*, in the context of this triad of cases, is a true watershed in sentencing of juveniles.

Impact of Miller on Defendant

Having found that *Miller* applies retroactively, the court must turn to whether the sentence ordered herein violated Defendant's Eighth Amendment rights. Unlike Evan Miller and Kuntrell Jackson, this defendant was NOT sentenced to life imprisonment without the possibility of release and Arizona law did not mandate a natural life sentence. Therefore, on its face, it would appear that defendant cannot argue that his sentence was in violation of his Eighth Amendment rights since he was given the opportunity for release in the future at the time of his sentencing.

However, from 1994 to the present date, the only mechanism for release under a life sentence in Arizona has been through clemency or commutation. There is a vast difference between clemency/commutation and parole and the distinction is central to the issue of whether there is a "meaningful opportunity" for release as contemplated under *Miller*.

In *Solem v. Helm*, 463 U.S. 277, 303 (1983), the Supreme Court addressed this difference, and wrote:

> We explicitly have recognized the distinction between parole and commutation in our prior cases. Writing on behalf of the *Morrissey* Court,[8] for example, Chief Justice Berger contrasted the two possibilities: "Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals." In *Dumschat*, The Chief Justice similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence."[9]

The Supreme Court in *Solem* further noted that the possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." They found little difference from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. "Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless." *Id.*

Consistent with the Supreme Court's findings about South Dakota's release statistics in *Solem*, this Court has a basis to conclude that the frequency of release under parole in Arizona is

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[8] Morrissey v. Brewer, 408 U.S. 471 (1972)

[9] Connecticut Board Of Pardons V. Dumschat, 452 U.S. 458 (1981)

far greater than the percentages for release under clemency or commutation. This Court must therefore conclude that clemency or commutation is not a "meaningful opportunity" for release as would be mandated under *Miller* in cases in which the possibility for release is ordered for a juvenile offender.

Miller's retroactive application combined with the finding that there is not a meaningful opportunity for release under Arizona law leads this Court to the last issue, which is whether defendant's claim under *Miller* is ripe for determination. Defendant is not yet eligible for release under the terms of his original sentence, regardless of whether such possibility for release would come to him through clemency, commutation, parole or any other system for review. Until just days before the oral argument in this matter, this issue would likely have driven the ruling, as this court would have been inclined to reserve rights to Defendant to challenge Arizona law upon such time that he becomes eligible for release. However, there has been an intervening event that the State and at least five of similarly-situated defendants concur has resolved the entire issue.

On April 22, 2014, Governor Brewer signed into law HB 2593. This law serves to reinstate parole for juvenile offenders sentenced to life with the possibility of release, including those sentenced before the law becomes effective. Every indication is that it was proposed, supported and enacted in direct response to *Miller*. Separate from that anecdotal assessment, this Court believes that ARS § 13-716 read in conjunction with subsection (I) of ARS § 41-1604.09 (which will become effective on July 24, 2014), closes the "*Miller* gap"[10] that was created by the 1994 *Truth in Sentencing* Amendments to Titles 13 and 41 of the Arizona Revised Statutes.[11]

For the purpose of this order, this Court is compelled to set forth the new statute so that there is no confusion or ambiguity in the future as to the status of law relied upon in rendering this decision. The newly-enacted law provides the following relevant provisions:

> **13-716. Juvenile offenders sentenced to life imprisonment; parole eligibility**
>
> Notwithstanding any other law, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years of age is eligible for parole on completion of service of the minimum sentence, regardless of whether the offense was committed on or after January 1, 1994. If granted parole, the person shall remain on

[10] The "*Miller* gap" stated herein relates to clemency or commutation not being a meaningful opportunity for release.

[11] Parole was abolished in Arizona in 1994 with amendments to A.R.S. § 41-1604.09.

parole for the remainder of the person's life except that the person's parole may be revoked pursuant to section 31-415.

41-1604.09. Parole eligibility certification; classifications; appeal; recertification; applicability; definition

I. This section applies only to either of the following:
1. A person who commits a felony offense before January 1, 1994.
2. A person who is sentenced to life imprisonment and who is eligible for parole pursuant to section 13-716.

Conclusion

In summary, *Miller* prohibits a mandatory life sentence for juvenile offenders. Second, *Miller* must be given retroactive application under Arizona law. Third, Arizona did not have mandatory life sentencing for juveniles at the time of sentencing and allowed for commutation or clemency. Fourth, commutation or clemency as applied in Arizona does not provide a "meaningful opportunity" for release for juvenile offenders (under *Miller*) who were sentenced to life with the possibility of release. Fifth, defendant is not yet eligible for release. Sixth, HB 2593 resolves the residual issues for those sentenced to life imprisonment on or after January 1, 1994 that could have called into question whether Defendant's sentence violated the letter and spirit of *Miller*.[12]

Accordingly, notwithstanding the finding that *Miller* applies retroactively and that it represents a significant change in law under Rule 32.1(g) of the Arizona Rules of Criminal Procedure,

IT IS ORDERED denying Defendant relief under Rule 32 with the condition that upon ARS § 13-716 and § 41-1604.09(I) becoming effective under Arizona law,[13] the Arizona Department of Corrections shall set a specific date for parole eligibility for this Defendant.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

[12] During argument, one defense counsel raised an issue as to whether the new law, when effective, will provide a mechanism for termination of lifetime parole. He raised this as a basis to support the granting of Rule 32 Relief and the need for re-sentencing under the new statutes. *Miller* addressed the possibility of release and not issues relating to parolees, and this court rejects consideration of the impact on parolees.

[13] On or about July 24, 2014

ATTACHMENT 2

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Respondent,*

v.

CHARLES VINCENT WAGNER, JR., *Petitioner.*

No. 1 CA-CR 21-0492 PRPC
FILED 5-10-2022

Petition for Review from the Superior Court in Maricopa County
No. CR 1994-092394
The Honorable Rosa Mroz, Judge, *Deceased*

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Julie A. Done, Kristin L. Larish
Counsel for Respondent

Michael J. Dew Attorney at Law, Phoenix
By Michael J. Dew
Counsel for Petitioner

Arizona Justice Project, Phoenix,
By Karen Smith, Randal Boyd McDonald
Counsel for Amicus Curiae Arizona Justice Project

OPINION

Presiding Judge Maria Elena Cruz delivered the opinion of the Court, in which Judge Samuel A. Thumma and Judge Michael J. Brown joined.

C R U Z, Judge:

¶1 Charles Vincent Wagner, Jr. petitions this court for review from the summary dismissal of his petition for post-conviction relief filed under Arizona Rule of Criminal Procedure ("Rule") 32. For the following reasons, we grant review and grant relief, to the extent that we remand for an evidentiary hearing as provided by *State v. Valencia*, 241 Ariz. 206 (2016).

FACTUAL AND PROCEDURAL HISTORY

¶2 In June 1994, Wagner shot and killed a woman in a grocery store parking lot. He was 16 years and two months old at the time. The State prosecuted Wagner as an adult and sought the death penalty. A jury found him guilty of first degree murder and attempted armed robbery.

¶3 As required by Arizona Revised Statutes ("A.R.S.") section 13-703(B) (1994),[1] the superior court held a hearing on aggravating and mitigating circumstances to determine Wagner's sentence for first degree murder. Because parole had been abolished for those who committed felonies as of January 1, 1994, the superior court's sentencing options for the murder conviction were limited to death, life imprisonment with no release for the rest of Wagner's natural life, or life imprisonment with the possibility of release through executive clemency after Wagner served 25 years. *See* A.R.S. §§ 13-703(A) (1994), 31-402 (1994), 41-1604.09(I) (1994); *Lynch v. Arizona*, 578 U.S. 613, 615 (2016).

¶4 The State relied on the trial record to prove aggravation. To establish mitigation, the defense called witnesses who testified about Wagner's upbringing, psychological issues, and maturity level, both at the time of the shooting and since then. The superior court found the State

[1] Where appropriate, we cite the statutes in effect when Wagner committed the crimes. *See State v. Newton*, 200 Ariz. 1, 2, ¶ 3 (2001); A.R.S. § 1-246. Unless so indicated, we cite the current version of statutes and rules.

proved two statutory aggravators—that Wagner committed the murder for pecuniary gain and in an especially cruel manner. The court found Wagner proved the statutory mitigator of age and a non-statutory mitigating factor based on his difficult family history. The court ultimately determined "that the two mitigating factors [were] sufficiently substantial to call for life imprisonment instead of death despite the aggravating factors of pecuniary gain and cruelty."

¶5 The superior court sentenced Wagner to life imprisonment, "not to be released on any basis for the remainder of [his] natural life." The court explained that it was sentencing Wagner to "natural life, as opposed to a sentence of life imprisonment requiring a minimum of 25 years imprisonment prior to being eligible for release," based on his "use of a deadly weapon, the presence of accomplices, the especially cruel manner in which the offense was committed, the fact the crime was committed for pecuniary gain, the severe emotional harm caused to the victim's immediate family and the danger to the community that [Wagner] presents." The court sentenced Wagner to a consecutive prison term of 7.5 years for the attempted armed robbery conviction. Wagner's convictions and sentences were affirmed on appeal. *See State v. Wagner*, 194 Ariz. 310 (1999).

¶6 In 2012, the United States Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller v. Alabama*, 567 U.S. 460, 465 (2012).[2] Contrasting "the juvenile offender whose crime reflects unfortunate yet transient immaturity" with "the rare juvenile offender whose crime reflects irreparable corruption," the *Miller* court held that the sentencer must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 479-80 (internal quotation marks and citation omitted).

¶7 In 2016, the United States Supreme Court declared *Miller* retroactive. *See Montgomery v. Louisiana*, 577 U.S. 190 (2016). The *Montgomery* court described *Miller* as providing a "substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* at 210. The *Montgomery* court added that giving

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[2] The United States Supreme Court had earlier decided that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

effect to *Miller*'s holding required a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors" in order "to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* (quoting *Miller*, 567 U.S. at 465).

¶8 Following its *Montgomery* decision, the United States Supreme Court summarily granted, vacated the judgments in, and remanded for further consideration, several petitions for writ of certiorari by Arizona defendants who had been "sentenced to life without the possibility of parole for crimes they committed before they turned 18." *See Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring). The defendants in those cases had been sentenced after consideration of their youth by the sentencing court. *Id.* at 12-13.

¶9 In *Valencia*, the Arizona Supreme Court "granted review to consider whether *Miller* is a significant change in the law that may require the resentencing of persons serving natural life sentences for crimes committed as juveniles." 241 Ariz. at 208, ¶ 8.[3] At issue were claims for post-conviction relief by two defendants, Healer and Valencia, who had committed first degree murder in 1994 and 1995, when they were sixteen and seventeen years old, respectively. *Id.* at 207, ¶¶ 2-4. Each defendant was sentenced to natural life imprisonment after "the trial court in each case considered various aggravating and mitigating factors, including the defendant's age." *Id.* at ¶ 4.

¶10 The *Valencia* court held that *Miller* and *Montgomery* established a significant change in the law that must be given retroactive effect. *Id.* at 209, ¶ 15. The court further determined that *Miller* and *Montgomery* applied to Healer and Valencia even though the superior court had discretion to impose a more lenient sentence than natural life in each case and even though the court had considered the defendants' youth before imposing sentence. *Id.* at 208-10, ¶¶ 11-12, 17-18. The *Valencia* court observed that because Healer and Valencia committed murder after the elimination of parole, their natural life sentences, though not mandatory, "did amount to sentences of life without the possibility of parole." *Id.* at 208, ¶ 11. The court rejected the State's argument that the superior court's consideration of the defendants' youth before imposing sentence met the

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[3] The court did not need to decide whether *Miller* applied to juvenile offenders who received life sentences with the possibility of release after serving a minimum number of years because the legislature had reinstated parole for those offenders in 2014. *See* A.R.S. §§ 13-716, 41-1604.09(I)(2); 2014 Sess. Laws, ch. 156, § 2 (2d Reg. Sess.) (H.B. 2593).

requirements of *Miller*. *Id.* at 209, ¶ 16. The court reasoned that argument was refuted by *Montgomery*, and it further referred to the United States Supreme Court's decision to grant, vacate, and remand the cases of similarly situated defendants in *Tatum*. *Id.*

¶11 Concluding that Healer and Valencia had established colorable claims for post-conviction relief under Rule 32.1(g), the *Valencia* court ruled they were entitled to evidentiary hearings where they would "have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *Id.* at 210, ¶ 18.

¶12 Wagner sought post-conviction relief based on a Rule 32.1(g) significant change in the law, and the State agreed he was entitled to an evidentiary hearing under *Valencia*.

¶13 Before that hearing took place, the United States Supreme Court decided *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), which addressed the application of *Miller* and *Montgomery* in state courts. The defendant in *Jones* had received a mandatory sentence of life in prison without parole after committing murder when he was 15 years old. *Id.* at 1312. Following *Miller*, the Mississippi Supreme Court ordered a "new sentencing hearing where the sentencing judge could consider Jones's youth and exercise discretion in selecting an appropriate sentence." *Id.* at 1312-13. At the hearing, Jones' attorney argued that the defendant's "chronological age and its hallmark features diminished the penological justifications for imposing the harshest sentences" and the record did not "support a finding that the offense reflects irreparable corruption." *Id.* at 1313 (internal quotation marks and citation omitted). The sentencing judge acknowledged he had discretion to impose a more lenient sentence but determined that Jones should still be sentenced to life in prison without parole "after considering the factors relevant to the child's culpability." *Id.* (internal quotation marks and citation omitted).

¶14 Jones contested the constitutionality of his resentencing, arguing that *Miller* and *Montgomery* required the judge to make an explicit or implicit finding that he was "permanently incorrigible" before imposing a sentence of life without parole. *Id.* at 1311. The high court disagreed, explaining that *Miller* only required "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence" and that *Montgomery* "flatly stated that *Miller* did not impose a formal factfinding requirement"

or "a finding of fact regarding a child's incorrigibility." *Id.* (internal quotation marks and citation omitted).

¶15 The *Jones* majority rejected the dissent's claim that it was "implicitly overruling" or "unduly narrowing" *Miller* and *Montgomery*. *Id.* at 1321. The majority emphasized that its decision did "not overrule *Miller* or *Montgomery*" but merely clarified that those decisions did not "require a finding of permanent incorrigibility." *Id.* at 1321-22. Applying that interpretation to Jones' case, the court concluded the resentencing "complied with [*Miller* and *Montgomery*] because the sentence [of life without parole] was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth." *Id.* at 1322.

¶16 After *Jones*, the State moved to vacate the pending evidentiary hearing in Wagner's case. The State contended that *Jones* "implicitly overruled" *Valencia*'s application of *Miller* and *Montgomery* to "defendants like Wagner" and that Wagner's sentencing complied with the constitutional requirements imposed by *Miller*, as interpreted by *Jones*, because Wagner's "natural life sentence was not mandatory and the trial court considered Wagner's 'youth and attendant characteristics' before imposing sentence." Wagner disputed the State's argument and contended that *Valencia* was "unaffected by *Jones*."

¶17 The superior court granted the State's motion to vacate the hearing and summarily dismissed Wagner's petition for post-conviction relief. Agreeing with the State's position, the court reasoned that "*Jones* implicitly overruled *State v. Valencia*" and *Miller* did not apply to Wagner's "situation because [Wagner's] natural life sentence was a discretionary sentence, and not as a result of a mandatory sentence" and it was imposed after the sentencing judge considered Wagner's "youth and attendant characteristics." Wagner petitions for review.

DISCUSSION

¶18 We consider the superior court's denial of post-conviction relief for an abuse of discretion, which occurs if the court "makes an error of law or fails to adequately investigate the facts necessary to support its decision." *State v. Pandeli*, 242 Ariz. 175, 180, ¶ 4 (2017).

¶19 We begin with the general principle that both we and the superior court are bound by the decisions of the Arizona Supreme Court and "are not permitted 'to overrule, modify, or disregard them.'" *State v. Sullivan*, 205 Ariz. 285, 288, ¶ 15 (App. 2003) (quoting *City of Phoenix v. Leroy Liquors*, 177 Ariz. 375, 378 (App. 1993)); *see also State v. Eichorn*, 143 Ariz. 609,

613 (App. 1984) ("Whether prior decisions of the Arizona Supreme Court are to be disaffirmed is a question for that court."). By virtue of the Supremacy Clause, however, we must follow a federal constitutional decision of the United States Supreme Court over a prior decision of our state supreme court if the federal decision has "rendered the position of the Arizona Supreme Court untenable." *State v. Casey*, 10 Ariz. App. 516, 517 (1969); *see also Hernandez-Gomez v. Volkswagen of Am., Inc.*, 201 Ariz. 141, 143-44, ¶ 8 (App. 2001) ("The [Arizona Supreme Court's] conclusion is, of course, binding on this court . . . absent a subsequent decision by the United States Supreme Court governing the same subject."); *cf. State v. Brahy*, 22 Ariz. App. 524, 525 (1974) (holding that First Amendment jurisprudence of the United States Supreme Court did not upset a prior decision of the Arizona Supreme Court because the prior state decision was consistent with the later federal decisions).

¶20 Here, the superior court's determination that *Jones* "implicitly overruled" *Valencia* was erroneous because *Jones* did not render *Valencia* "untenable." *Valencia* was based on *Miller* and *Montgomery*—decisions that *Jones* explicitly stated it was not overruling. Nor was *Jones*' interpretation of *Miller* and *Montgomery*—that a sentencing judge is not obligated to specifically find a juvenile offender "permanently incorrigible" before declining to impose a parole-eligible sentence—incompatible with *Valencia*. Consistent with *Jones*, our supreme court's decision in *Valencia* did not mandate specific findings about a juvenile offender's "permanent incorrigibility" or "transient immaturity" in deciding whether to impose a parole-eligible sentence.[4]

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[4] We also note that even if our supreme court's directives in *Valencia* could be interpreted as going beyond what was required by *Jones*, that would not necessarily render *Valencia* incompatible with *Jones*. The *Jones* court noted that nothing prevented states from prescribing sentencing procedures that exceeded requirements under the United States Constitution. *Jones*, 141 S. Ct. at 1323. The *Valencia* decision did not state that it should be read as requiring the minimum process sufficient under the United States Constitution. It is not inconceivable that our supreme court might direct Arizona courts, after considering Arizona's particular sentencing scheme and Arizona's Constitution, to implement procedures that could be interpreted by some as going beyond what is minimally required by the United States Constitution. *Cf. State v. Ault*, 150 Ariz. 459, 463 (1986) ("The Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens.")

¶21 The superior court's further determination that *Miller* and *Montgomery* do not apply to Wagner because he did not receive a mandatory life-without-parole sentence was also in error. Although the *Jones* decision clarified what procedures *Miller* and *Montgomery* require of courts when sentencing juvenile homicide offenders, *Jones* said nothing—and therefore altered nothing—about the type of sentence encompassed by *Miller* and *Montgomery*. Accordingly, *Jones* did not implicitly overrule the *Valencia* court's application of *Miller* and *Montgomery* to defendants who—like Wagner—were sentenced to life terms under a scheme that did not allow for the possibility of parole.

¶22 *Miller*'s use of the term "mandatory" does not change this analysis. The crux of *Miller* is two-part: (1) a sentencing court must have the option of imposing a parole-eligible sentence to a juvenile offender who is required to serve a life term, and (2) the court must consider the offender's youth in determining whether to impose a parole-eligible sentence. *Miller*'s use of "mandatory"—as well as the understanding of its counterpart, "discretionary"—must be read in the context of whether a parole-eligible sentence is available. Here, because the superior court had no discretion to sentence Wagner to a parole-eligible term, his sentence is encompassed by *Miller*. It matters not whether the superior court had "discretion" to impose alternative non-parole-eligible penalties or whether the court considered the defendant's youth in exercising that discretion.

¶23 Nor can an argument be made that a life sentence with the possibility of "release" by executive clemency equals a life sentence with the possibility of parole. *See Chaparro v. Shinn*, 248 Ariz. 138, 141-42, ¶ 15 (2020) (comparing the procedures for obtaining parole with the more demanding burdens of obtaining commutation through executive clemency); *see also Graham v. Florida*, 560 U.S. 48, 57, 79, 82 (2010) (reasoning that executive clemency is not equivalent to parole because it does not provide a "meaningful" or "realistic opportunity to obtain release").

¶24 Apart from its determination in prior cases that the opportunity to seek executive clemency is not equivalent to parole eligibility, the United States Supreme Court left little doubt that *Miller* and *Montgomery* apply to the scheme under which Wagner was sentenced when it decided to grant, vacate, and remand the cert petitions of Arizona defendants similarly situated to Wagner "for further consideration in light of *Montgomery*." *Tatum*, 137 S. Ct. at 11. The *Valencia* court, too, recognized that a life sentence with the possibility of release only by executive clemency was encompassed by *Miller* when it held that *Miller* applied to defendants similarly situated to Wagner.

¶25 The State contends that Wagner's case falls outside *Miller* because the superior court could have sentenced him to an illegal, parole-eligible life term. If a court's theoretical ability to impose a parole-eligible sentence in violation of state law were an exception to *Miller*, the exception would swallow the rule. The mere fact that some courts may have mistakenly sentenced defendants to parole-eligible terms in violation of state law, or erroneously described a non-parole-eligible sentence as parole eligible, does not establish that Wagner's sentencing procedure complied with *Miller*. And the record negates the State's argument that the superior court here "understood the life sentencing alternatives as natural life and life with the possibility of parole after 25 years." At no point during the sentencing proceedings in this case did the superior court refer to "parole" or convey that it believed it could sentence Wagner to a parole-eligible term.

CONCLUSION

¶26 We vacate the superior court's dismissal of Wagner's petition for post-conviction relief and remand for further proceedings consistent with this opinion.

COURT OF APPEALS
STATE OF ARIZONA

AMY M. WOOD • Clerk of the Court
FILED: AA

ATTACHMENT 3

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL PAUL JESSUP, *Petitioner-Appellee,* v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, *Respondents-Appellants.*	No. 18-16820 D.C. No. 2:15-cv-01196-NVW OPINION

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted February 9, 2022
Phoenix, Arizona

Filed April 21, 2022

Before: Mary H. Murguia, Chief Judge, Susan P. Graber, Circuit Judge, and Sidney A. Fitzwater,* District Judge.

Opinion by Judge Graber

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* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

SUMMARY**

Habeas Corpus

The panel reversed the district court's judgment granting habeas corpus relief to Petitioner Michael Paul Jessup, who challenged his sentence of life without the possibility of any form of release, which an Arizona state court imposed for the first-degree murder Petitioner committed when he was 17 years old.

The district judge held that the Arizona courts' denial of post-conviction relief was contrary to and an unreasonable application of *Miller v. Alabama*, 567 U.S. 460 (2012), in which the Supreme Court held that, before a sentencer may impose a sentence of life without parole on a defendant who committed a crime as a juvenile, the Eighth Amendment requires that the defendant receive an individualized sentencing hearing during which the sentencer considers the defendant's youth and its attendant circumstances.

The state post-conviction court had rejected Petitioner's *Miller* claim on the ground that, unlike the individuals sentenced under the mandatory sentencing schemes at issue in *Miller*, Petitioner in fact received an individualized sentencing hearing during which the sentencing judge, after considering Petitioner's youth and its attendant circumstances, found Petitioner unsuitable for any form of release.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the state court's application of *Miller* was a reasonable one because the sentencing judge thoughtfully considered whether Petitioner warranted a sentence of life with the possibility of *any* form of release, took into account Petitioner's youth and the characteristics of young people, and concluded that Petitioner warranted a sentence of life without the possibility of release.

Petitioner asserted that under the Arizona statutory scheme in effect at time of the murder and at the time of the sentencing, there was no practical difference between a sentence of natural life and a sentence of life with the possibility of release. The panel held that the state court reasonably concluded that, despite this practical result, *Miller* does not mandate resentencing. Given *Miller*'s focus on the required procedure, and given the sentencing judge's extensive deliberation here as to whether Petitioner warranted a possibility of release, the panel wrote that the state post-conviction court reasonably distinguished *Miller*, which addressed situations in which the sentencing authority imposed a sentence of life without parole automatically.

The panel remanded for entry of judgment in favor of the State.

COUNSEL

Eliza C. Ybarra (argued), Assistant Attorney General, Criminal Appeals Section; J.D. Nielsen, Habeas Unit Chief; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondents-Appellants.

Keith J. Hilzendeger (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellee.

OPINION

GRABER, Circuit Judge:

Petitioner Michael Paul Jessup was 17 years old when he kidnapped, robbed, and murdered a man in Arizona in 1998. The next year, he pleaded guilty to first-degree murder in Arizona state court. The sentencing judge held an individualized sentencing hearing. The judge exercised his discretion to impose a sentence of life imprisonment without the possibility of any form of release. Although the judge weighed among the mitigating factors Petitioner's youth and a psychological report that addressed the characteristics of youth, the judge found Petitioner unsuitable for the more lenient sentence of life imprisonment with the possibility of release.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that, for a defendant who committed a crime as a juvenile, the Eighth Amendment permits a sentence of life without parole. But before a sentencer may impose that harsh sentence on a juvenile offender, the juvenile defendant

must receive an individualized sentencing hearing during which the sentencer considers the defendant's youth and its attendant circumstances. *Id.* at 483. Petitioner sought post-conviction relief in Arizona state court on the ground that his sentence violated *Miller*. The state post-conviction court rejected Petitioner's *Miller* claim on the ground that, unlike the individuals sentenced under the mandatory sentencing schemes at issue in *Miller*, Petitioner in fact received an individualized sentencing hearing during which the sentencing judge, after considering Petitioner's youth and its attendant circumstances, found Petitioner unsuitable for any form of release. Because the state court's application of *Miller* was a reasonable one, we reverse the district court's grant of habeas relief, and we remand for entry of judgment in favor of Respondents, who are state officials ("the State").

FACTUAL AND PROCEDURAL HISTORY

In 1998, when Petitioner was 17 years old, he and a companion kidnapped 79-year-old Frank Watkins. They forced Watkins into his pickup truck, took his personal property, and drove to a remote location. Along the way, they stopped to pick up another companion. Once the group arrived at a remote area, Petitioner forced Watkins to walk to a drainage ditch and then shot him several times in the head and face, killing him. Police officers arrested Petitioner about ten days later.

A grand jury indicted Petitioner on five counts, including one count of first-degree murder. At the time, Arizona Revised Statutes section 13-703(A) listed three potential penalties for first-degree murder: (1) death; (2) "natural life," Arizona's term for life without the possibility of release; and (3) life with the possibility of release (in some form, such as parole or commutation) after 25 years of imprisonment, or after 35 years of imprisonment if the

victim was less than 15 years old. Ariz. Rev. Stat. § 13-703(A) (1998). Petitioner and the prosecutor entered into a plea agreement. Petitioner agreed to plead guilty to first-degree murder and armed robbery. In exchange, the prosecutor agreed not to seek the death penalty and to drop the other three charges.

At the sentencing hearing, the parties debated whether Petitioner warranted a sentence of life without the possibility of parole or a sentence of life with the possibility of parole after 25 years. Petitioner's lawyer presented testimony by a psychologist who emphasized Petitioner's age and age-related characteristics, including Petitioner's emotional age of 12 or 13. Petitioner's age was not a cursory or tangential issue. The psychologist has examined numerous young people, and his 24-page, single-spaced report contextualized his findings in comparison to other youthful offenders. The report described Petitioner as "immature" with "regard to impulse control." The psychologist explained why Petitioner was slow to mature and why he had "a functional social level of about 2/3 [his] chronological age." It also was noted that, in general, "[t]he incidence of violence is highest in the age group 15–24" and that Petitioner "can be no younger than 43 at [the] time of release." Addressing specifically the prospect for a young person's maturation, the report concluded:

> Having little foresight and even less capacity for reflection, [Petitioner] has [lived] and is likely to continue to live in moments as opposed to epochs. A broadening of temporal awareness tends to accompany advancement into adulthood, and for this reason, I believe that [Petitioner's] risk of violent offense will gradually diminish with

> maturation – particularly after age 25. Eligibility for, application to, and granting/denial of parole in any case will attend to his psychological condition at the point of that decision many years hence. I regard the minimum sentence available to the court of 25 years to life as sufficient, in the case of Michael Jessup, to offer protection to the general public.

Petitioner's lawyer, too, stressed Petitioner's youth and his ability to reform.

After much deliberation and weighing of mitigating and aggravating factors as to the murder count, the judge sentenced Petitioner to natural life:

> So when my choice is between a chance that you will be paroled and certainty of knowing that you will be in prison for the rest of your life, the choice becomes clear to me. I really do believe that you forfeited your right to walk as a free member of society, again, because of the heinousness of the crimes and cruelty that you imposed on Mr. Watkins.

In 2013, Petitioner filed, in state court, a notice of post-conviction relief, arguing that his sentence of life without the possibility of parole violated *Miller*. The state trial court assumed that *Miller* applied retroactively, but the court denied relief on the ground that the sentencing judge had considered Petitioner's age and age-related characteristics. On appeal, the Arizona Court of Appeals also denied relief, reasoning in full:

> Assuming *arguendo* that *Miller* applies retroactively, Jessup has not shown an entitlement to relief. *Miller* prohibits *mandatory* life sentences without the possibility of parole for juvenile offenders. [132 S. Ct.] at 2460. Jessup's sentence to natural life was not mandatory. The superior court noted at sentencing that it had the option to sentence Jessup either to natural life or life with a possibility of release after 25 years' imprisonment. *See* Ariz. Rev. Stat. § 13-703(A) (1999). In considering the appropriate sentence, the superior court found Jessup's age to be one of several mitigating factors. The court also heard from a psychologist regarding his presentence evaluation of Jessup as a juvenile offender. Among other opinions, the psychologist did not believe Jessup's aggressive activity would extend into adulthood and his appreciation of the wrongfulness of his acts would increase with age. The psychologist further noted that adolescents do not have the same kind of judgment as adults. In short, the superior court considered "how children are different" and Jessup's sentence to natural life complied with *Miller*.

The Arizona Supreme Court summarily denied relief without comment.

In 2015, Petitioner filed this action, asserting that his life sentence violates *Miller*. A magistrate judge recommended that the district judge deny the petition. The district judge disagreed and granted habeas relief. The district judge held

that the Arizona courts' denial of relief was contrary to and an unreasonable application of *Miller*. The State timely appeals.

STANDARDS OF REVIEW

We review de novo the district court's grant of habeas relief. *Jones v. Davis*, 8 F.4th 1027, 1035 (9th Cir. 2021). We review the state court's decision through the lens of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Habeas relief is available only if the state court's decision was contrary to, or an unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d)(1). We consider the last reasoned decision by the state courts, *Demetrulias v. Davis*, 14 F.4th 898, 905 (9th Cir. 2021), here, the Arizona Court of Appeals' decision quoted above. Finally, in conducting our review, we consider only Supreme Court "precedents as of the time the state court renders its decision." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (emphasis and internal quotation marks omitted). The state court denied relief to Petitioner in 2015, several years after the Supreme Court decided *Miller*, 567 U.S. 460.

DISCUSSION

In *Miller*, the Supreme Court considered state statutes that required the sentencing judge to impose a mandatory sentence of life without parole. *Id.* at 465–69. Because sentencing judges lacked discretion to choose anything other than a mandatory sentence of life without parole, the challenged state statutes prohibited a sentencing judge from considering any of the defendant's individual characteristics, including the defendant's youth and its attendant circumstances. *Id.* at 466, 469 (citing Ark. Code Ann. § 5-4-104(b) (1997) & Ala. Code §§ 13A-5-40(a)(9), 13A-6-2(c) (1982)). The Court held that such statutes, when applied

to defendants who were juveniles at the time of their crimes, violate the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 465.

The Court's reasoning rested on the confluence of two lines of cases. *Id.* at 470. The first set of cases, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), "establish that children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. "[Y]outh matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.* at 473. The "characteristics of youth . . . weaken rationales for punishment [and] *can* render a life-without-parole sentence disproportionate." *Id.* (emphasis added). State statutes that impose mandatory life sentences without any possibility of parole "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 474. The second line of cases, beginning with *Woodson v. North Carolina*, 428 U.S. 280 (1976), "demand[s] individualized sentencing when imposing the death penalty." *Miller*, 567 U.S. at 475. The challenged state statutes' "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476. Together, the two lines of cases "teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Id.* at 477.

The Court did not ban sentences of life without parole for juveniles. But the Court held that, before imposing a sentence of life without parole, the sentencer must consider the defendant's individual characteristics, including his or her youth. The sentencer must "take into account how

children are different, and how those differences counsel against irrevocably sentencing them to a lifetime of prison." *Id.* at 480. The Court's decision "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing [life without parole]." *Id.* at 483.

Four years later, the Supreme Court held that *Miller* applies retroactively. *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016). And the Court recently held that *Miller* does not mandate any particular factual finding; it requires only that the sentencer take into account youth and the mitigating qualities of youth. *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2021); *see also United States v. Briones*, 18 F.4th 1170, 1175–76 (9th Cir. 2021) (holding, on remand from the Supreme Court, that the sentencing court complied with *Miller* even though it did not make a factual finding of permanent incorrigibility). But because those decisions came after the state court denied relief to Petitioner, we do not consider them as part of our AEDPA review. *Greene*, 565 U.S. at 38. Instead, we consider whether the state court's denial of post-conviction relief was contrary to, or an unreasonable application of, *Miller* at the time of the state court's decision.

Miller requires, for a juvenile offender, an individualized sentencing hearing during which the sentencing judge assesses whether the juvenile defendant warrants a sentence of life with the possibility of parole. Here, the sentencing judge thoughtfully considered whether Petitioner warranted a sentence of life with the possibility of *any* form of release, took into account Petitioner's youth and the characteristics of young people, and concluded that Petitioner warranted a sentence of life without the possibility of release. The state court did not apply Supreme Court precedent unreasonably

when it concluded that the sentencing hearing complied with *Miller*.

Petitioner's argument to the contrary rests entirely on an analysis of the state's statutory scheme in 1998, the year of the murder. As described above, Arizona Revised Statutes section 13-703(A) listed, in 1998, two potential penalties for Petitioner's conviction of first-degree murder once the plea agreement took the death penalty off the table: (1) life without the possibility of any form of release; and (2) life with the possibility of release, including parole, after 25 years of imprisonment. Petitioner points out that, at the time of the murder in 1998 and at the time of the sentencing in 1999, persons serving life sentences for crimes committed in 1994 or later were ineligible for parole. In 1993, the Arizona legislature had eliminated parole for crimes committed in 1994 or later, and the legislature had replaced parole with a credit system for early release. 1993 Ariz. Sess. Laws, ch. 255, §§ 86, 88; *see State v. Vera*, 334 P.3d 754, 758–59 (Ariz. Ct. App. 2014) (describing the change). Moreover, the early-release credits were unavailable for persons serving a life sentence, even if that sentence nominally included a possibility of parole. *Vera*, 334 P.3d at 760 & n.8.

Petitioner asserts that, applying the 1994 legal change to Petitioner's 1999 sentencing, there was no *practical* difference to Petitioner between a sentence of natural life and a sentence of life with the possibility of release. A sentence of natural life would permit no form of release, and a sentence of life with the possibility of release would allow commutation, but not parole. In Petitioner's view, then, both sentences would result, as a practical matter, in a sentence of life without parole. Indeed, the Supreme Court listed Arizona as among the jurisdictions that require sentences of

life without parole. *Miller*, 567 U.S. at 486 n.13. Petitioner urges us to conclude that his sentencing hearing thus violated *Miller*.

We hold that the state court reasonably concluded that, despite this practical result, *Miller* does not mandate a resentencing in the circumstances of this case. *Miller* addressed situations in which the sentencing authority imposed a sentence of life without parole *automatically*, with no individualized sentencing considerations whatsoever. *See, e.g.*, *id.* at 466 (Arkansas sentencing judge's statement "that 'in view of the verdict, there's only one possible punishment'" (brackets omitted)); *id.* at 469 (citing *Miller v. State*, 63 So. 3d 676, 691 (Ala. Crim. App. 2010)); *Miller*, 63 So. 3d at 691 (Alabama sentencing court's imposition of life without parole without "individualized sentencing or consideration of [evidence in] mitigation"). *Miller*'s focus was on requiring the sentencing judge, before sentencing a juvenile to a lifetime of imprisonment, "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480. That precise procedure was followed here, albeit with respect to the possibility of *any* form of release, not just the possibility of parole (a single form of release). Given *Miller*'s focus on the required procedure, and given the sentencing judge's extensive deliberation here as to whether Petitioner warranted a possibility of release, the state post-conviction court reasonably distinguished *Miller*.

The sentencing judge here, after fully considering Petitioner's age and other relevant considerations, concluded that Petitioner did not warrant *any* form of release. Necessarily, then, the sentencing judge concluded that Petitioner did not warrant a possibility of parole, which is

one form of release. Nothing in the record suggests that the precise form of potential release at issue had any effect on the sentencing judge's exercise of discretion. Much to the contrary, the record makes clear that the sentencing judge (and everyone else involved) genuinely, if mistakenly, thought that he was considering a sentence of life with the possibility of *parole*.[1] The state post-conviction court reasonably applied *Miller* in concluding that no resentencing was warranted here.

Petitioner nevertheless contends that the state court's rejection of his *Miller* claim was unreasonable because, had the court nominally imposed a sentence of life with the possibility of release generally or the possibility of parole specifically, Arizona's laws would have prevented him from ever being eligible for parole. Petitioner's assertion about the application of state law is questionable at best. 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. *See, e.g.*, Ariz. Rev. Stat. § 13-716 (enacted in 2014) ("Notwithstanding any other law, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years

[1] The misunderstanding by the sentencing judge and everyone else involved in Petitioner's case was apparently common. The Arizona reporter is full of cases in which the sentencing judge mistakenly thought that he or she had discretion to allow parole. *E.g.*, *Chaparro v. Shinn*, 459 P.3d 50, 52 (Ariz. 2020); *Vera*, 334 P.3d at 755. A district court recently noted that, "[d]espite the elimination of parole, prosecutors continued to offer parole in plea agreements, and judges continued to accept such agreements and impose sentences of life with the possibility of parole." *Viramontes v. Att'y Gen.*, No. CV-16-00151-TUC-RM, 2021 WL 977170, at *1 (D. Ariz. Mar. 16, 2021).

of age is eligible for parole on completion of service of the minimum sentence, regardless of whether the offense was committed on or after January 1, 1994."); *Vera*, 334 P.3d at 756–61 (describing the application of section 13-716); *see also Chaparro*, 459 P.3d at 52–55 (holding that a defendant who received a sentence of life with the possibility of parole in 1995 was parole-eligible, notwithstanding the legislature's elimination of parole); Ariz. Rev. Stat. § 13-718(A) (enacted in 2018) (providing that a defendant whose post-1993 plea agreement stipulated to parole eligibility is parole-eligible, notwithstanding the legislature's elimination of parole).

But even assuming that Petitioner's doubtful assertion about state law is correct, Petitioner has shown only that a hypothetical defendant who received a lenient sentence would have a strong *Miller* claim. That is, if a sentencing judge determined that a hypothetical defendant *warranted* the possibility of release or parole, but the state courts nevertheless refused to permit parole, then that hypothetical defendant would have a strong *Miller* claim. But the reason why such a *Miller* claim would be viable proves why this hypothetical does not help Petitioner: that *Miller* claim would have merit *because the sentencing judge concluded that the defendant warranted a possibility of release or parole*. Here, by contrast, the sentencing judge determined—considering Petitioner's age and the characteristics of youth—that Petitioner warranted a sentence without any possibility of any form of release. Accordingly, in Petitioner's circumstances, it was reasonable for the state court to distinguish *Miller*.

REVERSED AND REMANDED.

APPENDIX 26

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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. _____ Maricopa County Superior Court No. CR2004-005097 **STATE'S PETITION FOR SPECIAL ACTION**

I. INTRODUCTION.

In this Special Action, Petitioner State of Arizona ex rel. Rachel H. Mitchell seeks review of Respondent Judge Katherine Cooper's orders (1) denying the State's motion to vacate the *State v. Valencia*, 241 Ariz. 206 (2016) evidentiary hearing and dismiss Bassett's successive petition for postconviction relief (PCR) and (2) summarily denying the State's motion for reconsideration and request to stay the proceedings until all avenues of reconsideration and review are exhausted. (Attachments A and B.) In denying the State's motion Respondent Judge instead found Bassett was entitled to an evidentiary hearing under Rule 32.1(g), "pursuant to *Valencia*," 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, such as a psychological evaluation regarding his risk to reoffend and potential for rehabilitation, testimony from a mental health expert, cognitive testing, etc. (Attachment A.)

Respondent Judge exceeded her authority in finding Bassett was entitled to a Rule 32 hearing to determine whether his sentencing proceeding satisfied *Miller v. Alabama*, 567 U.S. 460, 483 (2012), because that claim was finally adjudicated on the merits, and thus, precluded. Preclusion aside, Respondent Judge abused her discretion because her ruling is irreconcilable with *Miller*, as narrowly construed by

Jones v. Mississippi, 141 S. Ct. 1307, 1316 (2021) and *State v. Soto-Fong*, 474 P.3d 34, 40, ¶¶ 19, 22-23 (2020), which both clarified that *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*."[1]

For these reasons, expounded below, Petitioner urges this Court to accept jurisdiction of this special action petition and find that Respondent Judge exceeded her authority and abused her discretion when she: (1) found Bassett's 32.1(g) *Miller* claim colorable, contrary to the PCR court's previous determination, (2) found Bassett's natural life sentence mandatory and that the trial court had no discretion in sentencing, also contrary to the PCR court's previous determination, and (3) found Bassett was entitled to hearing "pursuant to *Valencia*" because his sentencing

[1] The State recognizes this Court recently rejected similar arguments in *State v. Wagner*, 510 P.3d 1083 (2022), but respectfully asserts that *Wagner* was wrongly decided and has petitioned for review of that opinion. Bassett's case exemplifies why *Wagner* is wrong, and conversely, why Respondent Judge exceeded her authority and abused her discretion.

hearing did not include information that Bassett claims was necessary to "adequately consider" his youth and attendant characteristics, when neither *Miller* nor *Valencia* contain any such requirement or standard. (Attachments A and B.)

II. JURISDICTIONAL STATEMENT.

This Court can accept jurisdiction to consider this Petition pursuant to Article 6, Section 5 of the Arizona Constitution and the Arizona Rules of Procedure for Special Actions. *See also State v. Arellano*, 213 Ariz. 474, 476 ¶ 4 (2006). While this Court's decision to exercise its special action jurisdiction is highly discretionary, *Haas v. Colosi*, 202 Ariz. 56, 57, ¶ 2 (App. 2002), it "'is appropriate when there is no plain, speedy and adequate remedy by way of appeal' or 'in cases involving a matter of first impression, statewide significance, or pure questions of law,'" *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 270-271, ¶ 9 (App. 2007) (quoting *Roman Catholic Diocese v. Superior Court*, 204 Ariz. 225, 227, ¶ 2 (App. 2003)), and "where justice cannot be satisfactorily obtained by other means." *Nataros v. Superior Court*, 113 Ariz. 498, 499 (1976). Judicial economy is also a consideration in determining whether to accept special action jurisdiction. *Grand v. Nacchio*, 214 Ariz. 9, 18, ¶ 24 (App. 2006).

This case is appropriate for special action jurisdiction for multiple reasons. First, it presents pure questions of law. Second, there is a risk that judicial time and resources and time and resources of the parties and expert witnesses will be

unnecessarily wasted conducting an evidentiary hearing with no constitutional basis for such a hearing. Third, this issue is a matter of significance with more than a dozen cases pending in superior court, this Court, and the Arizona Supreme Court where the postconviction court *agreed* with the State and vacated the pending *Valencia* hearings or resentencings in a majority of the cases. (*See* Addendum A.)

III. STANDARDS OF REVIEW.

In reviewing a trial court's order in the context of a special action, this Court must find that the trial judge abused his or her discretion or exceeded his or her jurisdiction or legal authority before granting relief. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 253, ¶ 10 (2003); Ariz. R.P. Spec. Act. 3. An abuse of discretion includes an error in interpreting or applying the law. *See State v. Pandeli*, 242 Ariz. 175, 180, ¶ 4 (2017); *McGuire v. Lee*, 239 Ariz. 384, 386, ¶ 6 (App. 2016). An abuse of discretion also occurs when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Gomez*, 211 Ariz. 111, ¶ 12 (App. 2005) (citing *State v. Chapple*, 135 Ariz. 281, 297 n. 18 (1983)); *see also State v. Wassenaar*, 215 Ariz. 565, 570 (App. 2007) (abuse of discretion occurs when an exercise of discretion is exercised for untenable reasons).

Here, Respondent Judge exceeded her authority when she found Bassett presented a colorable *Miller* claim under Rule 32.1(g) because that claim was finally adjudicated in 2013, and thus, precluded. Respondent Judge also abused her

discretion when she incorrectly interpreted and applied *Miller*, *Montgomery*, *Valencia*, and *Jones*. Nothing in those cases entitles Bassett to a postconviction evidentiary hearing under Rule 32.1(g) because he believes more information should have been presented for adequate consideration of his youth and attendant characteristics. Likewise, Respondent Judge's finding that the trial court imposed a natural life sentence "without giving Bassett's youth and attendant characteristics the weight required by *Miller*," is legally incorrect because there is no such requirement or standard in *Miller*. Finally, Respondent Judge's finding that Bassett is entitled to an evidentiary hearing, where no constitutional basis exists for such a hearing, amounts to a denial of justice and finality for the State and the victims.

IV. FACTS AND PROCEDURAL HISTORY.

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 saw 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 the car to retrieve the shotgun. Bassett was apprehended the following day and indicted for the two murders. (*Id*.)

B. Trial and Sentencing Proceedings.

On December 19, 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 filed a notice of intent to seek the death penalty. However, *Roper v. Simmons*, 543 U.S. 551 (2005), was decided soon thereafter, making Bassett ineligible for the death penalty, and the notice was struck without objection.

In its sentencing memorandum, the State first noted "the range of sentencing for each count is life without the possibility of parole for 25 years or natural life," but requested Bassett be sentenced to consecutive natural life sentences for the murders. (App102, 104-06, 109.) After setting forth the aggravating factors, 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). (App106.) Specifically, citing *State v. Clabourne*, 194 Ariz. 379 (1999), the State noted, "[i]n addition to chronological age, this factor requires consideration of the Defendant's 1) level of intelligence, 2) maturity, 3) participation in the murder, and 4) criminal history and past experience with law enforcement." (*Id*.)

The State argued that 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. (App106-09.) Additionally, Bassett had a reputation for carrying a gun and was nicknamed "Little Scrapper" for fighting. (*Id.*)

The State noted Bassett's mother was present during his police interview at Bassett's request. (App108.) In its memorandum, the State quoted a report from Bassett's Drug Diversion Program, detailing Bassett's history:

> Lonnie wants to go into the military and then become a police officer. He reports that he has been in about 15 fights in the last twelve months. He reports that some are at school but most are in the community. He reports that most start around dusk. He reports that he is not the aggressor in most cases. Mr. & Mrs. Alexander report [] he has been diagnosed with Post-Traumatic Stress Disorder. They report he was Physically/Sexually Abused or neglected when he was younger. They report that he is currently in counseling and Anger Management classes. They report that Lonnie sees his mother about twice per year, Thanksgiving and Christmas, maybe. They report [] the mother lives about a mile from them. They report that Lonnie has been living with them for most of his life. They report [] the mother has signed papers for them to provide education, medical needs, etc.

(*Id.*) The Diversion report also indicated Bassett smoked marijuana and drank

alcohol 2-3 times a week but recognized the Alexanders' positive influence on Bassett. (*Id.*) The State requested the court consider all this information in determining how much weight to give Bassett's age as a mitigating factor. (App109.)

Bassett submitted a sentencing memorandum, listing the following as 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, Charles and Jane Alexander, since he was a baby because his mother did not want to assume responsibility for caring for him, although she kept custody of his older brother. (App33.) A few months before his second birthday, Bassett's father kidnapped him and his brother. (App33, 43-57.) They were located a month later in Council Bluffs, Iowa, and his father was arrested and charged with two counts of custodial interference.[2] (*Id.*) Upon his return, the Alexanders resumed responsibility for

[2] Information detailing the kidnapping of Bassett and his brother, Bassett's father's personal history, and the criminal charges that resulted were attached to Bassett's sentencing memorandum. (App43-57.)

Bassett. (App34.)

Bassett argued because he was 16 years old when he committed the crimes, he did not possess the "impulse control of an adult." (App38.) Citing *Roper*, 543 U.S. 55, Bassett noted the "profound differences between adults and juveniles and the ramifications those difference[s] makes when addressing juvenile crime." (*Id.*) Quoting *Roper*, Bassett pointed to three general differences between juveniles and adults: 1) a 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) a juvenile's character is not well formed rendering suspect any conclusion that a juvenile is among the worst offenders and "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (Quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). (App38-39.)

Two years prior to the murders, Bassett was diagnosed with Post Traumatic Stress Disorder (PTSD) by the Jewish Family and Children's Services and began receiving therapy and medication. (App34-35, 70-74.) The psychiatric evaluation, attached to his sentencing memorandum, detailed the abuse by his father and exposure to domestic violence, and his treatment and medication plan. (App70-74.) Not long after his diagnosis, however, Bassett stopped taking his medication, which

he argued made him more aggressive and likely contributed "to the manner in which he reacted to the events surrounding the deaths of Joseph Pedroza and Frances Tapia." (App34-35.) Bassett argued his PTSD, hypervigilance, and "exaggerated startle response," as a result of his childhood, caused him to overreact on the night of the shootings. (App40.)

Bassett's memorandum also detailed his prospects for rehabilitation. At the age of 14, Bassett was employed by Charles Alexander at Philips Plastics. (App34, 40, 59.) He started out as a janitor but was quickly promoted to an apprentice machinist and described by the President and Vice-President as having "great work ethics for his age" and "a pleasure to have" at the business. (*Id.*) Before incarceration, Bassett was in advanced classes at school. (App34, 40.) After incarceration, he took advantage of self-improvement opportunities including obtaining his High School Equivalency Diploma and several academic awards at the Hard Knocks High School program. (App34, 61-68.) Bassett's memorandum also noted his remorse. (App40.) Several people submitted letters stating Bassett was kind, generous, a hard worker, was taken advantage of because of his kindness, and if given a chance he could show he is a good person. (App83-88-99.)

The crime victims also submitted a sentencing memorandum, which detailed the facts of the murders and their impact on the victims' families and included several letters from family and friends. (App112-26.)

The presentence investigation detailed Bassett's convictions, statements of the victims and interested parties, and factors to consider in sentencing. (App11-14.) Letters from victims and interested parties were attached to the presentence investigation. (App15-29.)

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.) After the victims addressed the court, the State argued Bassett would be a death-eligible, except for *Roper*, and requested consecutive natural life sentences for each murder. (App143, 148.) The State argued the following aggravating factors supported its request: a double homicide; the murder of Tapia was especially cruel, as she endured mental and physical anguish (she watched Pedroza be killed as she was driving, and was shot in the shoulder and tried to "ward off the blow," before Bassett fired again, killing her); use of a deadly weapon; grave risk of death to Colyer because Bassett shot the driver of the vehicle in which Colyer was a passenger; 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," referencing Tapia, before pumping the shot gun a third time and shooting her. (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 spoke on Bassett's behalf, telling the court that Bassett was just a 16-year-old kid who was preyed upon by Pedroza and others like him. (App149-51.) Bassett's girlfriend told the court that he made a bad decision that night and he was only 16 years old and was scared. (App153.) Defense counsel also emphasized Bassett "was a child at 16 years old when he committed the crimes." (App154.) Counsel 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." (*Id.*)

Counsel argued, "Lonny did not possess the maturity to handle the freedom that he'd been given," referring to Bassett's past with underage drinking and minor offenses while he maintained his job at Philips Plastics, which reflected his immaturity. (App154-55.) Counsel argued Bassett's juvenile referrals were "immature juvenile acts." (App155.) Referencing his memorandum, counsel argued *Roper*'s prohibition on the death penalty for juveniles was due, in part, to poor impulse control of people Bassett's age. (App156.) Counsel argued Bassett's PTSD compounded his impulsivity. (*Id.*) Counsel emphasized that *Roper* determined juveniles are more susceptible to negative influences than adults, like what occurred here with Bassett and Pedroza. (App157.)

Lastly, counsel argued a juvenile's character is not fully formed at age 16 and

quoted *Roper*: "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient. As individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (*Id.*) Counsel argued that Bassett has the tools to better himself in the future and asked that he be sentenced to life with the possibility of parole after 25 years to be given the opportunity to "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 stated it considered everything presented. (App163.) 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.) In mitigation, the court gave Bassett's age of 16 and a half years old "considerable weight" but found it tempered by Bassett's intelligence and ability to "to obtain and hold employment and apparently do very well with employment." (App164-65.) The court considered Bassett's juvenile justice system contacts as a factor in his maturity because he was given the opportunity to seek help and he did not, Bassett's PTSD diagnosis and that he stopped taking his medications, Bassett's family support, and his statement of remorse. (App165.)

The court found Bassett's conduct regarding Tapia showed a "hardened heart" and found it was "a personality trait that is extremely dangerous to the public." (App166.) 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 the evidence presented during trial, the court found Bassett was a danger to the public that "cannot be addressed with anything less than a natural life sentence." (*Id.*) The court found a sentence of natural life 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 *Miller* was "a significant change in the law that would probably overturn the conviction or sentence," because the Court "ruled that mandatory life without parole sentences for juveniles are unconstitutional." (App176.)

On July 2, 2013, the court dismissed Bassett's PCR notice as untimely and successive, finding that even assuming *Miller* constituted a significant change in the law, *Miller* did not apply to Bassett's case. (App178-79.) The court found:

> …in *Miller*, the Supreme Court ruled that a mandatory life sentence without the possibility of parole was unconstitutional. Hence, the judge or jury must have the opportunity to consider mitigating circumstances such as age prior to imposing either life with the possibility of parole

> or the harshest sentence possible for a juvenile, that being natural life without the possibility of parole.
>
> In the instant case, the record demonstrates that the age of the Defendant was given "considerable weight" as a mitigating factor. Even after considering defendant's age as a mitigating factor, the Court chose to sentence him to the term of his natural life pursuant to A.R.S. § 13-752. Since the sentence of natural life without the possibility of parole was not statutorily mandated and the Court had the discretion to order life with the possibility of parole but chose not to, defendant has failed to demonstrate that *Miller* is a significant change in the law as applied to his case.

(App179.)

On July 17, 2013, Bassett filed a motion for rehearing pursuant to Rule 32.9(A). A request for leave to file an amicus and an amicus brief were filed in support of Bassett's motion for rehearing. The postconviction court stated, because it was not determined whether *Miller* had retroactive application, it could address the motion for reconsideration pursuant to Rule 32 only on the sentence of life with the possibility of release after 25 years, not the natural life sentence. (App181-82.) Regarding Bassett's natural life sentence, the court reasoned, even if *Miller* applied retroactively, "the sentencing judge did take into account the age of the defendant as part of the sentencing determination" and "[the *Miller*] requirements regarding mitigation have been met in this matter and there is no basis for defendant to be relieved from the natural life sentence that was imposed upon him." (*Id.*)

The court appointed counsel to file a brief on the retroactive applicability of *Miller* to his sentence of life with the possibility of release after 25 years. (App183.)

After briefing on *Miller*'s applicability to Bassett's parole/release-eligible sentence, including acceptance of another amicus brief supporting Bassett, and hearing oral argument,[3] the postconviction court denied relief on Bassett's claim that his life with the possibility of release sentence was unconstitutional 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. (App185-92.)

In a petition for review, Bassett argued that H.B. 2593 entitled him to a full resentencing. (App9.) This Court 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 notice and petition arguing that *Miller* and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), 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 juvenile defender's age and whether a juvenile's crime reflects "permanent incorrigibility." (App209-10.)

[3] Before the PCR court heard argument on the retroactivity of *Miller*, H.B. 2593 was passed, "establishing parole eligibility for juveniles sentenced to life imprisonment." (App8.)

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 that the record in his case was insufficient and 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.*) Bassett contended that although his age was given some weight this does not mean it "was given the required constitutionally mandated weight required by *Miller*." (App211.)

On February 12, 2018, in its PCR 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.) Since then, Bassett's case 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, however, 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*,

the Arizona Supreme Court preemptively affirmed *Miller*'s narrow holding in *Soto-Fong*, 25 Ariz. at ¶¶19-23. Based on *Jones* and *Soto-Fong*, the State moved to vacate the pending evidentiary hearing and dismiss Bassett's successive PCR petition, arguing *Jones* implicitly overruled *Valencia*. (App223-246.)

After briefing and oral argument, Respondent Judge denied the State's motion and subsequently denied the State's motion for reconsideration and request for a stay until reconsideration and review were exhausted. (App223-357; Attachments A and B.) It is from these rulings that the State seeks relief in this special action petition.

V. RESPONDENT JUDGE EXCEEDED HER AUTHORITY AND ABUSED HER DISCRETION WHEN SHE FOUND BASSETT WAS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE THAT CLAIM, BASED ON *MILLER* ALONE, WAS PRECLUDED, AND NEITHER *VALENCIA* NOR *MILLER* REQUIRE "ADEQUATE CONSIDERATION" OF, OR A PARTICULAR "WEIGHT" BE GIVEN TO, A JUVENILE OFFENDER'S YOUTH AND ATTENDANT CHARACTERISTICS.

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 its earlier legal conclusions.

Respondent Judge exceeded her authority in finding Bassett's natural life sentence mandatory under *Miller* because parole was abolished, 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, though this Court acknowledged the PCR court's determination when reviewing Bassett's sentence on Count 2: "that even if *Miller* applied retroactively, its requirements had been met because the sentencing court adequately considered Bassett's age "as part of the sentencing determination" for Tapia's murder. (App8 at ¶3.) In fact, Bassett did not argue his natural life sentence was mandatory, as prohibited by *Miller*, 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 subsequent to *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, the previous determination of fact and law. *Montgomery*, 577 U.S. 190, says nothing about the legal characterization of Bassett's sentence and did not provide a basis for the postconviction court to revisit its 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 for several reasons.

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. Bassett even conceded his sentencer gave his age considerable weight. (App208.) Unsurprisingly, this Court, like the postconviction court in 2013,

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 the State in this case 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 Arizona law, again recognized by the State in this case, further required courts to consider a "defendant's level of maturity, judgment and involvement in the crime," when addressing an offender's young age. *Id*. (quoting *State v. Greenway*, 170 Ariz. 155, 170 (1991)). (App106 (citing *Clabourne*, 194 Ariz. 379).)

Here, it is undeniable that Bassett's sentencer considered information about Bassett's 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, which provides the basis for *Miller*. 567 U.S at 477, 483. *Miller* found its decision "flows straightforwardly from" the precedents and principles of "*Roper*, *Graham*, and their individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments." 567 U.S at 483. In his sentencing memorandum and at sentencing, Bassett cited *Roper* extensively and detailed the "profound differences between adults and juveniles and the ramifications those difference[s] makes when addressing juvenile crime," including juvenile's poor

impulse control, susceptibility to negative influences, and that a juvenile's character is not fully formed, and applied *Roper* to Bassett's mitigation. (App38-39, 154-57.)

Second, Respondent Judge's characterization of Bassett's natural life sentence as mandatory ignores everyone's belief that the trial 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.) At sentencing, the court stated because "[t]here was no presumptive sentence for first degree murder when the death penalty is not allowed," he would "approach this 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).[4] Consistent with prior Arizona case law, the Ninth Circuit recently held that unlike the sentencing schemes in *Miller*, Arizona did

[4] While *Jessup* was noticed as supplemental authority before Respondent Judge denied the State's motion to vacate, and argued in the State's motion for reconsideration, Respondent Judge ignored it completely, though she repeatedly discussed *United States v. Briones*, 18 F.4th 1170, 1176 (9th Cir. 2021) at oral argument. The State recognizes that Ninth Circuit case law is not binding on this Court but believes *Jessup* is persuasive and correctly decided.

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.

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. *Miller*, 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 the Arizona Supreme 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) ("in first degree murder cases, [t]he 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 convicted of two counts of first degree murder and specifically 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, the Arizona Supreme 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 superior 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 the sentencing court believed the court had discretion, and it exercised that discretion when it sentenced Bassett to natural life for Tapia's murder and life with the possibility of *parole* after 25 years 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, because § 13-703 used the term parole, defining a natural life sentence where the defendant "is not eligible for commutation, *parole*...," and given that the Arizona Supreme Court interpreted § 13-703 as providing the alternative life sentence of life with the possibility of *parole*, it is not surprising that sentencing courts, including Bassett's sentencer, and counsel believed, albeit mistakenly, that parole was available.

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 of life with the possibility of parole after 25 years 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 this Court 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 27 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 16).)

The State has not seen one case during this time period where a sentencing court indicated that parole was not available. Nor did Respondent Judge or the defense point to such a case. Instead, as noted in footnote 3 of the State's reply below, (App278 (cited as Addendum C here)), 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 disregarded Bassett's individualized sentencing hearing.

Finally, the record confirms that Bassett's sentencing hearing was not an empty exercise and complied with *Miller*'s holding. 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 was appropriate for Tapia's murder and a sentence of life with the possibility of parole after 25 years was 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 of a juvenile's youth and attendant characteristics.

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

suggested 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 of 16 and a half was a mitigating factor under A.R.S. § 13-703(G)(5) and that in "addition to chronological age, this factor requires consideration of the 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); App143.) Applying these considerations to Bassett, the State described Bassett as extremely intelligent and not immature or impulsive, as mature enough to handle his own money, attend school full time and work in the summer, as the sole participant in the murders, and detailed that his three juvenile referrals were for minor infractions. (App106-07.) The State asked the court to consider all this information in determining the weight to give Bassett's age. (App109.)

Bassett countered that he "was a child at 16 years old when he committed the crimes." (App38, 154-56.) He 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." (*Id.*) He argued at 16-years-old he did not possess the "impulse control of an adult." (App38.)

Bassett quoted extensively from *Roper*, 543 U.S. 55, in his sentencing

memorandum and noted the "profound differences between adults and juveniles and the ramifications those difference[s] makes when addressing juvenile crime." (App38.) He noted three general differences between juveniles and adults set forth in *Roper*: 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, and "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient [and] as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside," any conclusion that a juvenile is among the worst offenders is suspect. (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.) He claimed his steady employment and advanced school classes prior to the crimes, and his self-improvement after incarceration, showed his potential for rehabilitation. (App34, 40, 61-68.) Bassett argued that he had the tools to better himself and asked he be given an opportunity to "outgrow[] his character flaws." (App157-58.) Bassett argued he was remorseful and apologized to the victims in

allocution. (App40, 158-62.) Several people wrote letters in support of Bassett stating he was kind, generous, a hard worker, was taken advantage of because of his kindness, and if given a chance could show he is a good person. (App83-99.)

Bassett presented information about victim Pedroza being a negative influence on him. Mr. Alexander told the court at sentencing that Bassett was just a 16-year-old kid who was preyed upon by Joseph and others like him. (App149-50.) Likewise, Bassett's girlfriend told the court Bassett made a bad decision that night, was only 16-years-old, and was scared. (App152-53.) Counsel emphasized that *Roper* determined juveniles are more susceptible to negative influences than adults, like what occurred here with Bassett and Pedroza. (App157.) 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 that Bassett was reputed to carry a gun, had been in a lot of fights and in counseling and anger management classes, and was nicknamed "Little Scrapper" for fighting. (App108-09.) The State presented information about Bassett's ability to deal with police including evidence of his prior juvenile referrals and Bassett's request for his mother before he was questioned by police. (*Id.*)

Bassett presented information about his dysfunctional family background, including his mother's abandonment and his father kidnapping him and his brother,

for which his father was later arrested and charged. (App33-34, 43-57.) Evidence showed, however, 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—abuse by his father and exposure to domestic violence—and that he stopped taking his medication, which likely caused him to overreact on the night of the shootings. (App40, 38-44.) Counsel further argued Bassett's PTSD compounded his impulsivity. (App156.)

Finally, defense counsel argued a juvenile's character is not fully formed at age 16. (App157.) Quoting *Roper*, defense counsel concluded that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient. As individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (*Id.*)

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 Crime Victims Legal Assistance Project, and the letters attached to the presentence report, and heard the evidence and argument at the sentencing hearing. (App130-

31.) The court gave Bassett's age considerable weight but tempered it with Bassett's intelligence and steady employment, which it was permitted to do. (App164-65.) The court also considered as factors in assessing Bassett's maturity, his contact with the juvenile justice system, that he was given the opportunity to seek help and did not, his diagnosis of PTSD and that he stopped taking his medications, his family support, and his statement of remorse. (App164.) 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.) This demonstrates, contrary to Respondent Judge's findings, the trial court's discretionary sentencing of Bassett was "constitutionally sufficient" and satisfied *Miller*.

For all of the foregoing reasons, this Court should accept jurisdiction and correct Respondent Judge's erroneous conclusion that Bassett's natural life sentence was mandatory under *Miller*.

B. This Court should also accept jurisdiction 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.) Again, this ruling, to the extent it is based on *Miller* alone, is precluded. (*See* App179.)

Moreover, Respondent Judge's findings are clearly untenable and legally incorrect, and therefore constitute an abuse of discretion, *Gomez*, 211 Ariz. at ¶ 12, because they are not supported by *Valencia* or *Miller*. First, nothing in *Valencia* entitles Bassett to an evidentiary hearing for "adequate consideration" of his youth and attendant characteristics. Rather, *Valencia* held that 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 actually the relief Bassett sought in his successive 2017 PCR petition.[5] (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

[5] In response to the State's motion to vacate the evidentiary hearing, Bassett's PCR claim morphed and expanded into arguing that he was entitled to a hearing to determine if his sentencer "adequately considered his age and attendant characteristics" and that his sentencing was unconstitutional because counsel failed to have a forensic psychiatric or psychological evaluation of Bassett performed. (*Cf.* App208-212, 218-19 to App250-70.) This is likely because similar to petitioner Jones, as recognized by Justice Thomas, "[w]ithout more," "the fact that *Miller* was retroactive did not help Jones, as he had already received the 'individualized' hearing *Miller* required." *Jones*, 141 S. Ct. at 1324 (Thomas, J., concurring). Nothing in *Miller* requires "adequate consideration" or a particular "weight" of Bassett's youth and attendant characteristics.

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*, 474 P.3d at 40, ¶¶19, 22-23, 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 broadened interpretation of *Miller* and expansion of *Montgomery*.

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. 474 P.3d at 40, ¶¶ 22-23.

Likewise, nothing in *Miller* requires a particular "weight" be given to a juvenile offender's youth and attendant characteristics or dictates "adequate consideration" of youth and attendant characteristics. Nor does *Miller* prescribe what, or how much, information must be presented when sentencing a juvenile offender. Rather, *Miller* 567 U.S at 483, "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." As set forth above, it is undeniable that Bassett received the kind of individualized sentencing contemplated by *Miller* because Bassett's mitigation was presented through the lens of *Roper*, which provides the basis for *Miller*, and Bassett's mitigation closely resembles the hallmark

features of youth described in *Miller*.

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. *Cf. State v. Amaral*, 239 Ariz. 217, 222, ¶¶ 17-20 (2016) (Amaral not entitled to a hearing to present scientific advances in juvenile psychology and neurology; "trial judge contemplated Amaral's youth and attendant characteristics when he considered Amaral's age, immaturity, and personal idiosyncrasies at the sentencing hearing."). Nor does *Montgomery*, which merely made *Miller* retroactive. Indeed, *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.*

Finally, Respondent Judge's finding—that Bassett is entitled to an evidentiary hearing on collateral review for "adequate consideration" of his youth and attendant characteristics and to give them the required "weight" when neither *Valencia* nor *Miller* require specific consideration or weight—conflicts with the principles of finality, which are "essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (O'Connor, J., concurring). If there is no finality,

"the prime goal of the judicial process will be proportionately defeated." *State v. Waldrip*, 111 Ariz. 516, 518 (1975) (quoting *Tucson Gas & Electric Company v. Superior Court*, 9 Ariz. App. 210, 212-13 (1969)). If Respondent Judge's ruling is left to stand, Bassett's case and others like it will "go on indefinitely." *Mata*, 185 Ariz. at 337. 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." Nothing in *Miller*, *Montgomery*, *Valencia*, or *Jones* requires this.

Thus, Respondent Judge erred when she found Bassett was entitled to an evidentiary hearing pursuant to *Valencia* because neither *Valencia* or *Miller* require any particular weight or consideration of a juvenile's youth and attendant characteristics, and when *Jones* implicitly overruled *Valencia*'s broad interpretation of *Montgomery* and expansion of *Miller*.

VI. CONCLUSION.

Based on the foregoing, Petitioner requests this Court accept jurisdiction of this petition and find Respondent Judge exceeded her authority and abused her discretion when she: (1) found Bassett's natural life sentence was mandatory, contrary to its previous 2013 finding, when the trial court clearly exercised its discretion in sentencing Bassett to natural life for Tapia's murder and life with the possibility of parole after 25 years for Pedroza's murder, and (2) found Bassett was

entitled to an evidentiary hearing "pursuant to *Valencia*" because the trial court failed to "adequately consider" Bassett's youth and attendant characteristics or give it the "weight required by *Miller*" when neither *Valencia* or *Miller* contain such a requirement. This Court should vacate Respondent Judge's findings and remand with instructions to vacate the evidentiary hearing and dismiss Bassett's successive PCR petition as precluded and for failure to state a colorable claim.

Respectfully Submitted August 9, 2022.

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

BY: /s/ *Julie A. Done*
/s/ Julie A. Done
Deputy County Attorney

APPENDICES

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ADDENDA

Addendum A **Other cases currently pending in the appellate or superior courts involving the same or similar issues of law decided in *State v. Bassett*.**

1. ***State v. Arias***, (*Tatum* 5 defendant) 1 CA-CR 22-0064 PRPC, currently pending a PCR petition for review after the superior court vacated his resentencing based on *Jones* and *Soto-Fong*.

2. ***State v. Bosquez***, CR2010-013094, currently pending a defense motion for rehearing after the superior court granted the State's motion to vacate the *Valencia* hearing based on *Jones*.

3. ***State v. Bustos***, CR2005-005248, currently pending a decision on Bustos's successive PCR petition after further briefing on *Jones* and *Wagner* (case was stayed for several months).

4. ***State v. Cabanas***, 1 CA-CR 21-0534 PRPC, currently pending the State's petition for review to the Arizona Supreme Court after this Court granted review and relief in a memorandum decision, on June 21, 2022, based on *Wagner*, reversing the superior court's ruling that granted the State's motion to vacate the *Valencia* hearing based on *Jones* and *Soto-Fong*.

5. ***State v. Conley*,** 1 CA-CR 22-0266 PRPC, currently pending a PCR petition for review after the superior court granted the State's motion to vacate the *Valencia* hearing based on *Jones* and *Soto-Fong*.

6. ***State v. DeShaw*,** (*Tatum* 5 defendant) currently pending petition for review in CR-21-0398-PR (consolidated with *State v. Purcell*) on procedural review issue after the superior court vacated his resentencing based on *Jones* and *Soto-Fong*.

7. ***State v. McLeod***, CR1996-090611, the State intends to file a petition for special action of the postconviction court's ruling, which granted a hearing after finding that a determination of whether "the crime was the result of irreparable corruption as opposed to transient immaturity" is mandated under 2012 United States Supreme Court law.

8. ***State v. Najar*,** (*Tatum* 5 defendant) CR-21-0084-PR, currently pending petition for review on same procedural issue raised in *DeShaw/Purcell* after the superior court vacated his resentencing based on *Jones* and *Soto-Fong*.

9. ***State v. Odom*****,** 1 CA-CR 21-0537 PRPC, currently pending a PCR petition for review after superior court granted the State's motion to vacate the *Valencia* hearing based on *Jones*.

10. ***State v. Pierce*****,** 1 CA-CR 22-0247 PRPC, currently pending a PCR petition for review after the superior court granted the State's motion to vacate the *Valencia* hearing based on *Jones*.

11. ***State v. Purcell*****,** (*Tatum* 5 defendant) currently pending petition for review in CR-21-0398-PR (consolidated with *State v. DeShaw*) on procedural review issue after the superior court vacated his resentencing based on *Jones* and *Soto-Fong*.

12. ***State v. Rutledge***, 1 CA-CR 22-0169 PRPC, currently pending a PCR petition for review (response filed but stayed before reply was due) after superior court granted the State's motion to vacate the *Valencia* hearing based on *Jones*.

13. ***State v. Tatum***, (*Tatum* 5 defendant) CR-22-0104-PR, currently pending petition for review on same procedural issue raised in *DeShaw/Purcell* (response not yet due) after the superior court vacated his resentencing based on *Jones* and *Soto-Fong*.

14. ***State v. Wagner***, CR-22-0156-PR, currently pending the State's petition for review to the Arizona Supreme Court from this Court's opinion that Wagner's natural life sentence was mandatory, contrary to its prior determinations, and that *Valencia* was still tenable after *Jones* and *Soto-Fong*.

Addendum B **Selected court of appeals' decisions finding Arizona juvenile natural life sentences not mandatory under *Miller*** (emphasis underlined)

1. ***State v. Conley***, 1 CA-CR 12-0569-PR, 2013 WL 5676080, at *1, ¶2 (App. Oct. 17, 2013) "*Miller* did not ban the imposition of sentences to life without the possibility of parole for juveniles. Rather, *Miller* held mandatory sentences of life-without-parole for juvenile offenders violated the Eighth Amendment. *Id*. at 2464. Because Conley's sentence to natural life was not mandatory, he has failed to state a colorable claim for relief."

2. ***State v. Rojas***, 1 CA-CR 13-0605 PRPC, 2015 WL 632135, at *1, ¶4 (App. Feb. 12, 2015) "*Miller* prohibits mandatory life sentences without the possibility of parole for juvenile offenders. *Id*. at 2460. Rojas's sentences to natural life were not mandatory. The trial court knew it had the option to sentence Rojas to natural life or life with a possibility of parole after twenty-five years' imprisonment. *See* Ariz.Rev.Stat. ("A.R.S.") § 13–703(A) (1999). Further, in its determination of which sentence to impose, the trial court acknowledged Rojas's "miserable childhood," and found that his age at the time he committed the murders and his lack of prior felony convictions were mitigating factors. Therefore, the court took into account "how children are different" and Rojas's sentences to natural life complied with *Miller*.

3. ***State v. Rue***, 2 CA-CR 2014-0458-PR, 2015 WL 707022, at *1, ¶6 (App. Feb. 12, 2015) "Rue and amicus curiae contend Arizona's first-degree murder sentencing scheme as a whole is unconstitutional when applied to juvenile defendants and there was no constitutional sentencing option available to the trial court. Indeed, in *State v. Vera*, we determined that because parole had been eliminated and the only possibility of release would be by pardon or commutation, a sentence of life with the possibility of release "was, in effect," a mandatory life sentence "in violation of the rule announced in *Miller*." 235 Ariz. 571, ¶17, 334 P.3d 754 (App.2014). But we further concluded in *Vera* that the legislature's 2014 enactment of A.R.S. § 13–716 remedied any claim that a life sentence without the possibility of release for a minimum number of calendar years was unconstitutional. *Id*. ¶27. That statute provides that a juvenile "who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years" is eligible for parole upon completion of the minimum sentence. § 13-716. Thus, any unconstitutional effect of the original sentencing scheme has been remedied."

4. ***State v. Jessup***, 1 CA-CR 13-0616 PRPC, 2015 WL 1605349, at *1, ¶4 (App.

Apr. 9, 2015) "*Miller* prohibits *mandatory* life sentences without the possibility of parole for juvenile offenders. *Id*. at 2460. Jessup's sentence to natural life was not mandatory. The superior court noted at sentencing that it had the option to sentence Jessup either to natural life or life with a possibility of release after 25 years' imprisonment. *See* Ariz.Rev.Stat. § 13–703(A) (1999)."

5. ***State v. Bustos***, 1 CA-CR 13-0765 PRPC, 2015 WL 3623640, at *2, ¶7 (App. June 9, 2015) "This court recently determined in *State v. Vera* that, because parole had been eliminated and the only possibility of release would be by pardon or commutation, a sentence of life with the possibility of release "was, in effect," a mandatory life sentence "in violation of the rule announced in *Miller*." 235 Ariz. 571, 576, ¶ 7, 334 P.3d 754, 759 (App.2014). But, in *Vera*, this court further held that the Legislature's enactment of Arizona Revised Statutes ("A.R.S.") section 13–716 (2014), remedied any claim that a life sentence without the possibility of release for a minimum number of calendar years was unconstitutional. 235 Ariz. at 761, ¶27, 334 P.3d at 578. The statute provides that a juvenile "who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years" is eligible for parole upon completion of the minimum sentence. A.R.S. § 13–716. Thus, any unconstitutional effect of the original sentencing scheme has been remedied."

6. ***State v. Cabanas***, 1 CA-CR 15-0660 PRPC, 2017 WL 3599595, ¶5 (2017) Court of appeals did not overrule the superior court's finding that Cabanas's "natural life sentence did not violate *Miller* because that sentence was not mandatory." Remanded for an evidentiary hearing pursuant to *Valencia* because "Cabanas was sentenced when there was no requirement that a sentencing court distinguish between crimes that reflect 'irreparable corruption' as opposed to 'transient immaturity of youth' before imposing a sentence of natural life on a juvenile." *Id*. at ¶8.

7. ***State v. Wagner***, 1 CA-CR 13-0606 PRPC, 2015 WL 1395226, ¶4 (2015) "Even assuming arguendo *Miller* is retroactive, we deny relief. *Miller* prohibits mandatory life sentences without the possibility of parole for juvenile offenders. *Id*. at ——, 132 S.Ct. at 2460. Wagner's natural life sentence was not mandatory. The superior court noted at sentencing that it had the option to sentence Wagner to natural life or life with a possibility of parole after 25 years' imprisonment. Ariz.Rev.Stat. ("A.R.S.") § 13–703(A) (1994)."

Addendum C **Cases where sentences of life with or without the possibility of parole after a period of years were imposed** (cited in Attachment to State's Response to Wagner's 2021 PCR petition for review).

1. ***State v. Marshall***, No. 1 CA–CR 14–0501 PRPC, 2016 WL 4045368, at *1, ¶2 (Ariz. App. July 28, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after twenty-five years" imposed for a first-degree murder committed in 1998).

2. ***State v. Beltran***, No. 1 CA–CR 14–0494 PRPC, 2016 WL 3463308, at *1, ¶2 (Ariz. App. June 21, 2016) (mem.) (sentence of "life in prison with the possibility of parole after twenty-five years" imposed for a first-degree murder originally sentenced in 1999).

3. ***State v. Hooks***, No. 1 CA–CR 14–0500 PRPC, 2016 WL 4394530, at *1, ¶2 (Ariz. App. Aug. 18, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after 25 years" imposed for a first-degree murder committed in 1999).

4. ***State v. Nouan***, No. 1 CA–CR 14–0503 PRPC, 2016 WL 4761928, at *1, ¶2 (Ariz. App. Sept. 13, 2016) (mem.) (sentence of "life imprisonment with the possibility of parole after 25 years" imposed for a first-degree murder; Nouan was convicted of murder in 1999); *cf. Nouan v. Ryan*, CV–17–02743–PHX–GMS–ESW, 2018 WL 7570286, at *1 (D. Ariz. Oct. 19, 2018)).

5. ***State v. Agboghidi***, 1 CA–CR 15–0123 PRPC, 2017 WL 4247961, at *1, ¶2 (Ariz. App. Sept. 26, 2017) (mem.) (sentence of "life with the possibility of parole after 25 years" imposed for a first-degree murder committed in 2004).

6. ***State v. Lee***, No. 1 CA–CR 14–0496 PRPC, 2016 WL 3854436, at *1, ¶2 (Ariz. App. July 12, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after twenty-five years" imposed for a first-degree murder committed in 2004).

7. ***State v. Jara***, 2 CA–CR 2016–0149–PR, 2016 WL 3188911, at *1, ¶¶1-2 (Ariz. App. June 7, 2016) (mem.) (two "life terms of imprisonment with the possibility of parole after twenty-five years" imposed in 2007).

8. ***State v. Coleman***, No. 1 CA–CR 14–0495 PRPC, 2016 WL 3944541, at *1, ¶2 (Ariz. App. July 19, 2016) (mem.) (sentence of "life imprisonment with a possibility of parole after 25 years" imposed for a first-degree murder

committed in 2009).

9. ***State v. Vera***, 334 P.3d 754, 755, ¶2 (Ariz. App. 2014) (sentence of "life without parole for twenty-five (25) years" imposed for a first-degree murder committed in 1995);

10. ***State v. Bautista***, 1 CA–CR 14–0497 PRPC, 2016 WL 3959954, at *1, ¶2 (Ariz. App. July 21, 2016) (mem.) (sentence imposed in 1998: "life imprisonment for first degree murder without the possibility of parole for 25 years" committed in 1998).

11. ***State v. Randles***, 334 P.3d 730, 731, ¶3 (Ariz. App. 2014), as amended (Sept. 22, 2014) (sentence of "life in prison without the possibility of parole until he served a minimum term of 25 years" imposed for a first-degree murder committed in 2011).

Addendum D **Cases where sentences of life with or without the possibility of release after a period of years were imposed.**

1. ***State v. Finley***, No. 1 CA–CR 14–0499 PRPC, 2016 WL 4046945, at *1, ¶2 (Ariz. App. July 28, 2016) (mem.) (sentence imposed in 1994 of "life in prison with the possibility of release after 25 years" for first-degree murder).

2. ***State v. Torres***, No. 2 CA–CR 2015–0052–PR, 2015 WL 2452297, at *1, ¶2 (Ariz. App. May 20, 2015) (mem.) (sentence of "life in prison with no eligibility for release for twenty-five years" imposed for first-degree murder committed in 1994); *cf. State v. Torres*, 2 CA–CR 2009–0302–PR, 2010 WL 715994, at *1, ¶ 2 (App. Mar. 1, 2010).

3. ***State v. Cox***, 2 CA–CR 2014–0035–PR, 2014 WL 4816081, at *1, ¶2 (Ariz. App. Sept. 29, 2014) (mem.) (sentence of life "without the possibility of release for twenty-five years" imposed for first-degree murder convicted in 1994).

4. ***State v. Cassa***, No. 2 CA–CR 2015–0237–PR, 2015 WL 5178560, at *1, ¶2 (Ariz. App. Sept. 3, 2015) (mem.) (sentence of "life imprisonment without the possibility of release for twenty-five years" imposed for first-degree murder originally sentenced in 1995).

5. ***State v. Valle***, No. 1 CA–CR 15–0539 PRPC, 2017 WL 4638252, at *1, ¶2 (Ariz. App. Oct. 17, 2017) (mem.) (sentence of life "with the possibility of release after 25 years" imposed for first-degree murder committed in 1995).

6. ***State v. Martinez***, No. 2 CA–CR 2017–0290–PR, 2017 WL 5153566, at *1, ¶2 (Ariz. App. Nov. 7, 2017) (mem.) (sentence imposed in 1997 of "life imprisonment without the possibility of release on any basis for twenty-five years" for first-degree murder).

7. ***State v. Hopper***, No. 2 CA–CR 2014–0029–PR, 2014 WL 5422143, at *1, ¶2 (Ariz. App. Oct. 24, 2014) (mem.) (sentence of "life imprisonment with no possibility of release until completion of twenty-five years" imposed in 1998 for first-degree murder pursuant to plea agreement).

8. ***State v. Cruz***, 2 CA–CR 2014–0102–PR, 2014 WL 5038151, at *1, ¶2 (Ariz. App. Oct. 8, 2014) (sentence of "life without the possibility of release on any basis for twenty-five years" imposed for a first-degree murder originally committed in 2000); *cf*. datasearch https://corrections.az.gov/public-resources/inmate-datasearch (last accessed on July 14, 2021, searching for

"Ralph David Cruz").

9. ***State v. Mendez***, No. 2 CA–CR 2016–0091–PR, 2016 WL 2855660, at *1, ¶2 (Ariz. Ct. App. May 16, 2016) (mem.) (sentence of "life in prison without the possibility of release for twenty-five years" imposed for first-degree murder committed in 2000); *cf. Mendez v. Ryan*, CV–17–00287–DJH–MHB, 2017 WL 5514192, at *1 (D. Ariz. Oct. 18, 2017), report and recommendation adopted, CV–17–00287–PHX–DJH, 2017 WL 5496194 (D. Ariz. Nov. 16, 2017).

10. ***State v. Cruz***, No. 2 CA–CR 2014–0160–PR, 2014 WL 6607491, at *1, ¶2 (Ariz. App. Nov. 20, 2014) (mem.) (sentence of "life in prison without the possibility of release for twenty-five years" imposed for a first-degree murder committed in 2004).

11. ***State v. Hutchinson***, No. 2 CA–CR 2016–0150–PR, 2016 WL 4409284, at *1, ¶2 (Ariz. App. Aug. 16, 2016) (mem.) (sentence imposed in 2008 of "life term without the possibility of release for twenty-five years" for first-degree murder).

12. ***State v. Otero***, No. 1 CA–CR 15–0639 PRPC, 2017 WL 2376331, at *1, ¶2 (Ariz. App. June 1, 2017) (mem.) (sentence imposed in 2008 of "life in prison with the possibility of 'release' after 25 years" for first-degree murder).

13. ***State v. Paulson***, No. 2 CA–CR 2011–0278, 2012 WL 5363109, at *1, ¶1 (Ariz. App. Oct. 31, 2012) (mem.) (sentence of "life imprisonment with the possibility of release in twenty-five years" imposed for first-degree murder committed in 2008).

14. ***State v. McDaniel***, No. 1 CA–CR 14–0559 PRPC, 2016 WL 4089144, at *1, ¶2 (Ariz. App. Aug. 2, 2016) (mem.) (sentence of "life imprisonment with a possibility of release after thirty-five years" imposed for first-degree murder as a dangerous crime against children committed in 2008).

15. ***State v. Cannon***, 1 CA–CR 14–0498 PRPC, 2016 WL 3884902, at *1, ¶2 (Ariz. App. July 14, 2016) (mem.) (sentence imposed in 2010 of "life with the possibility of release after twenty-five years" for first-degree murder).

16. ***State v. Legliu***, No. 1 CA–CR 11–0043, 2013 WL 269048, at *2, ¶12 (Ariz. App. Jan. 24, 2013) (mem.) (concurrent sentences of "life without the possibility of release for twenty-five years" imposed for first-degree murder committed in 2006 and originally sentenced in 2010).