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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

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

Maricopa County Superior Court
No. CR2004-005097

**REAL PARTY IN INTEREST
SUPPLEMENTAL BRIEFING**

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24 3. Respondent Judge correctly found a colorful claim existed that, if
25 proven, establish the trial court failed to adequately consider Mr.
26 Bassett’s youth and attendant characteristics 14

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ISSUE PRESENTED IN SUPPLEMENT

1. The Respondent Judge correctly found Mr. Bassett has presented a colorable claim in that he was sentenced under an unconstitutional mandatory sentencing scheme
2. The Respondent Judge correctly found Mr. Bassett is still legally entitled to a *Valencia* hearing to which the state previously stipulated despite the *Jones* ruling
3. Respondent Judge correctly found a colorful claim existed that, if proven, establish the trial court failed to adequately consider Mr. Bassett's youth and attendant characteristics

LEGAL ARGUMENT

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4 Respondent Judge correctly denied the State's request to withdraw its
5 concession to a *Valencia* evidentiary hearing and their request to dismiss Mr.
6 Bassett's Petition for Post-conviction Relief finding *Jones* did not alter Mr.
7 Bassett's right to an evidentiary hearing if he was able to establish a colorable claim.
8
9 Respondent Judge did not err when concluding Mr. Bassett had established
10 colorable Rule 32 claims for Post-conviction Relief; that Mr. Bassett was sentenced
11 under a mandatory sentencing scheme in violation of *Miller* which gives rise to an
12 evidentiary (*Valencia*) hearing and that a significant change in the law was
13 established entitling Mr. Bassett to an evidentiary hearing to determine if the
14 sentencer complied with the constitutional mandates of *Miller*.
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20 A mandatory life-without-parole sentence for a juvenile homicide offender is
21 unconstitutional, violating our Eighth Amendment. *Miller v. Alabama*, 567 U.S.
22 460, 479 (2012); *see also Jones v. Mississippi*, 141 S.Ct. 1307, 1321 (2021). Such
23 a sentence may only be imposed after an individualized sentencing hearing is held
24 where the sentencer considers the offender's youth and its attendant circumstances.
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26
27 *Id.* at 483. *Jones* holds there are "no magic words required," a sentencer is not
28 required to make a separate express or implied factual finding of permanent
incorrigibility before imposing a life-without-parole sentence on a juvenile

1 homicide offender¹. *Jones* at 1319. *Jones* did not overrule *Miller* or *Montgomery*,
2
3 with Justice Kavanaugh writing the “decision today carefully follows both *Miller*
4 and *Montgomery*.” *Id.* at 1321-22. Nor did *Jones* disturb *Valencia*. *Valencia*,
5
6 consistent with *Miller*, *Montgomery*, and *Jones* does not require a sentencer to make
7
8 a particularized finding of permanent incorrigibility before imposing a life-without-
9
10 parole sentence on a juvenile homicide offender. *Jones* at 1319; *Valencia* 241 Ariz.
11 206 (2016).

12
13 Thus, the “crux” of *Miller*, as clarified by *Jones* requires (1) the option of
14 imposing a parole-eligible sentence upon a juvenile offender who is required to
15
16 serve a life term, and (2) that the court consider youth in determining whether to
17
18 impose a parole-eligible sentence. 567 U.S. at 483; *Jones* at 1314. The *Jones* Court
19
20 reiterated “discretionary sentencing” was needed to “ensure that life without-
21
22 parole-sentences are imposed only in cases where that sentence is appropriate in
23
24 light of the defendant’s age.” *Id.* at 1317-18. Post-*Jones*, Arizona law permits a life-
25
26 without-parole sentence for a juvenile homicide offender only after considering

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28 ¹ *Jones*’ original sentence had been reversed after *Miller* and he was resentenced
with the option of a less severe sentence. The sentencer did not impose a lesser
sentence. The U.S. Supreme Court considered whether a sentencer who imposes a
life-without-parole sentence must additionally make a separate factual finding that
the defendant is permanently incorrigible and whether that sentencer must provide
an on-the-record explanation with implicit finding that the defendant is permanently
incorrigible in order to impose a life-without-parole sentence. *Jones*, 141 S. Ct. at
1311-1314, 1318-1322.

1 “how children are different, and how those differences counsel against irrevocably
2 sentencing them to a lifetime of prison” and whether the crime reflects transient
3 maturity. *Miller*, 132 S.Ct. at 2469; *Montgomery v. Louisiana*, 136 S.Ct. at 735; *see*
4 *also State v. Valencia*, 214 at 206, 210 (2016). Respondent Judge carefully adhered
5 to all state and federal law when concluding colorable claims were raised meriting
6 an evidentiary hearing and denying the state’s request to vacate the hearing and
7 dismiss Mr. Bassett’s Petition.
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14 **1. The Respondent Judge correctly found Mr. Bassett has**
15 **presented a colorable claim in that he was sentenced under**
16 **an unconstitutional mandatory sentencing scheme**

17 Respondent Judge found Mr. Bassett presented a colorable claim as the
18 sentencing laws under which he was sentenced did not allow for discretion entitling
19 him to an evidentiary hearing pursuant to *Valencia*.
20

- 21
22 a. The state incorrectly argues Arizona’s First-Degree
23 murder sentencing scheme provided the sentencer
24 with discretion because the court had two options
25 from which to sentence

26 The state incorrectly asserts the sentencing scheme in place when Mr. Bassett
27 was sentenced provided discretion to the sentencer to impose a sentence other than
28 natural life. Maricopa County Attorney Reply Brief, p 2. The sentencing scheme
cannot be deemed discretionary simply because a judge pronounced two sentences
as the practical implication of either sentence the judge imposed was a natural life

1 sentence; no parole system existed at the time of sentencing. *Miller* required a
2 sentencing judge to have actual discretion to impose a sentence that carried the
3 possibility of parole. 567 U.S. at 474-76.
4

5
6 Under Mr. Bassett’s sentencing scheme, parole was illusory with the only
7 potential relief through executive clemency. The United States Supreme Court has
8 found the unlikely possibility of an executive clemency grant to be an inadequate
9 substitute for parole. *Graham v. Florida*, 560 U.S. 48, 70 (2010); *see also Lynch v.*
10 *Arizona*, 578 U.S. 613, 615-16 (2016); *State v. Helm*, 463 U.S. 277, 303 (1983).
11 The *Graham* Court analyzed a sentencing statute analogous to Arizona and
12 concluded, contrary to the state’s assertion, that the sentencing scheme which
13 provided for executive clemency was not a constitutionally comparable substitute
14 for parole. 560 U.S. at 70. Parole was not an option for Mr. Bassett².
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21 The state continually fails to acknowledge the distinction between the two
22 types of sentencing schemes and relies upon the decisions of *Wagner*, *Fell*, and
23 *Cruz* to support its claim that sentencing for First-Degree murder at the time of Mr.
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28 ² 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. Arizona was counted as one of the twenty-nine jurisdictions with mandatory life-without-parole sentences for such juvenile homicide offenders. *Id.* at 486, n.13.

1 Bassett’s sentencing was not mandatory. *Wagner*³, *Fell*, and *Cruz* predate both
2
3 *Miller* and this Court’s decision in the case of *Chaparro v. Shinn*, 248 Ariz. 138
4 (2020). In *Chaparro*, an analysis between parole and clemency was undertaken,
5 finding “parole is not a form of executive clemency.” *Chaparro v. Shinn*, 248 Ariz.
6 138, ¶¶15-16 (2020); *see also Solem v. Helm*, 463 U.S. 277, 300-01 (1983) (“As a
7 matter of law, parole and commutation are different concepts ... Parole is a regular
8 part of the rehabilitative process ... Commutation, on the other hand, is an *ad hoc*
9 exercise of executive clemency.”).

10
11 Following the rationale of *Chaparro*, the Court of Appeals recently
12 confirmed Arizona’s mandatory sentencing scheme in *State v. Wagner*, finding the
13 sentencer lacked discretion to impose a life sentence with the possibility of parole⁴.
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23 ³ In *State v. Wagner*, 194 Ariz. 310 (1999), sentence was imposed before the death
24 penalty for juveniles was found unconstitutional, permitting the judge discretion to
25 impose a death sentence or a lesser sentence. In *State v. Fell*, 210 Ariz. 554 (2005),
26 the court concluded that the Sixth Amendment did not require a jury to find an
27 aggravating circumstance before a natural life sentence can be imposed. *State v.*
28 *Cruz*, 218 Ariz. 149 (2008), was a capital case where death was imposed, where a
jury instruction was at issue. The court incorrectly stated that if given a life
sentence, no state law would have prohibited release after serving twenty-five years.

⁴ “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 *Wagner*’s sentencing
procedure complied with *Miller*.” *Id.* at 25.

1 253 Ariz. 201, ¶21 (App. 2022); *see also State v. Dansdill*, 246 Ariz. 593, 603, ¶37,
2
3 n. 10 (App. 2019).

4 The Office of the Attorney General claims the recent Ninth Circuit decision
5
6 in *Jessup v. Shinn*, 31 F.4th 1262 (9th Cir. 2022), supports the contention that
7
8 Arizona’s natural life sentences were not mandatory and creates conflict with the
9
10 Respondent Judge’s decision. Office of Attorney General Amicus Brief, pp 14-15.
11 *Jessup*, however, was a pre-*Valencia* decision that was subject to the limitations of
12
13 a habeas review from a state court decision and the highly deferential standard of
14
15 review. In *Jessup*, the court found Mr. Jessup had not demonstrated that the denial
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17 of a resentencing hearing was so unreasonable as to constitute an extreme
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19 malfunction for which federal habeas relief was available given the specific facts of
20
21 his case. *Id.* at 1267. No explicit holdings regarding Arizona’s sentencing scheme
22
23 were issued in this case. *Id.* at 1266-67.

24 The Respondent Judge’s decision was not in conflict with *Jessup*. Rather, her
25
26 decision is consistent with a recent Ninth Circuit case that similarly concluded life-
27
28 with-parole was not a sentence that was legally available at the time Mr. Bassett
was sentenced. *See Crespin v. Ryan*, 46 F.4th 803, 806, n.1 (9th Cir. 2022)
 (“Because Arizona had abolished parole, *see State v. Vera*, 334 P.3d 754, 758–59
 (Ariz. Ct. App. 2014), the only possibility of release for those sentenced ... was

1 executive clemency, *see State v. Wagner*, 510 P.3d 1083, 1084 (Ariz. Ct. App.
2 2022).

3
4 Under Arizona law, parole was not available when Mr. Bassett was
5 sentenced, clemency is not a constitutionally equivalent substitute. Therefore, a life-
6 without-parole sentence was mandatory when Mr. Bassett was sentenced, and
7 Respondent Judge did not abuse her discretion when finding Mr. Bassett's
8 sentencing scheme was mandatory in violation of *Miller* but was consistent with
9 Arizona case law.
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14 b. The enactment of A.R.S. § 13-716 does not cure the
15 unconstitutional nature of Arizona's mandatory
16 sentencing scheme that was in effect when Mr.
17 Bassett was sentenced
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19 In amicus briefing, the Office of the Attorney General claims the enactment
20 of A.R.S. § 13-716 cured the mandatory nature of the sentencing scheme under
21 which Mr. Bassett was sentenced. The State asserts the complete abolition of parole
22 was nothing more than "a lack of parole procedure" for a twenty-year period.
23 Attorney General Amicus Brief, pp 9-10. However, this Court has recognized that
24 Arizona abolished parole in 1994, not merely the parole procedure. *State v. Cruz*,
25 251 Ariz. 203, 206, ¶15 (2021). Parole was not legally available when Mr. Bassett
26 was sentenced. *See Chaparro*, 248 Ariz. 138, 140-42, ¶¶3, 18 (2020). Despite an
27 attempt to trivialize the eradication of any meaningful and realistic path to release,
28

1 subsequent legislation failed to cure the constitutional deficiencies of Arizona's
2 sentencing scheme as it relates to mandatory juvenile homicide sentences of life
3 without the possibility of parole.
4

5
6 A.R.S. § 13-716 did not make all juvenile homicide offenders eligible for
7 parole as *Jones* mandates. Rather, A.R.S. § 13-716 applies only to those sentences
8 where a juvenile was sentenced to life *with* the possibility of parole after serving
9 twenty-five years. Thus, A.R.S. § 13-716 converts only the otherwise lawful
10 sentences into *Miller*-compliant sentences, not otherwise unlawful ones. As such,
11 Respondent Judge correctly interpreted and applied the holdings of *Miller* to Mr.
12 Bassett's case when finding a colorable claim exists pursuant to Rule 32.1(g).
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18 **2. The Respondent Judge correctly found Mr. Bassett is still**
19 **legally entitled to a *Valencia* hearing to which the state**
20 **previously stipulated despite the *Jones* ruling**

21 Mr. Bassett is entitled to and is guaranteed by law the right to a *Valencia*
22 hearing as to Count 1, First-Degree Murder. 241 Ariz. 206 (2016). In February of
23 2018, the state conceded a *Valencia* hearing to be appropriate and stipulated to
24 such⁵. In its amicus filing, the Office of the Attorney General asserts this Court
25 should find *Valencia* Hearings are no longer constitutionally relevant considering
26 the *Jones* decision. Attorney General Amicus Brief, p 17. This Court has already
27
28

⁵ In the State's February 12, 2018, pleading in Response to Mr. Bassett's Successor Petition, the State agreed Mr. Bassett was entitled to a *Valencia* evidentiary hearing.

1 addressed the issue raised in *Valencia* when stating the need for such evidentiary
2 and resentencing hearings could be obviated if legislation were enacted that
3 would permit inmates serving natural life sentences for murders committed as
4 juveniles to be considered for parole rather than resentencing them. *Valencia* at
5 ¶18-19. No such legislation has been enacted nor has the state agreed to a
6 resentencing these individuals.
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- 11 a. A *Valencia* hearing is an appropriate and relevant post-conviction
12 relief mechanism to determine which juvenile life-without-parole
13 claims should proceed to a resentencing

14 The State is inappropriately melding the concepts of *Valencia* post-
15 conviction issues with those of a resentencing as addressed in *Jones* when
16 asserting an evidentiary hearing is no longer relevant. In *Valencia*, this Court
17 found *Miller* to be a significant change in the law when considering the law that
18 was in effect when *Valencia* was sentenced. Ariz. 206, ¶9, 15 (“*Miller*, as clarified
19 by *Montgomery*, represents a ‘clear break from the past’ for purposes of Rule
20 32.1(g).”). This Court then determined that before an offender is entitled to a
21 resentencing, an offender must also establish that *Miller* “if determined to apply
22 ... would probably overturn” the sentence.” *Id.* at ¶17; *see also* Ariz. R. Crim. P.
23 32.1(g).
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Because *Miller* held that imposing a sentence of life without parole on “a
child whose crime reflects transient immaturity” violates the Eighth Amendment,

1 this Court concluded that, if a petitioner has made a colorable claim for relief
2 based upon *Miller*, they are entitled to an evidentiary hearing on their Rule 32
3 petition. *Id.* at ¶18. The means to obtain a resentencing is achieved through
4 success at a *Valencia* hearing.
5

6
7 *Valencia* therefore requires an evidentiary hearing be held before a
8 resentencing may occur. Proof must be established by a preponderance of the
9 evidence that the crime committed reflects transient immaturity to establish the
10 juvenile life-without-parole sentence was unconstitutional as to the specific
11 individual and therefore warrants a resentencing. *Id.* at 210, ¶ 18. Nothing in the
12 *Jones* decision limits the post-conviction relief process, rather it clarified
13 resentencing requirements.
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19 b. A *Valencia* hearing is not in conflict with the *Jones* decision but is
20 well-grounded in the rulings of *Miller* and *Montgomery*
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22 The *Jones* decision does not render *Valencia* untenable and should remain
23 applicable Arizona law. *Valencia* is well-grounded in the rulings of *Miller* and
24 *Montgomery*, cases the Supreme Court explicitly stated, in *Jones*, that it was not
25 overruling. *Jones* at 1321. *Jones* addressed issues associated with the
26 resentencing of a juvenile who was sentenced to life-without-parole after being
27 granted post-conviction relief. 141 S.Ct at 1313. The U.S. Supreme Court
28 declined to impose additional requirements upon the sentencing process when it

1 held a sentencing court did not need to make specific findings of permanent
2 incorrigibility before imposing a life-without-parole sentence upon a juvenile.
3 *Jones* at 1321 (“[A]n on-the-record sentencing explanation with an implicit
4 finding of permanent incorrigibility is not dictated by any historical or
5 contemporary sentencing practice[.]”). A sentencing judge is not required to
6 make a particular factual finding on the record before imposing a sentence of life-
7 without-parole. *Id.* at 13111-14, 1318-19.

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13 The *Jones* Court left to each State the ability to set forth their own
14 procedures. *Jones* at 1315. “When a new substantive rule of constitutional law is
15 established, this Court is careful to limit the scope of any attendant procedural
16 requirement to avoid intruding more than necessary upon the States’ sovereign
17 administration of their criminal justice systems. *Id.* at fn 2; *see Ford v.*
18 *Wainwright*, 477 U.S. 399, 416-17 (1986) (“[W]e leave to the State[s] the task of
19 developing appropriate ways to enforce the constitutional restriction upon [their]
20 execution of sentence.”); *see also Montgomery v. Louisiana*, 577 U.S. 190, 211
21 (2016).

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28 Arizona’s *Valencia* hearing is an appropriate attendant procedural
mechanism to determine which cases merit a resentencing; those where a life-
without-parole sentence was imposed upon “a child whose crime reflects

1 transient immaturity” in violation of the Eighth Amendment⁶. *Valencia* at ¶17.
2
3 The *Valencia* hearing is harmonious with the Court’s discussion in *Jones* at 1315,
4
5 fn 2 (quoting *Montgomery*, 577 U.S. at 211 (“That *Miller* did not impose a formal
6
7 fact finding requirement does not leave States free to sentence a child whose
8
9 crime reflects transient immaturity to life without parole. To the contrary, *Miller*
10
11 established that this punishment is disproportionate under the Eighth
12
13 Amendment.”)).

14
15 The *Jones*’ interpretations of *Miller* and *Montgomery*, (1) that a sentencing
16
17 judge is not obligated to make a finding of “permanent incorrigibility” before
18
19 imposing a life sentence and (2) that a sentencing judge need not make specific
20
21 findings when determining parole eligible sentences are harmonious with
22
23 Arizona’s *Valencia* holding. See *Wagner*, 235 *Ariz.* at 201, ¶20. Accordingly, the
24
25 reasoning of *Valencia*, and the principles of *Miller* apply in this matter.
26
27 Respondent Judge did not abuse discretion when finding Mr. Bassett raised a
28
colorable claim under Rule 32.1(g). Respondent Judge correctly concluded that
Mr. Bassett’s claim entitled him to a *Valencia* evidentiary hearing to establish
that the crime committed reflected transient immaturity, the juvenile life-without-

⁶ *Jones* specifically stated it did not overrule *Montgomery* which found a juvenile life-without-parole sentence to be unconstitutional if the crime is the product of transient immaturity. 577 U.S at 207.

1 parole sentence was unconstitutional, and that Mr. Bassett merits a resentencing⁷.

2
3 **3. Respondent Judge correctly found a colorful claim existed that, if**
4 **proven, establish the trial court failed to adequately consider Mr.**
5 **Bassett's youth and attendant characteristics**

6 A sentence runs afoul of the Eighth Amendment if it is disproportionate to
7 the individual's culpability and fails to advance a legitimate penological goal when
8 compared with a lesser sentence. *Graham v. Florida*, 560 U.S. 48, 67 (2010). While
9 the sentencer is not required to make a separate factual finding of permanent
10 incorrigibility before imposing a life-without-parole sentence on a juvenile
11 homicide offender, *Jones at 1319*, the Supreme Court has stated a juvenile
12 defendant must still receive an individualized sentencing hearing during which the
13 sentencer considers the defendant's youth and its attendant circumstances. 567 U.S.
14 at 483. "A sentence [must] follow a certain process – considering an offender's
15 youth and attendant characteristics – before imposing a life-without-parole
16 sentence." *Jones supra*, 141 S.Ct. at 1311-1314, 1316, 1318-1321 (*quoting Miller*,
17 132 S.Ct. at 2478).

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26 The Office of the Maricopa County Attorney attempts to minimize the
27 requirement of an individualized sentencing hearing, claiming Mr. Bassett's
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⁷ The Court is required to set a hearing on all claims "that present a material issue of fact or law" and are not otherwise precluded. A.R.S. § 13-4236. "The purpose of the 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, 479 (2012).

1 sentencing hearing met that threshold, asserting Mr. Bassett simply wants “more.”
2
3 Maricopa County Attorney Reply Brief, pp 6, 10-11. Mr. Bassett is not crying for
4 “more,” but asserting his sentencing hearing comport with constitutional
5 guarantees; the sentencer was not provided with meaningful information to allow
6 this to occur.
7
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9 Although the *Jessup* Court limited its findings to Jessup’s specific case, the
10 analysis relied upon by the court to determine whether an individualized sentencing
11 occurred offers guidance. 31 F.4th 1262, *10. The information provided to Jessup’s
12 sentencer starkly contrasts with that which was provided in Mr. Bassett’s case
13 supporting Respondent Judge’s conclusion that a colorable claim exists meriting an
14 evidentiary hearing.
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19 Testimony from a psychologist who studied Jessup and emphasized his age
20 and age-related characteristics was heard which included a presentation of Jessup’s
21 emotional age and a twenty-four-page, single-spaced report that compared the
22 psychologist's findings of Jessup to those of other youthful offenders. 31 F.4th
23 1262, *5. The court received a description of Jessup's maturity level, impulse
24 control abilities, and an explanation as to why his maturity was stunted. *Id.* Jessup's
25 lawyers addressed the sentencing court, stressing the characteristics of *his* youth
26 and discussed his ability and potential to reform, all reinforced by the psychologist's
27 opinion. *Id.* at *5, 6.
28

1 Unlike the vast presentation of information regarding Jessup's age and
2 attendant characteristics, Mr. Bassett's sentencing hearing lacked any sort of
3 psychological evaluation, forensic risk assessment to reoffend and the potential for
4 rehabilitation considering Mr. Basset's age, or testimony regarding the same. The
5 record is bereft of testimony from any mental health expert or forensic psychologist
6 regarding Mr. Bassett's psychological age and related characteristic. Generalized
7 statements about youth were provided to the court and counsel quoted three
8 paragraphs from *Roper v. Simmons*, 543 U.S. 551 (2005) that generically discussed
9 juvenile characteristics but offered nothing specific to Mr. Bassett's attendant
10 characteristics. Cognitive maturity testing was not done nor was a comprehensive
11 mental health evaluation provided with information for an individualized
12 assessment of Mr. Bassett's age and hallmark features. *See Jones*, 141 at 1316. The
13 evidence the state asserts was presented to the court was argument offered by the
14 prosecution without any examination by expert of Mr. Bassett.
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24 All such evidence should be heard at a *Valencia* hearing in an as-applied
25 challenge the constitutionality of Mr. Bassett's life-without-parole sentence.
26
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28 Respondent Judge correctly concluded an evidentiary hearing is warranted
after considering the actual record from the sentencing hearing and the information
presented to the court to determine if an individualized sentencing hearing that

1 considered age and attendant circumstances was constitutionally sufficient when
2
3 lacking critical information about Mr. Bassett himself.
4
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6 **RESPECTFULLY SUBMITTED** on this 21st day of November 2022.
7

8 By: /s/ Amy Bain
9 Amy E. Bain
10 *Bain & Lauritano, PLC*
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