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. CR-22-0227-PR No. 1 CA-SA 22-0152 Maricopa County Superior Court No. CR2004-005097 **STATE'S RESPONSE TO BRIEF OF *AMICUS CURIAE* ARIZONA JUSTICE PROJECT**

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INTRODUCTION

What is most telling about the Arizona Justice Project ("AJP")'s Amicus Brief is what it omits. Conspicuously absent is any mention of the lesser, parole-eligible sentence Bassett received for Pedroza's murder on Count 2. The fact that Bassett received this sentence means his natural life sentence for Tapia's murder on Count 1 could not have been mandatory. This reality undermines all AJP's arguments.

Also conspicuously absent is any argument defending Respondent Judge's conclusions that Bassett is entitled to an evidentiary hearing "pursuant to *Valencia*" because the court needs "*to adequately consider*" or give Bassett's youth and attendant characteristics "*the weight required by Miller*." (*See* Attachment A (Respondent Judge's ruling) at 5-6 (emphasis added).)

Presumably this is because AJP recognized *Miller* contains no such requirements. Instead, AJP argues that Bassett's natural life sentence is unconstitutional under *Miller* based on the broad interpretation of *Montgomery* that was rejected by *Jones*. But Bassett concedes that "[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." (Response at 18.) Consequently, AJP's brief, based on an incomplete procedural history and *Montgomery*'s dictum, is largely unhelpful.

ARGUMENT

A brief history of the pertinent case law is helpful in demonstrating why AJP's arguments are without merit. In 2012, *Miller v. Alabama*, 567 U.S. 460, 465 (2012) held "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eight Amendment's prohibition on 'cruel and unusual punishments.'" *Miller* reasoned "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features." *Id*. at 477. The focus in *Miller* was discretionary and individualized sentencing. *Id*. at 465, 474-78.

In 2016, *Montgomery v. Louisiana*, 577 U.S. 190, 194, 212 (2016), held "*Miller* announced a substantive rule of constitutional law," which made *Miller* retroactive. Courts thereafter broadened *Miller* with *Montgomery*'s dictum. In *Tatum v. Arizona*, 137 S. Ct. 11 (2016) (GVR), which consolidated five Arizona juvenile defendants, the Supreme Court granted defendants' petition for certiorari, vacated the Arizona court of appeals' judgments, and remanded the case "for further consideration in light of *Montgomery*." Justice Sotomayor's concurrence broadened *Miller* based on *Montgomery*:

> It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires 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" for whom a life

> without parole sentence may be appropriate. []136 S.Ct., at 734. There is thus a very meaningful task for the lower courts to carry out on remand.

Id. at *13.

Later in 2016, this Court held in *State v. Valencia*, 241 Ariz. 206, 209, ¶15 (2016), that "*Miller*, as clarified by *Montgomery*," was a clear break from the past and that Arizona law at the time petitioners were sentenced "allowed a trial court to impose a natural life sentence on a juvenile convicted of first degree murder without distinguishing crimes that reflected 'irreparable corruption' rather than the 'transient immaturity of youth.'" Relying on this broad interpretation of *Montgomery* and Justice Sotomayor's *Tatum* concurrence, *Valencia* found *Montgomery* refuted the State's narrow interpretation of *Miller*—that *Miller* required "only that the sentencing court consider the juvenile's age as a mitigating factor before imposing a natural life sentence." *Id*. at ¶16 (citing *Montgomery*, 136 S. Ct. at 734 and *Tatum*, 137 S. Ct at 12.) *Valencia* held 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.) *Valencia* concluded that petitioners were entitled to evidentiary hearings to establish "that their crimes did not reflect irreparable corruption but instead transient immaturity." *Id*. at ¶18.

In 2020, this Court held that *Miller*'s narrow holding required *only* that a trial

"consider 'an offender's youth and attendant characteristics' before sentencing a juvenile to life without the possibility of parole." *State v. Soto-Fong*, 250 Ariz. at 7, ¶19 (citing *Miller*, 567 U.S. at 483.) *Soto-Fong* recognized that "*Montgomery* muddied the Eighth Amendment jurisprudential waters with its construction of *Miller*" and "left the nation's courts in a wake of confusion." *Id*. at ¶¶21, 24. *Soto-Fong* agreed with Justice Scalia's dissent in *Montgomery* and Justice Bolick's concurrence in *Valencia* 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 ¶¶19-23 (citations omitted). *Soto-Fong* essentially predicted the holding in *Jones*, 141 S. Ct. at 1311-16.

In 2021, the United States Supreme Court in *Jones* confirmed that *Miller* "mandat[ed] 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." 141 S. Ct. at 1311, 1314-16. *Jones* granted certiorari "[i]n light of disagreement in state and federal courts about how to interpret *Miller* and *Montgomery*." *Id*. at 1316. *Jones* clarified that *Montgomery* only made *Miller* "retroactive[] to cases on collateral review" and did *not* add to *Miller*'s requirements. *Id*. at 1311, 1313, 1314-16, 1321. *Jones* found petitioner's argument, that *Montgomery* "described *Miller* as permitting life-without-parole sentences only for

'those whose crimes reflect permanent incorrigibility,' rather than 'transient immaturity,'" was "an incorrect interpretation of *Miller* and *Montgomery*." *Id*. at 1317 (quoting *Montgomery*, 577 U.S. at 209, 211). *Jones* further clarified that *Miller* does not require the court to make 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 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.*

Jones therefore implicitly overruled *Tatum* and *Valencia*'s broad interpretation of *Montgomery* and expansion of *Miller*[1] and confirmed *Soto-Fong*'s narrow interpretation of *Miller*. Indeed, *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

[1] The *Jones* dissent recognized that *Jones* overruled *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*.). The dissent was making the point that *Tatum* and *Jones* are inconsistent. *Jones*, as the most recent case, clearly controls. The *Jones* dissent also recognized that the majority had essentially 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), further confirming the narrowness of *Miller*'s holding. This Court, in *Soto-Fong*, also agreed with Justice Scalia's dissent in *Montgomery* (which further confirms that *Miller*'s holding was narrow). 250 Ariz. 7, ¶¶22-23.

Miller's narrow holding.

On December 6, 2021, the Ninth Circuit Court of Appeals rejected Briones's argument that "*Jones* left in place *Montgomery*'s dictum that LWOP is 'an unconstitutional penalty for ... juvenile offenders whose crimes reflect the transient immaturity of youth' *i.e.*, 'for all but...those whose crimes reflect permanent incorrigibility.'" *Briones*, 18 F.4th 1170. The court held *Jones* read *Miller* and *Montgomery* "for far narrower propositions" than proposed by *Briones*. *Id*.

On April 21, 2022, the Ninth Circuit Court of Appeals confirmed that unlike the sentencing schemes at issue in *Miller*, Arizona's sentencing scheme was *not mandatory* within the meaning of *Miller*. *Jessup v. Shinn*, 31 4th 1262, 1267 (9th Cir. 2022). *Jessup* rejected petitioner's argument that his natural life sentence was mandatory because parole had been abolished in Arizona. *Jessup* found petitioner's natural life sentence constitutional because, like Bassett, his "sentencing judge held an individualized sentencing hearing," and "exercised his *discretion* to impose a sentence of life imprisonment without the possibility of any form release." *Id*. at 1263, 1267 (emphasis added). *Jessup* further confirmed *Jones*'s holding that *Miller* "requires only that the sentencer take into account youth and the mitigating qualities of youth" and "*does not mandate any particular factual finding*." *Id*. at 1266 (citing *Jones*, 141 S. Ct. at 1311) (emphasis added). Respondent Judge's conclusions and AJP's arguments are simply irreconcilable with the current case law.

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

AJP's entire argument that Bassett's natural life sentence was mandatory is based on the unavailability of parole in Title 41 at the time the sentence was imposed. The fatal flaw in this argument is it requires this Court to exalt form over substance, to ignore the reasoning underlying *Miller* and what actually happened at Bassett's sentencing, including his sentence of life with the possibility of *parole* after 25 years imposed for Pedroza's murder in Count 2, and to disregard this Court's view of 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.").

Additionally, AJP cites no law supporting its argument that parole must be contemporaneously available at the time of sentencing for a sentence to be

considered discretionary and individualized, as required by *Miller*.[2] (Brief at 4-7.) Nonetheless, the availability of parole had no impact on the sentencing judge's choice between the greater (natural life) sentence and lesser (release-eligible) sentence. Thus, it does not make Bassett's natural life sentence mandatory under *Miller*.[3] As *Jessup* explained, "[n]othing 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*." 31 F.4th at 1267. That is exactly what happened in Bassett's case.

Jessup also recognized that unlike the sentencing schemes at issue in *Miller*, "in which the sentencing authority imposed a sentence of life without parole *automatically*, with no individualized sentencing considerations whatsoever," Jessup was sentenced to natural life after the judge took into account Jessup's youth and attendant characteristics and concluded that Jessup warranted a sentence of life without the possibility of release. *Id*. Again, that is exactly what happened in

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[2] Because the State has not argued that executive clemency is the same as parole, AJP's extended argument that clemency is distinct from parole is not only unhelpful to the Court but irrelevant to the issue before it. (Brief at 4-7.)

[3] To the extent AJP argues that the court of appeals rejected the State's arguments in *State v. Wagner*, 253 Ariz. 201 (App. 2022), the State respectfully asserts that *Wagner* was wrongly decided and has also sought review in that case.

Bassett's case. The trial court made a meaningful choice between two sentences that included an individualized consideration of Bassett's youth and attendant characteristics and determined a natural life sentence appropriate for Tapia's murder and a sentence of life with the possibility of parole after 25 years appropriate for Pedroza's murder. (App166-67, 171.)

AJP's argument that *Jessup v. Shinn* does not support the State's arguments or require review by this Court because *Jessup* is in a federal habeas posture is wrong.[4] (Brief at 10-11.) As set forth above, *Jessup* clearly analyzed whether Jessup's Arizona sentencing was constitutional under *Miller*, including whether his natural life sentence was mandatory under *Miller*. Further, as Amicus Curiae Arizona Attorney General explained, this Court should grant review to correct Respondent Judge's (and *Wagner*'s) unavoidable conflict with *Jessup* because if "it stands, it will inevitably lead to litigation in federal courts over the correct characterization of Arizona's first-degree murder statute for *Miller* purposes." (AG Amicus Brief at 16.)

Because *Jessup v. Shinn*, which reversed *Jessup v. Ryan*, no longer supports

[4] AJP previously relied on *Jessup v. Ryan*, No. 2:15-14cv-01196-PHX-NVW, 2018 WL 4095130 (D. Ariz. Aug. 28, 2018), in its briefs submitted in support of defendants Wagner, 1 CA-CR 21-0492 PRPC (brief at 10, 12), Cabanas, 1 CA-CR 21-0534 PRPC (brief at 13-14, 15), and Odom, 1 CA-CR 21-0537 PRPC (brief at 11, 12) when the federal district court's decision benefitted them. It was not until the Ninth Circuit reversed the district court that AJP decided that *Jessup*, as a federal habeas case, is irrelevant to state cases.

AJP's arguments, AJP relies on *Crespin v. Ryan*, 46 F.4th 803, 806 n.1 (9th Cir. 2022). But *Crespin* does not support AJP's argument that Bassett's natural life sentence was mandatory for several reasons. First, *Crespin* recognized that while *Jones* said it was not overruling *Miller* or *Montgomery*, it "narrowed the potential sweep of those decisions"—which is what the State has argued. *Id*. at 808. Second, *Crespin* provided relief on a very narrow basis—that Crespin's sentencing did not comply with *Miller* because he entered into a plea agreement in which he agreed to a specific sentence (life without the possibility of parole) rather than permitting his sentencer to choose between the two statutorily-available sentences.[5] Third, *Crespin* confirmed the holdings in both *Briones* and *Jessup*.

Furthermore, AJP ignores the State's citations to *Rue v. Roberts*, 2022WL3572946 and *Aguilar v. Ryan*, 2022WL3573068, two Arizona then-juvenile defendants' cases, decided by the same Ninth Circuit panel on the same day as *Crespin*, which affirmed *Jessup*. (Brief at 11.) The Ninth Circuit held that Rue's and Aguilar's natural life sentences were not mandatory, that *Jones* affirmed *Miller*'s narrow holding, and that their sentencings complied with the rule announced in *Jones*. (*See* State's Petition at 15.) Therefore, *Jessup*, *Rue*, and *Aguilar* demonstrate a clear conflict with *Bassett* (and *Wagner* and *Cabanas*) that requires this Court's

[5] It should be noted that the State filed a petition for rehearing, arguing the court's finding that Crespin's agreed to sentence violated *Miller* was wrong. But after a response was ordered and filed, Crespin passed away and the petition was not heard.

intervention.

Begrudgingly, AJP admits that Arizona courts have repeatedly held that natural life sentences were not mandatory. (Brief at 7.) But it nonetheless asserts that Bassett's natural life sentence was mandatory because parole was not available when he was sentenced. AJP's argument fails because, again, it ignores Bassett's sentence of life with the possibility of parole that was imposed on Count 2, ignores the implementation of § 13-716, which the 2014 postconviction court applied to Bassett's sentence imposed on Count 2 (App192), and more importantly, ignores the discretion that was clearly exercised by Bassett's sentencer, which is the key assumption in both *Miller* and *Montgomery*. *See Jones*, 141 S. Ct. at 1318 (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").

Contrary to AJP's assertion, *Chaparro v. Shinn*, 248 Ariz. 138 (2020) *supports* the State's argument that Bassett's natural life sentence was not mandatory under *Miller*.[6] *Chaparro*, 248 Ariz. at 139, ¶2, held that "despite § 41-1604.09's

[6] This Court should disregard AJP's contention that State agents have taken an opposite legal position in another case currently pending before this Court because a purported position taken, or argument made, by a "State agent" in a different, unrelated case does not bind the State in this case. (Brief at 7-8.)

prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994, a sentence imposing 'life without possibility of parole for 25 years' means the convicted defendant is eligible for parole after serving 25 years' imprisonment." *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))). *Chaparro* merely addressed a distinguishable situation. The reason Chaparro's sentence was illegal was that no subsequent statute like A.R.S. § 13-716 had implemented parole procedures for adult offenders like Chaparro. But even under that circumstance, Arizona would still have enforced it. Additionally, *Chaparro*, which does not mention *Wagner*, *Fell*, or *Cruz*, did not "clarify" that they were incorrect. (Brief at 8.)

Lastly, to the extent AJP contends *Valencia* supports its assertion that Bassett's natural life sentence was mandatory, that contention fails because it ignores *Valencia*'s plain language that petitioners' natural life sentences "were not mandatory." *Valencia* 241 Ariz. at 208, ¶11. (Brief at 7.)

B. Bassett is not entitled to an evidentiary hearing because he already received a discretionary, individualized sentencing as contemplated by *Miller*.

Instead of defending Respondent Judge's findings, which are not supported

by either *Miller* or *Valencia*, AJP broadly asserts that *Jones* did not affect the unconstitutionality of Bassett's natural life sentence under *Miller*. (Brief at 12-15.) But AJP fails to identify *how* Bassett's natural life sentence allegedly does not satisfy *Miller*. Seemingly recognizing that neither *Miller*, nor *Valencia*, require "adequate consideration" of, or a particular "weight" be given to, Bassett's youth and attendant characteristics, as found by Respondent Judge, AJP instead attempts to perpetuate *Montgomery*'s now defunct dictum.

AJP argues *Montgomery* "held" that States could remedy *Miller* violations by extending parole eligibility to juveniles already sentenced to life without the possibility of parole. (Brief at 2.) That is not *Montgomery*'s holding. As *Jones* clarified, natural life sentences are permissible as long as the sentencer considered age and attendant circumstances while exercising its discretion to choose between two sentences. Further, as the *Valencia* concurrence recognized, that "amounts to none-too-subtle coercion." 241 Ariz. at 211, ¶27 (citing Justice Scalia's dissent in *Montgomery*.)

AJP argues *Jones* presupposed that the procedure required under *Miller*—considering a juvenile's youth and attendant characteristics—would help make life without parole sentences "relatively rare" or "uncommon" for juveniles. (Brief at 13.) But nothing in *Miller*'s holding, as narrowly construed by *Jones*, presupposed or promised that a juvenile will rarely be sentenced to life with the possibility of

parole. Nor did *Miller* require States to take action to purportedly "reduce the prevalence of natural life sentences for juvenile offenders" as asserted by AJP. (*Id*.) Again, as the *Valencia* concurrence recognized, by "being convicted of first-degree murder, juvenile offenders already have been proven 'uncommon.'" 241 Ariz. at 212, ¶30. The *Valencia* concurrence further reasoned, "[o]ur system's integrity and constitutionality depend not on whether the overall number of sentences of life without parole meted out to youthful murderers are many or few," but "depend primarily on whether justice is rendered in individual cases." *Id*.

AJP argues *Jones* assumed that by now most juvenile offenders who could seek collateral review as a result of *Montgomery* would have done so, and if eligible, received a new sentencing under *Miller*, but that is not the case in Arizona. (Brief 13-14.) That is wrong. Bassett and other then-juvenile defendants *did* seek collateral review in light of *Montgomery*, but *Jones* changed the law. Nothing in *Miller* or *Montgomery* entitled Bassett to resentencing or to a particular sentence, as AJP implies.

CONCLUSION

This Court should decline AJP's invitation to follow the broad interpretation of *Montgomery* that *Jones* rejected, and which rejection was affirmed by *Briones*, *Jessup*, and *Crespin*.

Respectfully Submitted October 24, 2022.

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