APPENDIX

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

APPENDIX A

Petrone-Cabanas, Arizona Superior Court Special Verdict (Feb. 20, 2002)

IN THE SUPERIOR COURT
STATE OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA Plaintiff,	CR 99-004790 CR 99-006656
v.	
FELIPE PETRONA-CABANAS Defendant.	SPECIAL VERDICT ON COUNT 2

I. BACKGROUND.

On July 19, 2002, the defendant, Felipe Petrona-Cabanas, pled guilty to count 2, murder in the first degree of Officer Marc Atkinson.[1] The crime occurred on March 26, 1999, is a class 1 felony and was committed in violation of Ariz. Rev. Stat. (A.R.S.) §§ 13-1105(A)(3), 13-1101 and 13-703.

On January 18, January 31, February 1, and February 12, 2002, a separate sentencing hearing was held, as is required by A.R.S. § 13-703(B). The court has considered the evidence presented at the sentencing hearing and the arguments of counsel in

[1] Defendant also pled guilty to count 1 (conspiracy to sell or transport narcotic drugs), count 3 (transportation or sale of narcotic drugs), count 4 (aggravated assault), count 5 (attempted first degree murder) and count 6 (misconduct involving weapons).

making the following aggravation and mitigation findings pursuant to A.R.S. § 13-703(G) and (H). Statements by the surviving family members have been considered only as allowed by § 13-703(D).

The state bears the burden of proving the existence of statutory aggravating circumstances beyond a reasonable doubt. *State v. Hoskins*, 199 Ariz. 127, ¶86, 14 P.3d 997, ¶86 (2000), *cert. denied*, 122 S.Ct. 386, 151 L. Ed.2d 294 (2001). Only the aggravators expressly set forth by § 13-703(G) may justify imposition of a death sentence. *State v. Williams*, 166 Ariz. 132, 141, 800 P.2d 1240, 1249 (1987).

On the other hand, the defendant must prove mitigating factors only by a preponderance of the evidence. *State v. Pandeli*, 200 Ariz. 365, 374, ¶29, 26 P.3d 1136, 1145, ¶29 (2001), *petition for cert. filed*, (2001). Moreover, a defendant is not limited to those mitigators set forth in § 13-703(H). Rather, a trial judge must consider "every conceivable mitigating factor." *Williams*, 166 Ariz. at 141, 800 P.2d at 1249. Non-statutory factors include any facet of a defendant's character, propensities or record, and any other circumstances of the offense.

The rules of evidence govern admissibility of information tending to prove aggravation. But information relevant to any mitigating circumstance may be presented regardless of its admissibility under the evidence rules. § 13-703(D).

The court has discretion to determine how much weight, if any, to give each mitigating factor. *Pandeli*, 200 Ariz. at 376, 26 P.3d at 1147, ¶44. The purpose of mitigating evidence is to permit the court to determine whether a sentence less severe than death is appropriate. *Pandeli*, 200 Ariz. at 376, ¶43, 26 P.3d

at 1147, ¶43. The death penalty is mandatory only if the trial court finds, in its discretion, the existence of one or more statutory aggravating factors and no sufficiently mitigating factors. *Williams*, 166 Ariz. at 141, 800 P.2d at 1249.

The court has not considered the presentence report or any supplement thereof in determining aggravating factors, but has considered the same in determining mitigating factors. The court has not considered any recommendation of any victim or family of a victim as to the sentence to be imposed.

II. AGGRAVATING CIRCUMSTANCES.

A. The State's Allegations.

The state has alleged the existence of three of the aggravating factors set forth in § 13-703(G). They are:

1. Defendant's contemporaneous convictions in this case on count 4 (aggravated assault) and count 5 (attempted first degree murder). The state alleges that these are "serious offenses" for which defendant was "previously convicted" under Arizona law. This allegation of an aggravating factor is made pursuant to § 13-703(G)(2).
2. Defendant "created a grave risk of death to another person or persons" during the commission of the murder of Officer Atkinson. This allegation of an aggravating factor is made pursuant to § 13-703 (G)(3).
3. The murdered victim, Officer Marc Atkinson, was an on-duty peace officer killed in the course of performing his official duties. This allegation of an aggravating factor is made pursuant to § 13-703 (G)(10).

B. Discussion.

1. A.R.S. § 13-702(G)(2).[2] A defendant becomes eligible for the death penalty if the state proves beyond a reasonable doubt that "[t]he defendant was previously convicted of a serious offense, whether preparatory or completed." § 13-703(G)(2). Defendant Petrona pleaded guilty to attempted murder and aggravated assault against eyewitness Mr. Vertigan. The state contends these convictions qualify as "prior serious offenses" under § 13-703(G)(2). Both convictions are "serious offenses" for purposes of this aggravating factor. § 13-703(I)(1)(a) (first degree murder) and (d) (aggravated assault committed by the use of a deadly weapon). Less clear, however, is whether convictions arising from offenses committed contemporaneously to the murder qualify as "prior" convictions. The Supreme Court's most direct statement on this issue resides in footnote 2 in *State v. Gretzler*, 135 Ariz. 42, 59, 659 P.2d 1, 18 (1983).[3]

---

[2] Because § 13-703 was amended in 2001, the aggravating factors are now found in subsection (G) and will be referred to accordingly.

[3] Footnote 2 provides:

> We have held that our death penalty statute is not a recidivist or enhancement statute, the purpose of which is to serve as a warning to convicted criminals and encourage their reformation. Rather,
>
> > "We have stated that the 'purpose of an aggravation/mitigation hearing is to determine the character and propensities of the defendant. * * * Revelation of subsequent lawless acts of violence would help to attain the objectives of the sentencing statute. *State v. Valencia*, 124 Ariz. 139, 141, 602 P,2d 807, 809 (1979)."
>
> *Steelman II, supra*, 126 Ariz. at 25, 612 P.2d at 481.

Capital sentencing judges of this court have considered this as the Supreme Court's most authoritative pronouncement on the issue.

The critical holdings in *Gretzler* are that the purpose of the aggravating and mitigating factors is to prove defendant's character and propensities, and that previous serious offense convictions prove character and propensities irrespective of the order in which the underlying crimes occurred or the order in which the convictions were entered. *See State v. McKinney*, 185 Ariz. 567, 580-581, 917 P.2d 1214, 1227-1228 (1996) (conviction occurs when jury reaches its verdict and all that such a "previous conviction" need precede is the capital sentencing hearing); *State v. Williams*, 183 Ariz. 368, 383, 904 P.2d 437, 452 (1995) ("That a defendant had been found guilty of other lawless acts of violence is relevant to his character, whether the acts occurred before or after the murder."). This being the case, the state claims that crimes which occurred nearly simultaneously with the murder speak just as

---

> Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred, *State v. Jordan, supra*, 126 Ariz. at 287, 614 P.2d at 829, or the order in which the convictions were entered. *State v. Valencia, supra*, 124 Ariz. at 141, 602 P.2d at 809.
>
> Any language suggesting the contrary in *State v. Ortiz, supra*, 131 Ariz. at 21i, 639 P.2d at 1036, is hereby disapproved. In Ortiz, we found the trial court erred in considering a contemporaneous conviction for conspiracy to commit murder as aggravation for the murder. *This exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events.*

Gretzler, 135 Ariz. at 57, n.2, 659 P.2d at 16, n.2 (italics added).

effectively about defendant's character as do those which might occur before or after. Admittedly, the state's argument has much to recommend it and makes good sense.

Indeed, the Supreme Court has made decisions that arguably conflict with the "same set of events" statement in the *Gretzler* footnote. In *State v. Jones*, the defendant was convicted of, in pertinent part, six first degree murders, three aggravated assaults, three armed robberies, and two first degree burglaries. 197 Ariz. 290, 297, 311, ¶¶1, 64, 4 P.3d 345, 352, 366 (2000), *cert. denied*, 121 S.Ct. 1616, 149 L.Ed.2d 480 (2001). The trial court found all the non-capital offenses were "prior serious offenses." The defendant did not make specific challenges to the trial court's ruling.

The Supreme Court affirmed, finding that "because [the defendant] was convicted of these serious offenses before the sentencing phase, *each* offense provides sufficient grounds for satisfying the F.2 factors . . ." *Jones*, 197 Ariz. at 311, ¶64, 4 P.3d at 366 ¶64 (italics added). The troublesome word in the Court's holding is "each." All but one of the non-capital convictions were committed during the same set of events that occurred at the Moon Smoke Shop, where two victims were killed. 197 Ariz. at 297-98, ¶¶4-7, 4 P.3d at 352-53, ¶¶4-7. The remaining first degree burglary arose from events at the Fire Fighters Union Hall, which included four murders. 197 Ariz. at 29-98, ¶8, 4 P.3d at 353, ¶8. Therefore, since "each" conviction constituted a prior serious offense and was sufficient to aggravate all the murders, at least one of the offenses was used as an aggravator even though it or they arose out of the same course of events.

The context of the Court's ruling, however, suggests that it did not have in mind *Gretzler's* "same set of events" prohibition. Rather, the use of the word "each" seems to be unfortunate and not intended to suggest that convictions occurring from contemporaneous events may be used to aggravate a murder. Indeed, the particular issue was not before the Court. This court will therefore not consider the Supreme Court's language here as being an indication of its intent to permit contemporaneous offenses to qualify as "prior serious" crimes.

In a similar posture is *State v. Rogovich*, where the defendant was convicted of, in pertinent part, four first degree murders, two aggravated assaults and two armed robberies, for crimes committed during two distinct sets of events. 188 Ariz. 38, 40-41, 932 P.2d 794, 796-97 (1997).

At issue was whether the aggravated assaults and armed robberies satisfied former § 13-703(F)(2)(which required conviction for a felony involving the use or threat of violence.). The defendant contended the state failed to establish the convictions qualified under former (F)(2). Citing the general and oft-cited holding in *Gretzler*, the Court held (F)(2) "appl[ied] to convictions entered prior to the sentencing hearing, regardless of the order in which the underlying crimes occurred or the convictions entered." *Rogovich*, 188 Ariz. at 44, 932 P.2d at 800.

As in *Jones*, a literal interpretation of the Court's decision arguably conflicts with *Gretzler's* "same set of events" prohibition. All of the relied-upon convictions arose during the same set of afternoon events, which began with the defendant's aggravated assaults at his apartment complex and ended with the robbery of $45

of a convenience store clerk (who was not the same convenience store clerk the defendant had killed in the morning). *Rogovich*, 188 Ariz. at 40, 932 P.2d at 796. As a result, the convictions, despite arising out of the same series of afternoon events that included the killing of three people, were used to aggravate those killings as well as the distinct morning murder. Again, however, the context of the Court's holding does not indicate an intent to permit application of contemporaneously committed offenses to qualify as "prior serious" crimes. The precise issue was not before the Court. In addition, one could argue that the (F)(2) offenses did not occur during the "same set of events" as envisioned by *Gretzler* because they occurred in separate places and over several hours. *Rogovich*, 188 Ariz. at 40, 932 P.2d at 796. Therefore, this court does not find *Rogovich* to conflict with *Gretzler's* "same set of events" language.

In addition to these reasons, there are other bases for relying on *Gretzler* and rejecting the state's argument. Despite containing some dicta and appearing solely in a footnote, *Gretzler* provides the Supreme Court's most definitive pronouncement regarding contemporaneously committed serious offenses. Further, only one statutory aggravator, § 13-703(G)(8), clearly addresses contemporaneously committed crimes, and it applies only to homicides. If the Legislature wishes the (G)(2) aggravator to apply to "other serious crimes committed during the commission of the offense," it can expressly do so by using the same unequivocal language it included in (G)(8).

Moreover, there is a rational basis for distinguishing between contemporaneously committed serious offenses and those that are

temporally separated from the instant crime. A clear purpose of (G)(2) is to identify convicted first degree murderers who have a propensity to commit serious offenses. It is rational to measure such a propensity by the number of other times such a murderer has committed serious offenses rather than by the number of discreet serious crimes committed during the defendant's criminal conduct at the time of the subject murder.

Finally, the purpose of aggravating circumstances contained in A.R.S. § 13-703 is to narrow the class of death-eligible defendants. *State v. Soto-Fong*, 187 Ariz. 186, 202, 928 P.2d 610, 626 (1996). The factors thus are interpreted and applied in a way that narrows the class of those who are most deserving of the ultimate sanction. *McKinney*, 185 Ariz. at 581, 917 P.2d at 1228. Adopting the state's interpretation of the applicability of § 13-703(G)(2) would broaden, not narrow, the class of death-eligible defendants. Less than explicit statutory direction by the Legislature and imprecise signals from the Supreme Court should not result in expanding the class of death penalty eligible defendants.

For these reasons, Mr. Petrona's convictions for aggravated assault and attempted first degree murder of Mr. Vertigan do not qualify as "prior serious offenses" under (G)(2) and this aggravating circumstance has not been proven beyond a reasonable doubt.

Despite this conclusion, the court finds that the above discussion illustrates the muddled state of the law regarding the application of (G)(2) to other serious offenses committed contemporaneously with the murder. This court respectfully disagrees with

Gretzler insofar as it prohibits serious offenses committed during the same set of events as the murder from being considered "prior serious offenses." This rule results in an anomaly that makes little sense, as highlighted by the following discussion.

In addition to being convicted for first degree murder, Petrona pleaded guilty to attempted murder and aggravated assault against Mr. Vertigan. In support of these convictions, the court finds beyond a reasonable doubt that after he shot Officer Atkinson, Petrona turned and pointed his gun at Mr. Vertigan, who then fired his own weapon at defendant, approached, and grabbed him. Defendant responded by pointing his gun at Mr. Vertigan's face and squeezing the trigger, but the weapon did not fire.

Because the offenses against Mr. Vertigan clearly fell within the same series of events, *Gretzler* prohibits their use under (G)(2). Nevertheless, because Petrona intended to shoot Mr. Vertigan in the face, the (G)(3) "zone of danger" factor does not apply. *See* (G)(3) discussion, *infra*. But if during this course of events the evidence proved beyond a reasonable doubt that Petrona unintentionally placed another person at grave risk of death, the (G)(3) factor would apply. Therefore, his sentence could be aggravated by his unintentional conduct but not for his intentional attempt to kill Mr. Vertigan.

Finally, but for the fortunate fact that the gun did not fire, it is highly likely that the (G)(8) factor would have applied because Petrona would be facing another homicide committed during the course of the Atkinson murder. This curious scenario hardly comports with the Court's declaration that the aggravation/mitigation hearing is designed to

determine a defendant's character and propensities. *Gretzler*, 135 Ariz. at 59, n.2, 659 P.2d at 18, n.2.

Despite this court's disagreement with *Gretzler*, however, it interprets the current state of the law as prohibiting it from applying (G)(2) to the offenses committed against Mr. Vertigan. Assuming *arguendo* that this interpretation is incorrect, and that (G)(2) does apply, this court finds that Petrona confronted Mr. Vertigan almost immediately after firing his shots at Officer Atkinson, and essentially responded to Mr. Vertigan's unexpected presence upon the scene. Although defendant intended to point the gun at Mr. Vertigan's face and squeeze the trigger, Petrona acted impulsively.

For these reasons, the court finds that even if (G)(2) exists, it would not be accorded great weight because it fails to say much about defendant's propensities or character.

2. A.R.S. § 13-702(G)(3). It is an aggravating circumstance where, in the commission of the offense, the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense. The question 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, 1174 (1994). The "grave risk" factor does not apply where the other endangered person was a victim or intended victim of the conduct. *State v. Brewer*, 170 Ariz. 486, 500, 826 P.2d 783, 797 (1992). Although the factor is not limited to cases in which another person was in the direct line of fire, the general rule is that the presence of bystanders or

pointing a gun at another to facilitate escape does not satisfy (G)(3). *Wood*, 180 Ariz. at 69, 881 P.2d at 1174. The state argues that Petrona created a grave risk of death to UPS driver Steve Bowers and two employees of a nearby business.

Bowers was an eyewitness to the murder. He sat inside his truck about 70 feet north of and 90 degrees to Petrona's left at the time of the murder. From there he had an unobstructed view of the crime scene and adjoining parking lots. When defendant first got out of the Lincoln and aimed at the passing patrol car, Bowers said, he saw the two employees running into a building. They were inside from 10-15 seconds before Petrona began shooting. Defendant, tracking only the patrol car with his gun as it passed, rapidly fired five shots at the car. Toward the end of the shooting, he was facing more toward Bowers, who was to the shooter's left. But Bowers estimated that defendant did not turn more than 25 degrees during the shooting. He never threatened or pointed his gun at Bowers. Bowers said the only person who could have been hit during the shooting was the driver of the Lincoln, who had gotten out of the car and was running away to the left of Petrona.

One of the two employees, Mr. Armenta, testified he saw Petrona get out of the Lincoln with a gun in his hand. He and the other employee ran into their work place, arriving inside before the shots began. He was opening an inside door from the office to the warehouse when he heard the first shot. He hid inside a steel box and heard more shots.

A ballistics expert testified it would have taken 4.3 seconds for Petrona to have aimed and taken the shots

at the patrol car, during which time he would have rotated his aim about 80 degrees to his left (north).

This evidence does not support a finding beyond a reasonable doubt that Petrona created a grave risk of death to another person. The state proved beyond a reasonable doubt that defendant aimed his gun at the passing patrol car and tracked it while firing. No one else stood between the shooter and the target. Although other persons were in the area, they were not in grave risk of danger from Petrona's murderous act. *See State v. Smith*, 146 Ariz. 491, 502, 707 P.2d 289, 300 (1985) ("Defendant in this case, however, shot only at the victim . . . who was the only person standing between defendant and what he wanted--the money in the cash register. The shooting thus was not random and indiscriminate, but purposeful. Although other persons were in the store at the time of the shooting, defendant's murderous act itself did not place them within the zone of danger.").

For these reasons, the court finds that the (G)(3) aggravator has not been proven beyond a reasonable doubt.

3. A.R.S. § 13-703(G)(10). It is an aggravating circumstance where the victim was an on-duty peace officer who was killed while performing official duties and the defendant knew or should have known the victim was a peace officer. § 13-703(G)(10). Mr. Petrona pleaded guilty under § 13-1105(A)(3), which elevates murder to the first degree when, "[i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."

The state's reliance on (G)(10) presents what may be an issue of first impression in Arizona: whether applying (G)(10) to a defendant's sentence for first degree murder under § 13-1105(A)(3) violates the constitutional right against double jeopardy.

The federal and state constitutional double jeopardy clauses protect against multiple punishments for the same offense. *State v. Welch*, 198 Ariz. 554, 555, ¶6, 12 P.3d 229, 230, ¶6 (App. 2000). In deciding whether a defendant has been punished twice for the same offense, the court must examine the elements of the crimes for which the individual was sentenced and decide whether each requires proof of an additional fact that the other does not. *State v. Eagle*, 196 Ariz. 188, 190, ¶6, 994 P.2d 395, 397, ¶6 (2000), *cert. denied*, 531 U.S. 839, 121 S.Ct. 102, 148 L.Ed.2d 60 (2000).

Here, we are not dealing with two "offenses" as such. Rather, the question is whether elements of § 13-1105(A)(3) may be committed without the victim being "an on duty peace office who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer." § 13-703(G)(10). *See State v. Mann*, 188 Ariz. 220, 227, 934 P.2d 784, 791 (1997) (no double punishment problem by aggravating first degree murder sentence based on cruelty and multiple homicide because they are not elements of the offense); *State v. Schad*, 163 Ariz. 411, 420, 788 P.2d 1162, 1171 (1989) (pecuniary gain aggravator applies to felony murder based on robbery because robbery requires proof the defendant took property from the victim, while proof of pecuniary gain requires state to establish defendant's motivation was expectation of pecuniary gain).

Another significant authority is *State v. Lara*, 171 Ariz. 282, 830 P.2d 803 (1992). The Supreme Court held that it was proper to consider the death of a victim under former § 13-702(D)(1) (infliction of serious bodily injury) to aggravate defendant Lara's manslaughter sentence. *Lara* also holds that an armed robbery sentence was properly aggravated under former § 13-702(D)(2) (use of a deadly weapon). *Lara*, 171 Ariz. at 285, 830 P.2d at 806.

The central teaching of *Lara* is that the Legislature is free to choose to impose a more severe punishment through reliance on the use of an element of the crime, and that if it so chooses, the courts must follow. 171 Ariz. at 283-84, 830 P.2d at 804-805. Numerous cases have relied on Lara to reject claims of double punishment. *See e.g., State v. Tschilar*, 200 Ariz. 427, 435, ¶33, 27 P.3d 331, 339, ¶33 (App. 2001) ("An element of an offense may be used as an aggravating factor if the legislature has specified that it may be so used. *State v. Lara*, (citation omitted)."); *State v. Greene*, 192 Ariz. 431, 444, ¶62, 967 P.2d 106, 119,162 (1998) ("an element of a crime can also be used for enhancement and aggravation purposes."); *State v. Lee*, 189 Ariz. 608, 620, 944 P.2d 1222, 1234 (1997) ("The legislature may establish a sentencing scheme in which an element of a crime could also be used for enhancement and aggravation purposes. *State v. Lara*, (citation omitted)").

Lara and its progeny, which include death penalty cases, answer in the affirmative the question of whether the state may rely on the death of a police officer to aggravate Mr. Petrona's sentence. This conclusion gives rise to a second question: does the (G)(10) aggravator sufficiently narrow the class of

murderers so its application here does not result in unconstitutionally cruel and unusual punishment?

The United States Supreme Court addressed this issue in *Lowenfield v. Phelps*, 484 U.S. 231, 241-46, 108 S.Ct. 546, 552-55, 98 L.Ed.2d 568 (1988). The Court analyzed Louisiana's death penalty scheme which, but for jury-sentencing, parallels Arizona's.[4] The defendant's first degree murder sentence was aggravated by a factor (multiple victims) that was identical to an element of the offense. The defendant contended this overlap left the jury at sentencing free simply to repeat one of findings at trial, and thus not to narrow further in the sentencing phase the class of death-eligible murderers. *Lowenfield*, 484 U.S. at 241, 108 S.Ct. at 553-55.

The Court disagreed. It held the constitutionally required narrowing need not necessarily occur at sentencing, but may be accomplished at the guilt phase:

> The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase.

Lowenfield, 484 U.S. at 244-45, 108 S.Ct. at 554.

---

[4] Indeed, Louisiana elevates murder to the first degree if the offender has a specific intent to kill or inflict great bodily harm on a peace officer, and aggravates first-degree murder if the victim was a peace officer. *Lowenfield*, 484 U.S. at 242-43, n.6, 108 S.Ct. at 553, n.6.

The Court concluded that the narrowing function may be provided in either of two ways. The legislature may itself narrow the definition of death-eligible murders, so the guilty finding addresses the constitutional concern, or lawmakers may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. 484 U.S. at 246, 108 S.Ct. at 555.

The Arizona Supreme Court has adopted the *Lowenfield* analysis. In *State v. West*, 176 Ariz. 432, 448-49, 862 P.2d 192, 208-09 (1993), *overruled on other grounds, State v. Rodriguez*, 192 Ariz. 58, 63, n.7, 961 P.2d 1006, 1011, n.7 (1998), the Court rejected the defendant's claim that the pecuniary gain aggravator insufficiently narrows the class of death-eligible defendants when applied to felony murder committed in the course of a burglary. The Court held that the constitution requires only that the class of murderers in general be narrowed into death-eligible and non-death-eligible, which occurs upon the finding that the defendant is guilty of first degree murder. Citing *Lowenfield*, the Court concluded, "That all first degree murders committed for pecuniary gain are death eligible does not render Arizona's capital sentencing scheme unconstitutional." *West*, 176 Ariz. at 449, 862 P.2d at 209. Similar is *State v. Greenway*, 170 Ariz. 155, 823 P.2d 22 (1991), where the defendant argued pecuniary gain could not be used to aggravate a first degree murder sentence where the killing occurred during a robbery. The Court disagreed, finding, "Only those persons convicted of first degree murder as defined in A.R.S. [§] 13-1105 are eligible for the death penalty. . . . Moreover, only when the State has proven one or more aggravating

factors and there are no mitigating factors sufficient to call for leniency will a person convicted of first degree murder receive the death penalty." *Greenway*, 170 Ariz. at 164, 823 P.2d at 31.

As applied here, defendant's plea of guilty to first degree murder of an on-duty law enforcement officer removed him from the general class of murderers who were not eligible for the death penalty. His plea even separated him from the class of death-eligible first degree murderers who kill while committing certain felonies.

In summary, reliance on the (G)(10) factor to aggravate a first degree murder sentence under § 13-1105(A)(3) offends neither the constitutional right against double jeopardy nor the right to be free from cruel and unusual punishment.

Finally, had the Legislature sought to limit application of (G)(10) to statutory classes of first degree murder other than those falling within § 13-1105(A)(5), it could have done so by crafting the factor in a way similar to § 13-702(C)(1) and (C)(2). Those non-death circumstances aggravate crimes that involve the infliction or threatened infliction of serious physical injury, or the use, threatened use or possession of a deadly weapon or dangerous instrument during the crime. Neither may be used as an aggravator, however, "if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment . . . ."

For all these reasons, the state may rely on the (G)(10) factor to aggravate defendant's sentence for first-degree murder. This aggravating circumstance has been proven beyond a reasonable doubt.

4. Other statutory aggravating circumstances. Section 13-703(E) requires that the court set forth in its special verdict "its finding as to the existence or nonexistence of each of the circumstances" listed in § 13-703(G). Accordingly, the court finds that the aggravating circumstances set forth in §§ 13-703(G)(1), (4), (5), (6), (7), (8) and (9) do not exist.

III. ENMUND/TISON FINDINGS.

The indictment charged defendant with first degree murder pursuant to § 13-1105(A)(3). That statute defines the requisite culpable mental state as "[i]ntending or knowing." When he entered his plea of guilty, defendant specifically admitted that his criminal conduct was committed knowing that he would cause the death of Officer Atkinson. As such, the court finds that this verdict must reflect compliance with the requirements of *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987).

The court finds that the evidence presented at both the change of plea proceeding and the § 13-703 sentencing hearing meets *Enmund/Tison* requirements. First, defendant admitted during the plea proceeding that he killed Officer Atkinson. Second, the testimony of Mr. Bowers, Mr. Haag and Mr. Vertigan proves beyond a reasonable doubt that Mr. Petrona both intended to kill and attempted to kill Officer Atkinson. Accordingly, the court finds that the *Enmund/Tison* requirements are fully met by the evidence presented.

IV. MITIGATING CIRCUMSTANCES.

A. Defendant's Contentions.

The court's analysis of the evidence offered in mitigation is that defendant alleges the existence of one statutory and five nonstatutory mitigators. They are:

1. International law and sentencing practices and the evolving standards of decency prohibit capital punishment of juvenile offenders.
2. Defendant's age, pursuant to § 13-703(H)(5).
3. Defendant's remorse and acceptance of responsibility for his crimes.
4. Defendant's lack of criminal history, impoverished upbringing, close family ties and otherwise good character.
5. The circumstances of the murder of Officer Atkinson.
6. Defendant's amenability to rehabilitation.

B. Discussion.

1. International law and sentencing practices and the evolving standards of decency prohibit capital punishment for juvenile offenders. While greatly respecting the presentation made by the defense witnesses on this issue, the court does not find mitigation here. Capital punishment comports with the United States Constitution for offenders who are 16 years or older. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d (1989). The Arizona capital sentencing scheme mandates that age be treated as a mitigating factor and be considered by the court. § 13-703(H)(5). And decisions of the Arizona Supreme Court painstakingly set out the manner in

which a sentencing court should evaluate in mitigation the age of a defendant. (Those cases are discussed *infra*). This court is mandated by Arizona law to consider whether the defendant's age, either standing alone or in conjunction with other factors, is a mitigating factor sufficiently substantial to preclude a death sentence. The court will do so here.

2. The remaining mitigating factors as alleged by the defense. The court elects to discuss all of the remaining factors together because it finds them to be interrelated.

Felipe Petrona-Cabanas was born on July 14, 1981; therefore, on the day he murdered Officer Marc Atkinson, Mr. Petrona was 17 years, 8 months and 8 days old. As such, defendant was a minor at the time of his crimes. While § 13-703(H)(5) itself does not provide what age is a mitigating circumstance or how much weight should be accorded to it, both the United States Supreme Court[5] and the Arizona Supreme Court have held that the young age of the defendant convicted of first degree murder is "a substantial and relevant factor" which must be given "great weight". *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982). Therefore, defendant has proven a "substantial" mitigating factor.

The issue then becomes the proper weight to accord to this proven mitigating factor. Chronological age is only the beginning of the analysis. In addition to youth, a sentencing court is required to consider a defendant's level of intelligence, maturity, involvement in the crime and other mitigating factors. See, e.g., *State v. Jimenez*, 165 Ariz. 444, 456, 799 P.2d

[5] *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 LEd.2d 1 (1982).

785, 797 (1990) (17-year-old defendant's age "must be considered in conjunction with" other mitigating factors).

The evidence proves that Mr. Petrona was born into and raised in grinding poverty in Cerrito de Oro, Guerrero, Mexico. But his impoverished background does not mitigate his sentence here because, without question, he was provided love and moral guidance by his parents, family and community. The letters which the court received from those who know defendant in his hometown and home state, the poignant videotaped messages which the court viewed, the in-court testimony of defendant's parents, defendant's lack of any sort of legal difficulties in Mexico, defendant's altrustic reasons for coming to this country, his recognition of the horrific nature of his crimes, his acceptance of responsibility and his own words to Dr. Fernandez-Barillas,[6] prove that the defendant's family and community instilled in him a strong sense of right and wrong and a strong moral foundation. Accordingly, defendant's poverty does not in any way mitigate his sentence because there is no causal connection between defendant's poverty and his crime. His family life and upbringing is one of defendant's personal assets, not a reason for his failure to abide by the most elemental of society's precepts.[7]

---

[6] Dr. Fernandez-Barrillas' psychological evaluation includes these quotes from Mr. Petrona about his parents and upbringing: his father is "respectful and affectionate;" his mother is "a good mother, affectionate, too;" his parents were "very strict;" he was punished if he came home late.

[7] The court agrees with Dr. Fernandez-Barillas' facially incongruous conclusion that Mr. Petrona grew up "in conditions

While not mitigating, defendant's poverty explains why he came to the United States. The court finds as true that defendant came to this country to work at a legitimate job so that he could help support his family. Mr. Petrona's motives in coming here are found by the court to be evidence of good character, as is his good behavior and lack of a juvenile record in Mexico.[8] Good character throughout one's life prior to the murder is a mitigating circumstance. *State v. Williams*, 183 Ariz. at 383-84, 904 P.2d at 452-53.

Mr. Petrona entered the United States in November or December of 1998. He worked briefly at a Wickenburg-area farm or ranch and then came to Phoenix. At that time, he was a 17-year-old fifth grade dropout, with no job skills, no English language skills, no adult supervision and no prospects. It is clear that upon arrival in Phoenix, all of Mr. Petrona's anchors of stability had been hoisted. His home, his parents, his siblings, his community, his work — all were gone. Here is where the defendant chose to associate himself with Fredi Flores-Zeveda and chose to engage in the sale of narcotic drugs. It is here, the court finds, that defendant's young age plays its first major role in these tragic events because Mr. Petrona's young age helps explain why a young man who had never before been in trouble, who knew right from wrong and who had been provided a strong moral foundation during his formative years by his parents, family and community, became unhinged from his strong moral

---

that could be labeled as fairly desirable, except from a socio-economic and educational perspective."

[8] It is true that Mr. Petrona entered the United States illegally, but the court does not find that this fact detracts from defendant's good character while in Mexico.

underpinnings. Such an occurrence is one of the often-present vagaries of youth. Without the presence of parents, without the structure of home and family, often times young persons exhibit a profound lack of self-discipline and a lack of judgment. Parents know this and Arizona capital sentencing law recognizes this. As the Supreme Court said in *State v. Gerlaugh*, 144 Ariz. 449, 461, 698 P.2d 694, 706 (1985):

> Age is entitled to great weight as a mitigating circumstance, especially if the defendant is a minor [citations omitted]. There is a special concern in such cases that the defendant "lacked substantial judgment in committing the crime." [citation omitted].

The court finds that Mr. Petrona, at 17 years old, away from home, parents and community, "lacked substantial judgment" in becoming involved with Fredi Flores-Zevada, in dealing narcotics and in arming himself with a weapon. He knew it was wrong to do so, but he forsook his moral foundation and chose to support himself illegally. Defendant's lack of substantial judgment played a significant role in these tragic events.

Another characteristic of youth which our Supreme Court has recognized as being important in ascribing proper weight to the age mitigator is "juvenile impulsivity". *State v. Jackson*, 186 Ariz. 20, 31, 918 P.2d 1038, 1049 (1996); *State v. Laird*, 186 Ariz. 203, 209, 920 P.2d 769, 775 (1996). Examination of the facts of both *Jackson* and *Laird* is instructive.

Jackson was 16 years and 10 months old when he murdered his victim. The Supreme Court found age to be a mitigating circumstance, but in determining the weight to assign to it, the court looked at other factors,

including defendant's claim of having acted impulsively. Jackson was found to be of average intelligence (as is Mr. Petrona, according to Dr. Fernandez-Barillas). Jackson had a horrible family background, as contrasted to defendant's very stable, nurturing family. The Supreme Court rejected Jackson's claim of impulsivity by referring to the facts of the case, as follows:

> Jackson was a major participant throughout the entire course of the kidnapping, robbery and murder. On the morning of the murder, he met with Hernandez and asked him where he could obtain a gun to commit a robbery. Jackson and Miles then accompanied Hernandez to a home where Jackson broke in and stole a gun. On their way back from the home, Hernandez suggested that they rob a nearby Dairy Queen. Jackson declined. Instead, as a car approached, Jackson said, "watch me jack this bitch," and attempted to "car jack" the driver. Tr. Jan. 19, 1994 at 37. The driver, however, quickly sped-off before Jackson could reach her. Thwarted in his first "car jacking" attempt, Jackson thought up a ruse. As the victim's car approached, he asked her for a "light." *Id.* at 44. He then pointed the gun at her and took over. He drove the car approximately 30 minutes to a remote desert area, unaffected by his victim's pleas for mercy. He did not kill her immediately. Instead, he pondered his victim's fate while she begged for her life.
>
> Jackson's crime does not show juvenile impulsivity. He planned it, made all the necessary preparatory steps, and carried it out.

> Instead of robbing the victim at the point of abduction, which might reflect the impulsive act of a young, inexperienced and immature person, Jackson drove her to a remote desert area to accomplish his crimes. He displayed deliberateness and an ability to delay gratification. *See State v. Walton,* 159 Ariz. 571, 589, 769 P.2d 1017, 1035 (1989) (carrying out play over significant period of time reflects delay of gratification and maturity).

State v. Jackson, 186 Ariz. at 31, 918 P.2d at 1049. Jackson's young age was found to be insufficient to call for leniency in light of these facts and his death sentence was affirmed.

In *Laird*, the Supreme Court engaged in a similar analysis. Laird was 17 years and 5 months old when he murdered. He was of low-average intelligence. He had a supportive family. Unlike Mr. Petrona, psychological evaluations indicated that Laird suffered from an anti-social personality disorder and narcissism, and was described as violent and sadistic. The Supreme Court also examined and rejected Laird's claim of impulsivity and immaturity, as follows:

> Laird's crime does not show immaturity or impulsivity. He was the only participant in the murder. Two weeks before he killed her, he told friends that he was going to get a Toyota 4x4, even if he had to kill for it. Neighbors saw Laird stalking her the day before she disappeared. That night, he broke into her home, reversed the lock on the bathroom door, and waited until morning to ambush her. He tied her up, locked her in the bathroom, and strangled her. He

> dumped her body in the desert and concealed it with vegetation. He showed deliberation and an ability to delay gratification. *See State v. Walton,* 159 Ariz. 571, 589, 769 P.2d 1017, 1035 (1989) (carrying out plan over significant period of time reflects delay of gratification and maturity), *aff'd,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Finally, we consider Laird's past experience. Laird had no criminal record before 1992. But he broke into a home that year and stole some valuables and a car. He was convicted of two counts of theft and three counts of trafficking in stolen property. He committed the present offenses a few months later.

State v. Laird, 186 Ariz. at 209-210, 920 P.2d at 775-776. Laird's death sentence was, likewise, affirmed.

The only factor which Mr. Petrona has in common with *Laird* and *Jackson*[9] is that he was a major participant in the murder. Indeed, Mr. Petrona admits that it was he who shot and killed Officer Atkinson. But unlike *Laird* and *Jackson*, the circumstances of this murder support Dr. Fernandez-Barillas' conclusion from "behavioral and test data,

---

[9] The court notes that the Supreme Court also affirmed the death sentence of a 17-year, 8-month-old defendant in *State v. Soto-Fong*, 187 Ariz. 186, 928 P.2d 610 (1996). This court finds little in that opinion which is of help in resolving the issues presented here, but the court notes that Soto-Fong's age was not found to be sufficiently substantial to call for leniency because he maintained a household with his pregnant girlfriend, had a job, and was convicted of 3 murders.

both objective and projective," of "significant impulsivity." Psychological evaluation, at 8.[10]

The prime evidentiary support for the psychological finding, and the most probative, objective manifestation of it, is found in the very brief period of time in which defendant assessed Officer Atkinson's pursuit and made his fateful decision to shoot Officer Atkinson. Detective Olson testified that radio transmissions from Officer Atkinson were made as follows:

(1) 5:31:09 p.m. — reporting eastbound on Thomas from 33rd Avenue.

(2) 5:31:56 p.m. — reporting northbound on 31st Avenue.

(3) 5:32:28 p.m. — reporting "bailout" from defendant's vehicle.

As Mr. Vertigan testified, Officer Atkinson was only "several seconds" behind the white Lincoln when Mr. Vertigan first saw them. From this evidence, the court finds that Mr. Petrona concluded that Officer Atkinson was pursuing the white Lincoln, decided that it was likely he was going to be arrested and decided to shoot Officer Atkinson and did so in a time frame that began no earlier than when Officer Atkinson turned north onto 31st Avenue and ended less than 90 seconds later. This stands in stark contrast to the facts in *Laird* and *Jackson*. Mr. Petrona's murder of Officer Atkinson simply does not show what the *Laird* court calls "deliberation and an ability to delay gratification," *State v. Laird*, 186 Ariz.

---

[10] Dr. Fernandez-Barillas also testified that Mr. Petrona has a "proclivity for impulsiveness," that impulsiveness was the "most prominent feature" of certain testing and that a lay definition of "impulsiveness" is "behaving before thinking."

at 209, 920 P.2d at 775; that is, it does not show maturity beyond defendant's chronological age. Rather, the facts do show that juvenile impulsivity played an important part in defendant's decision to shoot Officer Atkinson.

The Arizona Supreme Court has also held that prior experience and prior record are relevant in determining the proper weight to be accorded a young defendant's age. *State v. Hoskins*, 199 Ariz. 127, 150, 14 P.3d 997, 1020 (2000). In *Hoskins*, a 20-year-old defendant argued his age as a mitigator, but the Supreme Court rejected it as being substantial because the defendant had numerous juvenile referrals and adjudications. Mr. Petrona has none. The Supreme Court found that *Hoskins* conceived and predetermined and carried out "a criminal plan." *Id.* The court further stated:

> ... Had the murder been committed on the spur of the moment, impulsively, or in a quick lapse of judgment, mitigation based on age would deserve more weight...
>
> *Id*.

For all the reasons discussed above, it is evident that Arizona law requires that Mr. Petrona's age of 17 years and 8 months at the time he murdered Officer Atkinson be accorded very substantial weight in mitigation.

The defense also urges that mitigation exists in defendant's remorse and acceptance of responsibility. The following evidence has been presented. In the immediate aftermath of Officer Atkinson's murder, defendant was taken to Good Samaritan hospital where Det. Chavez interviewed him twice on March 26, 1999. Det. Chavez has described defendant as

"cooperative, polite and apologetic" on March 26, 1999 and further characterized Mr. Petrona's statements to him as a "full confession." Also on the night of the murder, and the next day, defendant told Chavez that he knew he did wrong, that he deserved to be punished and that he wanted to be punished.

Ten days to two weeks after the murder, Father John Auther met defendant in the jail's juvenile section. Mr. Petrona told Father Auther that he had "done something very, very, bad" and he "had to pay for what he did." Father Auther testified that he visited Mr. Petrona two or three times in the jail before Father Auther was transferred to San Diego. When visiting Phoenix, Father Auther visited defendant one more time in jail and has received approximately 15 letters from defendant in the last 2 ½ years. Father Auther testified that defendant has expressed concern for his family and lament over what he has done to his own life, but has never suggested that he is a victim or is otherwise undeserving of what is happening to him.

Additionally, it is noted that Mr. Petrona entered pleas of guilty to all charges without any concessions from the State of Arizona. Plainly put, defendant pleaded guilty knowing that his guilty pleas would not save him from execution.

The Arizona Supreme Court has said that remorse may be considered in mitigation. *State v. Medina*, 193 Ariz. 504, 975 P.2d 94 (1999). An examination of all the cases makes clear that evaluation of such claims is one of credibility for the sentencing court, and the credibility question should be resolved by examination of all the facts and circumstances. Rarely are such claims accepted as being significant by a

sentencing judge in a capital case because courts hear them all the time, they are easy to make and are so often motivated by defendant's self-interest. Additionally, of course, mere words always pale in comparison to the enormity of the crime of first degree murder.

Here, however, the court finds defendant's expression of remorse and his acceptance of responsibility to be genuine in light of the fact that defendant expressed remorse very early and often to Det. Chavez and Father Auther and in light of his strong family background and lack of prior record.[11]

The defense also urges that defendant is amenable to rehabilitation. The Arizona Supreme Court recognizes that the potential for rehabilitation is a mitigating factor. *State v. White*, 194 Ariz. 344, 982 P.2d 819 (1999). Among other evidence touching on this issue, Dr. Fernandez-Barillas found that Mr. Petrona does not appear to have "a true antisocial nor psychopathic character make up." Psychological evaluation, at 8. And his report further states that "when the psychopathy traits are clearly low, they decrease the risk of criminal or violent recidivism." Evaluation, at 7. When these facts are combined with defendant's age, average intelligence, lack of prior record, and well-developed conscience, the court finds that Mr. Petrona is amenable to rehabilitation.

V. CONCLUSIONS.

The court concludes that the state has proven beyond a reasonable doubt the existence of one

---

[11] Defendant also expressed remorse to Dr. Fernandez-Barillas, but because the doctor was interviewing defendant in preparation for sentencing, such expressions are not as probative as those made soon after the murder of Officer Atkinson.

statutory aggravating factor: defendant murdered Officer Marc Atkinson, who was an on duty peace officer and was killed in the course of performing his official duties and the defendant knew that Officer Atkinson was a peace officer. § 13-703(G)(10). The court further finds that defendant has proven by a preponderance of the evidence the statutory mitigating factor of age. § 13-703(H)(5). The court further finds that defendant has proven by a preponderance of the evidence the following nonstatutory mitigating circumstances: genuine remorse and acceptance of responsibility, lack of criminal history and good character before coming to Phoenix and amenability to rehabilitation.

Because the court has found the existence of the § 13-703(G)(10) aggravator, § 13-703(E) requires that the court determine whether the mitigating circumstances found are "sufficiently substantial to call for leniency." The factual findings set forth above and the decisions of the Arizona Supreme Court cause this court to accord very substantial weight to the § 13-703(H)(5) age mitigator. When considered together, the court finds that the mitigating factors are sufficiently substantial to call for leniency.[12]

VI. SENTENCE.

Count 2: It is the judgment of the court that defendant is guilty of murder in the first degree of Marc Atkinson, a class 1 felony, in violation of A.R.S. §§ 13-1105(A)(3) and 13-1101.

---

[12] For reasons set forth earlier in this special verdict, were a higher court to find that the § 13-703(G)(2) aggravator does exist as a matter of law, the court would not accord that aggravator great weight and would still conclude that the mitigating factors are sufficiently substantial to call for leniency.

As punishment it is ordered that the defendant, Felipe Petrona-Cabanas, be imprisoned in the custody of the state department of corrections for life and not be released on any basis for the remainder of his natural life. This sentence is not subject to commutation, parole, work furlough or work release. A.R.S. § 13-703(A).

Dated this 20th day of February, 2002.

/s/
Frank T. Galati
Judge of the Superior Court

APPENDIX B

Petrone-Cabanas, Arizona Superior Court Order Denying Relief (Oct. 6, 2021)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-006656	10/06/2021
HONORABLE PATRICIA ANN STARR	CLERK OF THE COURT A. Gonzalez Deputy
STATE OF ARIZONA	JOHN NELSON SCHNEIDER
v.	JULIE ANN DONE
FELIPE PETRONE CABANAS (A)	KEVIN D HEADE MIKEL PATRICK STEINFELD COURT ADMIN-CRIMINAL-PCR JUDGE STARR KRISTA WOOD

UNDER ADVISEMENT RULING / PCR RULING

The State has asked this Court to vacate the pending evidentiary hearing and dismiss Petrone Cabanas' petition for post-conviction relief. For the following reasons, the Court finds that the evidentiary hearing should be vacated, and Petrone Cabanas' petition dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petrone Cabanas pleaded guilty to first-degree murder, a dangerous offense, as well as other offenses. At the time of the homicide, Petrone Cabanas was 17 years old. The trial court sentenced Petrone Cabanas to natural life.

In June of 2013, Petrone Cabanas filed a PCR petition, arguing that he was entitled to resentencing pursuant to *Miller v. Alabama,* 567 U.S. 460 (2012). The trial court denied his petition, finding that his natural life sentence was not mandatory. On review, the Court of Appeals reversed and remanded to give Petrone Cabanas "the opportunity to establish that his crime reflects transient immaturity." *State v. Cabanas,* 2017 WL 3599595, at ¶ 8 (App. 2017). The Court of Appeals did so in reliance on *Miller v. Alabama,* 567 U.S. 460 (2012), as interpreted by *State v. Valencia,* 241 Ariz. 206 (2016).

After the United States Supreme Court issued its opinion in *Jones v. Mississippi,* 141 S. Ct. 1307 (2021), the State filed its Motion to Vacate and Dismiss.

II. STANDARD OF REVIEW

A defendant is entitled to post-conviction relief if there is a significant change in the law which applies to his case which would probably overturn his conviction or sentence. *State v. Shrum,* 220 Ariz. 115, 188, ¶ 13; Rule 32.1(g), Ariz. R. Crim. Pro. To be entitled to an evidentiary hearing, a defendant must present a colorable claim requiring further factual development. Rule 32.6, Ariz. R. Crim. Pro. A "colorable" claim is a factual claim that if true, would have changed the outcome of the proceeding. *State v. Runningeagle,* 176 Ariz. 59, 63 (1993).

III. LEGAL ANALYSIS

A person who commits a homicide when he is under 18 may be sentenced to life without parole, but only when that sentence is not mandatory and the sentencer has the discretion to impose a lesser sentence. *Miller v. Alabama,* 567 U.S. 460 (2012). The holding in *Miller* applies retroactively on collateral review. *Montgomery v. Louisiana,* 577 U.S. 190, 211 (2016). The question here is whether *Miller* applies to Petrone Cabanas' case, and if so, whether he had a sentencing that complies with *Miller.* If the Court finds that after *Jones,* Petrone Cabanas is not otherwise entitled to an evidentiary hearing, it must then decide whether it can disregard the mandate of the Court of Appeals requiring such a hearing.

First, the Court finds that Petrone Cabanas' sentencing complied with the requirement that the sentencer have the discretion to sentence him to a sentence less than natural life. Under A.R.S. § 13-703, the sentencing options available to the trial court were death, natural life, or life with the possibility of release after 25 years. Thus, Petrone Cabanas' natural life sentence was not mandatory.

Second, the Court finds that even if *Miller* applies, the trial court thoroughly considered Petrone Cabanas' youth and attendant characteristics, and thus satisfied *Miller.* In *Jones,* the Supreme Court found that *Miller* held that a sentencer need not make a finding of permanent incorrigibility to impose a sentence of life without parole, but must only consider the offender's "youth and attendant characteristics." *Jones* at 1311, quoting *Miller* at 483.

Here, the trial court considered Petrone Cabanas' young age of 17 at the time of the homicide, the

circumstances of the offense, Petrone Cabanas' social and family history, and strong community support. Petrone Cabanas presented Dr. Fernandez-Barillas' psychological evaluation, as well as the report of the mitigation specialist. The trial court considered all the information presented to it, and explicitly acknowledged Petrone Cabanas' "juvenile impulsivity" and young age. Thus, the trial court satisfied *Miller's* requirements.

The opinion in *State v. Valencia,* 241 Ariz. 206 (2016), does not require a different result, because the basis for that opinion no longer exists after *Jones.* In *Valencia,* the Arizona Supreme Court noted that *Montgomery* clarified that *Miller* set forth a new substantive rule of constitutional law that must be given retroactive effect.

> *Miller,* as clarified by *Montgomery,* represents a "clear break from the past" for purposes of Rule 32.1(g). Arizona law, when Healer and Valencia 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."

Valencia, 241 Ariz. at 209, ¶ 15.

In *Jones,* the Supreme Court disavowed this interpretation of *Montgomery.* According to the Supreme Court, "in making the rule retroactive, the *Montgomery* Court unsurprisingly declined to impose new requirements not already imposed by *Miller.*" *Jones,* 141 S. Ct. at 1317. A sentencer need not make a separate factual finding of permanent incorrigibility or an on-the-record sentencing explanation with an

implicit finding of permanent incorrigibility before sentencing an offender under 18 to life without parole. *Id.* at 1318-19.

The Arizona Supreme Court further explained its view of *Montgomery* in *State v. Soto-Fong,* 250 Ariz. 1 (2020). In *Soto-Fong,* the Court found that consecutive sentences imposed for separate crimes that exceed a juvenile's life expectancy do not violate the Eighth Amendment. The Court noted that "Montgomery muddied the Eighth Amendment jurisprudential waters with its construction of *Miller*. *Id.* at 40, ¶ 21. The Court further opined that "Miller did not enact a categorical ban," instead, it mandated that trial courts consider an offender's youth and attendant characteristics before imposing a life without parole sentence. *Id.* at ¶ 22. The Court plainly stated that "*Miller*'s holding was narrow – a trial court must consider certain factors before sentencing a juvenile to life without the possibility of parole." *Id.* at ¶ 23. Finally, the Court noted that the opinions in *Miller* and *Montgomery* had left state courts "in a wake of confusion." *Id.* at ¶ 24.

Jones later addressed that confusion, clarifying the requirements for a constitutional life without parole sentence for a juvenile offender. Here, Petrone Cabanas' natural life sentence was constitutionally imposed. Thus, even if *Miller* applies in Petrone Cabanas' case, he has not asserted a colorable claim for post-conviction relief because he received a sentencing at which his youth and attendant characteristics were considered.

The only question left, therefore, is whether this Court can disregard the mandate of the Court of Appeals. Because the mandate relied on *State v.*

Valencia, which *Jones* implicitly overruled, the basis for the mandate no longer exists. Therefore, the Court finds that it need not hold an evidentiary hearing that is no longer required under the current state of the law.

IV. CONCLUSION

Based on the foregoing,

IT IS ORDERED vacating the pending evidentiary hearing and dismissing Petrone Cabanas' petition for post-conviction relief in its entirety for failure to state a claim upon which relief could be granted.

APPENDIX C

Petrone-Cabanas, Arizona Court of Appeals Order Granting Relief (June 21, 2022)

IN THE COURT OF APPEALS
STATE OF ARIZONA
Division One

STATE OF ARIZONA, *Respondent,*
v.
FELIPE PETRONE CABANAS, *Petitioner*.

No. 1 CA-CR 21-0534 PRPC
FILED 06-21-2022

Petition for Review from the Superior Court in
Maricopa County
No. CR1999-006656
The Honorable Patricia A. Starr, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Julie A. Done, John Schneider
Counsel for Respondent

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade, Mikel Steinfeld
Counsel for Petitioner

Arizona Justice Project, Phoenix
By Karen S. Smith, Randal McDonald
Counsel for Amicus Curiae Arizona Justice Project

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge David D. Weinzweig and Judge Brian Y. Furuya joined.

PERKINS, Judge:

¶1 Felipe Petrone Cabanas petitions for review of the superior court's summary dismissal of his petition for post-conviction relief. For the following reasons, we grant review and relief, and we remand for an evidentiary hearing as provided by *State v. Valencia,* 241 Ariz. 206 (2016).

¶2 In 2001, Cabanas pled guilty to the first-degree murder of a police officer, an offense he committed at age 17. The superior court imposed a term of natural life in prison without the possibility of release.

¶3 Following the United States Supreme Court opinion in *Miller v. Alabama,* 567 U.S. 460 (2012), Cabanas petitioned for post-conviction relief, challenging the constitutionality of his natural life sentence. In denying relief, the superior court found that Cabanas's sentence did not violate *Miller* because the sentence was not mandatory and the sentencing judge considered his age as a mitigating factor. We reversed that ruling and concluded that *Valencia* required an evidentiary hearing to determine whether the crime reflected transient immaturity, entitling Cabanas to resentencing under *Miller. See State v. Cabanas,* 1 CA-CR 15-0660, 2017 WL 3599595, at *2, ¶¶ 8–9 (Ariz. App. Aug. 22, 2017) (mem. decision).

¶4 On remand, the superior court expanded the evidentiary hearing's scope to include reconstruction

of the evidence presented at sentencing. Cabanas objected to reconstruction of the sentencing record and sought special action review. As relevant here, we directed the superior court "to decide the material issue presently before it: whether Cabanas' crime reflected transient immaturity or irreparable corruption. It is not tasked with deciding whether the previous sentence should stand, nor may it base its decision on considerations by the previous sentencing judge." *See Cabanas v. Pineda,* 246 Ariz. 12, 20, ¶ 30 (App. 2018). Once again, we granted relief and remanded for an evidentiary hearing pursuant to *Valencia. Id.* at 20–21, ¶¶ 32–34.

¶5 Before the superior court held the evidentiary hearing, the United States Supreme Court issued its opinion in *Jones v. Mississippi,* 141 S. Ct. 1307 (2021), and the State moved to vacate the hearing and dismiss Cabanas's petition. The superior court granted the State's motion and summarily dismissed Cabanas's petition. The court found the basis for our mandate no longer existed because *Jones* implicitly overruled *Valencia,* and the current law no longer required an evidentiary hearing. Cabanas's timely petition for review followed.

¶6 We recently held in *State v. Wagner,* 1 CA-CR 21-0492, 2022 WL 1463719, at *4–5, ¶¶ 20–21 (Ariz. App. May 10, 2022), that *Jones* neither modified nor implicitly overruled *Valencia's* application of *Miller.* In *Wagner,* we granted relief and remanded for an evidentiary hearing consistent with *Valencia. Id.* at *1, ¶ 1. Because this case's procedural background and circumstances are similar, we find *Wagner* dispositive and need not further address the parties' arguments. As we have mandated twice before, we

direct the superior court to conduct an evidentiary hearing to determine whether the crime reflected transient immaturity in accordance with *Valencia.*

¶7 We vacate the superior court's dismissal of Cabanas's petition for post-conviction relief and remand for further proceedings consistent with this decision.

APPENDIX D

Petrone-Cabanas, Arizona Supreme Court Order Reversing Relief (Sept. 19, 2023)

SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA,
Respondent,
v.
FELIPE PETRONE CABANAS,
Petitioner.

Arizona Supreme Court No. CR-22-0185-PR
Court of Appeals, Division One 1 CA-CR 21-0534 PRPC
Maricopa County Superior Court No. CR1999-006656

Filed 09/19/2023

ORDER

On June 21, 2022, the court of appeals issued a memorandum decision (1 CA-CR 21-0534 PRPC) on Petitioner Felipe Cabanas' petition for review. The court of appeals vacated the superior court's summary dismissal of Cabanas' petition for post-conviction relief and remanded to the superior court for further proceedings.

On July 21, 2022, the State of Arizona filed *State's Petition for Review* requesting that this Court grant review because the court of appeals' memorandum decision in this matter "perpetuates the [court of appeals'] erroneous opinion" in *State v. Wagner* (1 CA-

CR 21-0492 PRPC) "where the court wrongly decided pure issues of law."

On August 16, 2022, Cabanas filed his *Response to Petition for Review to the Arizona Supreme Court* requesting that this Court deny review.

On September 6, 2022, the Arizona Attorney General filed a *Brief of Amicus Curiae Arizona Attorney General in Support of the State of Arizona.*

The Court has continued this matter pending its resolution of CR-22-0227-PR (*State v. Hon. Cooper/Bassett).* The Court, having issued its opinion in that matter on September 18, 2023,

IT IS ORDERED granting the State's Petition for Review.

IT IS FURTHER ORDERED vacating the court of appeals' memorandum decision issued in this matter on June 21, 2022.

IT IS FURTHER ORDERED remanding this matter to the court of appeals for further proceedings on Cabanas' petition for review consistent with this Court's opinion in *State v. Hon. Cooper/Bassett* (CR-22-0227-PR) filed on September 18, 2023.

DATED this 19th day of September 2023.

/s/

ANN A. SCOTT TIMMER
Vice Chief Justice

Chief Justice Brutinel, Justice Beene, and Justice Montgomery did not participate in the determination of this matter.

APPENDIX E

Petrone-Cabanas, Arizona Court of Appeals Order Denying Relief (Dec. 6, 2023)

IN THE COURT OF APPEALS
STATE OF ARIZONA
Division One

No. 1 CA-CR 21-0534 PRPC

STATE OF ARIZONA, *Respondent,*
v.
FELIPE PETRONE CABANAS, *Petitioner*.

Maricopa County Superior Court
No. CR1999-006656
Filed 12/06/2023

ORDER GRANTING REVIEW/DENY RELIEF

On September 19, 2023, the Arizona Supreme Court vacated our memorandum decision dated June 21, 2022, and returned jurisdiction to this court to reconsider our ruling based on its recent decision in State v. Hon. Cooper/Bassett (CR-22-0227-PR) filed on September 19, 2023. The parties filed simultaneous supplemental briefs on October 31, 2023. Upon reconsideration, and having reviewed the supreme court's ruling and the parties' supplemental briefs,

IT IS ORDERED granting review of the petition and denying relief.

/s/
Jennifer M. Perkins, Judge

APPENDIX F

Petrone-Cabanas, Arizona Supreme Court Order Denying Review (June 3, 2024)

SUPREME COURT
STATE OF ARIZONA

June 3, 2024

STATE OF ARIZONA,
v.
FELIPE PETRONE CABANAS,

Arizona Supreme Court No. CR-23-0331-PR
Court of Appeals, Division One No. 1 CA-CR 21-0534
PRPC
Maricopa County Superior Court No. CR1999-006656

The following action was taken by the Supreme Court of the State of Arizona on June 3, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Beene and Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

APPENDIX G

Wagner, Arizona Superior Court Special Verdict (Jan. 24, 1997)

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

STATE OF ARIZONA
Plaintiff, No. CR94-92394

v.

CHARLES VINCENT
WAGNER JR.
Defendant.

SPECIAL VERDICT

Pursuant to the provisions of A.R.S. § 13-703(D), the Court makes the following findings as to the existence or nonexistence of each of the circumstances set forth in A.R.S. § 13-703(F) and §13-703(G).

Specifically,

1. The Court finds that the Defendant has not been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The Court finds that the Defendant was not previously convicted of a serious offense, either preparatory or completed.

The State has urged the Court to find that the Defendant's conviction for Count II, Attempted Armed Robbery, a dangerous offense, is an aggravating circumstance, pursuant to the provisions of A.R.S. § 13-703(F)(2). The Court FINDS AND DETERMINES that, although the attempted armed robbery is a serious offense, the Court cannot consider it to be a prior conviction pursuant to 703(F)(2). This is because it was committed during the commission of the murder of Mrs. Fater. If the Legislature had intended other serious offenses perpetrated during the commission of first degree murder to be considered as aggravating circumstances, it would have clearly stated so in the statute. In fact, until the Legislature amended the statute to add 703(F)(8), the Court could not even consider another homicide that was committed during the commission of a first degree murder as an aggravating circumstance.

3. The Court finds that, in the commission of the offense, the Defendant did not knowingly create a grave risk of death to another person or persons in addition to the victim of the offense.

4. The Court finds that the Defendant did not procure the commission of the offense by payment, or promise of payment, of something of pecuniary value.

5. The Court finds that the State has proven, beyond a reasonable doubt, the existence of the statutory aggravating circumstance set forth in A.R.S. § 13-703(F)(5). The Court FINDS AND DETERMINES that the Defendant committed the offense as consideration for the receipt, or in

expectation of the receipt, of anything of pecuniary value. The evidence at trial established that, prior to going to the Smitty's parking lot, Defendant and his accomplices met together and agreed that they would go the Smitty's parking lot for the purpose of robbing someone and obtaining money and/or a car. In furtherance of the scheme, Defendant accosted the victim at gunpoint, and attempted to rob her. In the course of attempting to rob the victim, the Defendant shot and killed her. The sole reason for the victim being murdered was Defendant's expectation of the receipt of something of pecuniary value.

6. The Court finds that the State has proven, beyond a reasonable doubt, the existence of the statutory aggravating circumstance set forth in A.R.S. § 13-703(F)(6), that the offense was committed in an especially heinous, cruel, or depraved manner. The Court specifically FINDS AND DETERMINES that the Defendant committed the offense in an especially cruel manner. The Court's finding of cruelty satisfies the circumstance. This is because the especially heinous, cruel, or depraved aggravating circumstance is phrased in the disjunctive, and if any one of the three factors is found, the circumstance is satisfied.

"Cruelty" focuses on the victim's state of mind, and it exists when a defendant inflicts mental anguish or physical abuse before the victim's death. Mental anguish results when the victim experiences significant uncertainty about her ultimate fate. The victim's suffering must have been foreseeable to the defendant. The evidence presented at trial clearly

establishes that the victim suffered both physical and mental anguish prior to her death, and that her suffering was foreseeable to the Defendant. The Defendant attacked the victim as she was getting into her car. He hit her in the head, forced her into her car, and then shot her at close range numerous times. Since he was not suffering from any impairment at the time, he had to have realized that he was inflicting great pain on the victim. Despite her fatal injuries, the victim remained conscious as she bled to death. This is evidenced by the fact she was able to get out of her car and move for a short distance across the parking lot, while imploring someone to help her. She was obviously in physical pain from her injuries. She also suffered mental anguish prior to her death, as she had to have been uncertain about her ultimate fate from the time of the initial attack by the Defendant until she finally lost consciousness. The fact her physical and mental anguish lasted for minutes rather than for hours does not in any way diminish the finding of cruelty.

The State has also urged the Court to find that the offense was committed in an especially heinous or depraved manner. There is some evidence that the Defendant committed the murder in an especially heinous and depraved manner. This is evidenced by the fact this was a senseless murder; the victim was a middle-aged woman, who was obviously helpless against the gun-wielding younger man; and the Defendant shot the victim a number of times. It is further evidenced by his callous comment made a short time after the murder, when he said, “I just

popped some old lady at Smitty's," and by his statement that he did not feel "weird" about shooting the victim. Despite the preceding evidence, the Court finds that the State has failed to prove beyond a reasonable doubt that the offense was especially heinous or depraved. Although the Defendant's comments were callous and evidenced a lack of empathy for his victim, the court cannot find that the Defendant actually relished the murder, or that the number of gunshots inflicted constituted gratuitous violence, where the shots were fired in close succession as the victim struggled with the Defendant.

7. The Court finds that the Defendant did not commit the offense while in the custody of or on authorized or unauthorized release from the State Department of Corrections, a law enforcement agency or a county or city jail.

8. The Court finds that the Defendant has not been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The Court finds that the Defendant was not an adult at the time the offense was committed, but was prosecuted as an adult, and further finds that the victim was not under fifteen years of age nor was she seventy years of age or older.

10. The Court finds that the victim was not an on-duty peace officer who was killed in the course of performing her official duties.

As to the statutory mitigating circumstances set forth in A.R.S. §13-703(G), the Court finds that the evidence does not establish the existence of the mitigating factors set forth in (G)(1), (G)(2), (G)(3), and (G)(4). Specifically,

1. The Court finds that the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired.

2. The Court finds that the Defendant was not under unusual and substantial duress.

3. The Court finds that, since the jury found Defendant guilty of both premeditated murder and felony murder, his culpability is not based upon any theory of accomplice liability.

4. The Court finds that, since this is both a felony-murder situation, *and* a premeditated and intentional murder, the Defendant reasonably foresaw that his conduct would result in the victim's death.

5. The Court finds that the Defendant has proven, by a preponderance of the evidence, the existence of the statutory mitigating circumstance regarding age set forth in A.R.S. § 13-604(G)(5). Specifically, the Court finds that the Defendant was a juvenile, age 16, when he committed the offense. This mitigating circumstance is entitled to great weight. *See State v. Gerlaugh*, 144 Ariz. 449, 698 P.2d 694 (1985). This is especially true in this case, as the Defendant was an immature 16-year-old with extremely poor judgment when he committed the offense.

6. The Defendant urges the Court further to find that he has proven, by a preponderance of evidence, the following non-statutory mitigating circumstances: Defendant's post-arrest conduct; his lack of a prior felony record; the lenient treatment of codefendant Michael Gibson; the felony-murder finding; and Defendant's family background and psychological issues.

(a) Defendant's Post-Arrest Conduct: The Defendant presented evidence that he received numerous write-ups during the approximately 19 months that he was housed in the juvenile facility of the Maricopa County Jail, but that he has only received two write-ups since he turned 18 in March of 1996. The Defendant attributes his improved behavior to a new-found maturity since he reached the age of majority. The write-ups the Defendant received as a juvenile and as an adult were for making inappropriate comments, insolence, and being in an unauthorized area; none involved physical aggression or violence. It is apparent that the Defendant began behaving better in jail following his conviction for first degree murder and following his transfer to the maximum security facility of the jail. The Court FINDS AND DETERMINES that the Defendant has proven that he has not exhibited any violent behavior while in jail. The Court, however, FINDS AND DETERMINES that the Defendant has not proven to the Court that he has been a model jail inmate, or that his lack of recent write-ups is the result of his alleged new-found maturity. The Court FINDS AND DETERMINES that Defendant's post-arrest conduct

is not a nonstatutory mitigating circumstance for death penalty purposes. *See State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996).

(b) Defendant's Lack of a Prior Felony Record: The Defendant presented evidence that he has no prior felony convictions. The Court FINDS AND DETERMINES that the Defendant's lack of an adult criminal record is not a nonstatutory mitigating circumstance for death penalty purposes, since he was only 16 years old when he murdered Mrs. Fater. *See State v. Gallegos*, 185 Ariz. 340, 916 P.2d 1056 (1996).

(c) Lenient Treatment of Codefendant Michael Gibson: The Defendant urges the Court to consider the relatively lenient treatment of codefendant Michael Gibson as a mitigating circumstance. The State entered into a plea agreement with the codefendant, whereby he was allowed to plead to a lesser offense in exchange for his cooperation and testimony against the Defendant. He ultimately was sentenced to 10.5 years in prison. The Court FINDS AND DETERMINES that the sentence imposed upon codefendant Gibson is not a mitigating circumstance, where the Defendant was the person who attempted to rob the victim and murdered her. *See State v. Greenway*, 170 Ariz. 155, 823 P.2d 22 (1991).

(d) The Felony Murder Finding: The Defendant urges the Court to consider the jury's finding of felony murder as a mitigating circumstance. The Court cannot consider the jury's finding as mitigating where the jury also found unanimously that the murder was premeditated. The Court FINDS AND DETERMINES

that the felony murder finding is not a mitigating circumstance. *See State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993).

(d) Defendant's Family Background and Psychological Issues: The Defendant urges the Court to consider his family background and psychological profile as mitigating circumstances. The Defendant presented evidence that he has been diagnosed as suffering from "Oppositional Defiant Disorder" by Dr. Donald Stonefeld, and of "Conduct Disorder" by the psychologist who examined him in connection with the transfer hearing. He urges the Court to consider his psychological profile in conjunction with his family background as constituting a mitigating circumstance. The Court FINDS AND DETERMINES that the Defendant has established that he suffers from some type of character or personality disorder. Generally, mere character or personality disorders which do not rise to the level of mental impairment are not sufficient to constitute a mitigating circumstance for capital sentencing purposes. However, the Court must still determine whether such a disorder is entitled to independent mitigating weight because it may suggest some reason why the defendant should receive leniency, including a difficult family history. *See State v. Brewer*, 170 Ariz. 486, 826 P.2d 783 (1992).

The evidence established that, prior to becoming a teenage runaway, the Defendant lived at various times with either or both of his natural parents, or with his paternal grandparents. There are issues of

parental abandonment, as the Defendant was separated abruptly from his natural parents at 18 months of age when he went to live with his paternal grandparents for several years. His life was again disrupted when he was returned to his parents, and it was disrupted further when his parents later divorced. Defendant was subjected to some psychological abuse and physical abuse at the hands of his parents, although it cannot be said that he had an extremely abusive childhood. Nonetheless, the Defendant's childhood may be described as "difficult", and his development of a personality disorder is quite likely related to his difficult family history. The Court FINDS AND DETERMINES that the Defendant's difficult family history is a nonstatutory mitigating circumstance in this case. However, it is not entitled to great weight because the Defendant has failed to show that his family background had an effect on his behavior that was beyond his control. *See State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996).

The Court has weighed and balanced the two statutory aggravating circumstances in this case with the statutory mitigating circumstance of age and the nonstatutory mitigating circumstance of Defendant's difficult family background. The Court FINDS AND DETERMINES that a sentence of life imprisonment is appropriate in this case. The Court FINDS AND DETERMINES that the two mitigating factors are sufficiently substantial to call for life imprisonment instead of death despite the aggravating factors of pecuniary gain and cruelty. *See State v. Valencia*, 132 Ariz. 2248, 645 P.2d 239 (1982).

It is therefore the judgment and sentence of the Court that the Defendant be imprisoned in the state prison for life, not to be released on any basis for the remainder of the Defendant's natural life.

Although the statute is silent whether the Court is required to set forth on the record the reasons for imposing a sentence of natural life, as opposed to a sentence of life imprisonment requiring a minimum of 25 years imprisonment prior to being eligible for release, the Court will do so. The factors in support of a sentence of natural life are the 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 the Defendant presents.

DATED this 24th day of January, 1997.

/s/
BARBARA M. JARRETT
Judge of the Superior Court

APPENDIX H

Wagner, Arizona Superior Court Order Denying Relief (Sept. 29, 2021)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1994-092394	09/29/2021
HON. ROSA MROZ	CLERK OF THE COURT J. Matlack Deputy
STATE OF ARIZONA	
v.	KRISTIN LARISH JULIE ANN DONE
CHARLES VINCENT WAGNER JR. (A)	MICHAEL J DEW COURT ADMIN-CRIMINAL-PCR JUDGE MROZ

PETITION FOR POST-CONVICTION RELIEF DISMISSED

The Court has considered the State's Motion to Vacate Evidentiary Hearing and Dismiss Charles Wagner's Petition for Post-Conviction Relief filed on July 12, 2021, the Defendant's Response, and the State's Reply.

The Court finds that *Jones v. Mississippi,* 141 S.Ct. 1307 (2021), made clear that *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 that would probably overturn the Defendant's natural life sentence. The Court further

finds that *Miller* is not applicable to the Defendant's situation because the Defendant's natural life sentence was a discretionary sentence, and not as a result of a mandatory sentence. The Court further finds that *Jones* implicitly overruled *State v. Valencia,* 241 Ariz. 206 (2016), and that the Defendant is not entitled to an evidentiary hearing for the court to determine whether the Defendant's crimes were the result of transient immaturity or irreparable corruption. *Jones* clarified that all that is required for a sentencing court is to follow a certain process and consider an offender's youth and attendant characteristics before imposing a parole ineligible sentence. Judge Jarrett, who sentenced the Defendant, did follow a certain process and did consider the Defendant's youth and attendant characteristics before imposing a natural life sentence. In short, the Defendant's claims do not present a material issue of fact or law which entitles him to relief.

IT IS ORDERED granting the State's Motion to Vacate Evidentiary Hearing.

IT IS FURTHER ORDERED summarily dismissing the Defendant's Petition for Post-Conviction Relief filed on March 19, 2018.

APPENDIX I

Wagner, Arizona Court of Appeals Order Granting Relief (May 10, 2022)

IN THE COURT OF APPEALS
STATE OF ARIZONA
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.

CRUZ, 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

---

[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.

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 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 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

---

[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).

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.

---

[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).

¶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 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]

---

[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

¶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.

---

federal counterpart in safeguarding the fundamental liberty of Arizona citizens.")

¶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.

APPENDIX J

Wagner, Arizona Supreme Court Order Reversing Relief (Sept. 19, 2023)

SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA,
v.
CHARLES VINCENT WAGNER, JR.,

Arizona Supreme Court No. CR-22-0156-PR
Court of Appeals, Division One No. 1 CA-CR 21-0492 PRPC
Maricopa County Superior Court No. CR 1994-092394

Filed 09/19/2023

ORDER

On May 10, 2022, the court of appeals issued its opinion granting relief on Petitioner Charles Wagner's petition for review (1 CA-CR 21-0492 PRPC) from the superior court's summary dismissal of his petition for post-conviction relief. On June 7, 2022, the court of appeals denied the State of Arizona's motion for reconsideration.

On June 22, 2022, the State filed a *Petition for Review* requesting that this Court grant review because the court of appeals' opinion wrongly decided important issues of law, vacate the court of appeals' opinion, overrule this Court's opinion in *State v. Valencia,* 241 Ariz. 206 (2016), and affirm the superior

court's order dismissing Wagner's petition for post-conviction relief.

On July 15, 2022, Wagner filed *Defendant's Response to State's Petition for Review* requesting that this Court deny review.

The Court has continued this matter pending its resolution of CR-22-0227-PR (*State v. Hon. Cooper/Bassett*). The Court, having issued its opinion in that matter on September 18, 2023,

IT IS ORDERED granting the State's Petition for Review.

IT IS FURTHER ORDERED vacating the court of appeals' opinion issued in this matter on May 10, 2022.

IT IS FURTHER ORDERED remanding this matter to the court of appeals for further proceedings on Wagner's petition for review consistent with this Court's opinion in *State v. Hon. Cooper/Bassett* (CR-22-0227-PR) filed on September 18, 2023.

DATED this 19th day of September 2023.

/s/
ROBERT BRUTINEL
Chief Justice

Justice Montgomery is recused and did not participate in the determination of this matter.

APPENDIX K

Wagner, Arizona Court of Appeals Order Denying Relief (Dec. 20, 2023)

IN THE COURT OF APPEALS
STATE OF ARIZONA
Division One

No. 1 CA-CR 21-0492 PRPC

STATE OF ARIZONA, *Respondent,*
v.

CHARLES VINCENT WAGNER, JR., *Petitioner*.

Maricopa County Superior Court
No. CR 1994-092394

Filed 12/20/2023

ORDER GRANTING REVIEW AND DENYING RELIEF

On September 19, 2023, the Arizona Supreme Court issued an order vacating our opinion dated May 10, 2022, and directing this court to reconsider our ruling based on its recent decision in *State ex rel. Mitchell v. Cooper,* 256 Ariz. 1 (2023). The Arizona Supreme Court has now issued its mandate revesting jurisdiction in this court.

The court, Presiding Judge Maria Elena Cruz, Judge Samuel A. Thumma, and Judge Michael J. Brown participating, has reconsidered and, having reviewed the Arizona Supreme Court's ruling, now holds that since the trial court considered Wagner's

youth as a mitigating factor and was aware it could impose a sentence of life with no possibility of release for 25 years when it chose to sentence Wagner to natural life, and under the Arizona Supreme Court's holding in *Cooper,* Wagner's sentencing complied with *Miller v. Alabama,* 567 U.S. 460, 465 (2012). Because there has not been a significant change in the law that, if applied to Wagner's case, would probably overturn his sentence, Wagner is not entitled to relief under Arizona Criminal Rule of Procedure 32.1(g) and we must deny relief.

IT IS ORDERED granting review of the petition and denying relief.

/s/
MARIA ELENA CRUZ,
Presiding Judge

APPENDIX L

Wagner, Arizona Supreme Court Order Denying Review (June 3, 2024)

SUPREME COURT
STATE OF ARIZONA

June 3, 2024

STATE OF ARIZONA,
v.
CHARLES VINCENT WAGNER JR.,

Arizona Supreme Court No. CR-24-0013-PR
Court of Appeals, Division One No. 1 CA-CR 21-0492 PRPC
Maricopa County Superior Court No. CR 1994-092394

The following action was taken by the Supreme Court of the State of Arizona on June 3, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review of a Decision of the Court of Appeals = DENIED.

Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

APPENDIX M

Arias, Arizona Superior Court Order Denying Relief (Nov. 10, 2021)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-012663	11/10/2021
HONORABLE PATRICIA ANN STARR	CLERK OF THE COURT A. Gonzalez Deputy
STATE OF ARIZONA	JULIE ANN DONE ERIN O OTIS ELLEN DAHL
v.	
JONATHAN ANDREW ARIAS (B)	ELEANOR R KNOWLES EMILY S WOLKOWICZ
	COURT ADMIN CRIMINAL-PCR JUDGE STARR VICTIM WITNESS DIV-AG-CCC

RULING / RULE 32 CLAIM DISMISSED

The State has asked this Court to allow it to withdraw from its stipulation to resentencing and vacate the pending resentencing. For the following reasons, the Court vacates the resentencing and dismisses the Petition for Post-Conviction Relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

Arias pleaded guilty to several offenses, including two counts of first-degree murder, both dangerous offenses. At the time of the murders, Arias was 16 years old. The trial court sentenced Arias to natural life.

In June of 2013, Arias filed a PCR notice, arguing that he was entitled to resentencing pursuant to *Miller v. Alabama,* 567 U.S. 460 (2012). The trial court denied relief, as did the Arizona Court of Appeals. In 2016, the United States Supreme Court remanded the case "in light of" *Montgomery v. Louisiana,* 36 S. Ct. 718 (2016). On remand, the Court of Appeals stayed the matter pending the Arizona Supreme Court's decision in *State v. Valencia,* 241 Ariz. 206 (2016). In 2018, the State stipulated that the matter should be remanded for resentencing, and the Court of Appeals remanded "to the trial court for resentencing in light of *Montgomery v. Louisiana.*"

After the United States Supreme Court issued its opinion in *Jones v. Mississippi,* 141 S. Ct. 1307 (2021), the State filed its Motion to Withdraw and Vacate Sentencing.

II. LEGAL ANALYSIS

A person who commits a homicide when he is under 18 may be sentenced to life without parole, but only when that sentence is not mandatory and the sentencer has the discretion to impose a lesser sentence. *Miller v. Alabama,* 567 U.S. 460 (2012). The holding in *Miller* applies retroactively on collateral review. *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016). The question here is whether *Miller* applies to Arias's case, and if so, whether he had a sentencing that complies with *Miller.*

First, the Court finds that Arias's sentencing complied with the requirement that the sentencer have the discretion to sentence him to a sentence less than natural life. Under A.R.S. § 13-703, the sentencing options available to the trial court were natural life or life with the possibility of release after 25 years. Thus, Arias's natural life sentence was not mandatory.

Second, the Court finds that even if *Miller* applies, the trial court thoroughly considered Arias's youth and attendant characteristics, and thus satisfied *Miller*. In *Jones,* the Supreme Court found that *Miller* held that a sentencer need not make a finding of permanent incorrigibility to impose a sentence of life without parole, but must only consider the offender's "youth and attendant characteristics." *Jones* at 1311, quoting *Miller* at 483.

Here, the trial court considered the fact that Arias was 16 years of age at the time of the homicides, the circumstances of the offense, the extent of Arias's involvement in the crimes, his abandonment by his mother, his substance abuse issues, and his potential for rehabilitation. Thus, the trial court satisfied *Miller's* requirements.

The opinion in *State v. Valencia,* 241 Ariz. 206 (2016), does not require a different result, because the basis for that opinion no longer exists after *Jones.* In *Valencia,* the Arizona Supreme Court noted that *Montgomery* clarified that *Miller* set forth a new substantive rule of constitutional law that must be given retroactive effect.

> *Miller,* as clarified by *Montgomery,* represents a "clear break from the past" for purposes of Rule 32.1(g). Arizona law, when Healer and

> Valencia 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."

Valencia, 241 Ariz. at 209, ¶ 15.

In *Jones,* the Supreme Court disavowed this interpretation of *Montgomery*. According to the Supreme Court, "in making the rule retroactive, the *Montgomery* Court unsurprisingly declined to impose new requirements not already imposed by *Miller*." *Jones,* 141 S. Ct. at 1317. A sentencer need not make a separate factual finding of permanent incorrigibility or an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility before sentencing an offender under 18 to life without parole. *Id.* at 1318-19.

The Court further explained its view of *Montgomery* in *State v. Soto-Fong*, 250 Ariz. 1 (2020). In *Soto-Fong,* the Arizona Supreme Court found that consecutive sentences imposed for separate crimes that exceed a juvenile's life expectancy do not violate the Eighth Amendment. The Court noted that "*Montgomery* muddied the Eighth Amendment jurisprudential waters with its construction of *Miller*. *Id.* at 40, ¶ 21. The Court further opined that "*Miller* did not enact a categorical ban," instead, it mandated that trial courts consider an offender's youth and attendant characteristics before imposing a life without parole sentence. *Id.* at ¶ 22. The Court plainly stated that "*Miller*'s holding was narrow – a trial court must consider certain factors before sentencing a juvenile to life without the possibility of parole." *Id.* at

¶ 23. Finally, the Court noted that the opinions in *Miller* and *Montgomery* had left state courts "in a wake of confusion." *Id.* at ¶ 24.

Jones later addressed that confusion, clarifying the requirements for a constitutional life without parole sentence for a juvenile offender. Here, Arias's natural life sentence was constitutionally imposed. Thus, even if *Miller* applies in Arias's case, he has not asserted a colorable claim for post-conviction relief because he received a sentencing at which his youth and attendant characteristics were considered.

The only question then is whether this Court may deviate from the mandate and relieve the State of the stipulation it made in the Court of Appeals. Because the state of the law has changed between the time the mandate issued and now, the Court finds that it may. To find otherwise would be to engage in a resentencing that is not constitutionally required under the law as it currently stands.

III. CONCLUSION

Based on the foregoing,

IT IS ORDERED vacating the pending resentencing hearing and dismissing Arias's petition for post-conviction relief in its entirety for failure to state a claim upon which relief could be granted.

APPENDIX N

Arias, Arizona Court of Appeals Order Granting Relief (Sept. 1, 2022)

IN THE COURT OF APPEALS
STATE OF ARIZONA
Division One

STATE OF ARIZONA, *Respondent,*
v.
JONATHAN ANDREW ARIAS, *Petitioner*.

No. 1 CA-CR 22-0064 PRPC
FILED 9-1-2022

Petition for Review from the Superior Court in
Maricopa County
No. CR1999-012663-002
The Honorable Patricia A. Starr, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Julie A. Done, Ellen Dahl
Counsel for Respondent

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade, Eleanor Knowles, Emily Wolkowicz
Counsel for Petitioner

Coppersmith Brockelman PLC, Phoenix
By Scott M. Bennett, Andrew T. Fox

Counsel for Amicus Curiae Arizona Justice Project and Juvenile Law Center

---

MEMORANDUM DECISION

Vice Chief Judge David B. Gass delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge Angela K. Paton joined.

GASS, Vice Chief Judge:

¶1 Jonathan Andrew Arias petitions for review of the superior court's summary dismissal of his petition for post-conviction relief. We grant review and relief.

¶2 In 2001, Arias pled guilty to two counts of first-degree murder for offenses he committed when he was 16 years old. The superior court imposed two consecutive terms of natural life in prison without the possibility of release.

¶3 Following the United States Supreme Court opinion in *Miller v. Alabama*, 567 U.S. 460 (2012), Arias challenged the constitutionality of his natural life sentences through post-conviction relief. The superior court summarily dismissed the proceeding, finding *Miller* did not apply to Arias's natural life sentences because they were not mandatory and the sentencing judge considered his age as a mitigating factor. This court granted review of the dismissal but denied relief. *See State v. Arias*, 1 CA-CR 13-0548 PRPC, 2015 WL 2453175, at *1, ¶ 1 (Ariz. App. May 21, 2015) (mem. decision), *vacated sub nom. Arias v. Arizona*, 137 S. Ct. 370 (2016).

¶4 The United States Supreme Court vacated this court's decision and remanded for reconsideration

based on its opinion in *Montgomery v. Louisiana*, 577 U.S. 190 (2016) declaring *Miller* retroactive. *See Arias v. Arizona*, 137 S. Ct. 370. On remand, this court requested supplemental briefing on the Arizona Supreme Court's opinion in *State v. Valencia*, 241 Ariz. 206 (2016), which set forth the standard in Arizona for resentencing under *Miller* and *Montgomery*. The State waived further briefing and stipulated the matter should be remanded to the superior court for resentencing. This court accepted the stipulation, granted relief, and remanded for resentencing.

¶5 Before Arias was resentenced, the United States Supreme Court issued *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). Based on *Jones*, the State moved to withdraw its stipulation to resentencing, vacate resentencing, and dismiss the post-conviction relief proceeding. The superior court granted the motion and summarily dismissed Arias's petition for post-conviction relief. In doing so, the superior court found *Jones* disavowed the *Valencia* court's application of *Miller* and *Montgomery*, the legal basis for the State's stipulation had changed, and the current law no longer required resentencing. Arias timely petitioned for review.

¶6 This court recently held *Jones* neither modified nor implicitly overruled the *Valencia* court's application of *Miller* and *Montgomery*. *State v. Wagner*, 253 Ariz. 201, 205, ¶¶ 20-21 (App. 2022). Because the procedural background and circumstances of *Wagner* closely parallel those here, that opinion is dispositive of this case. The State, therefore, remains bound by its previous stipulation to resentencing. *See Pulliam v. Pulliam*, 139 Ariz.

343, 345 (App. 1984) ("parties are bound by their stipulation unless relieved therefrom by the court").

¶7 We vacate the superior court's dismissal of Arias's petition for post-conviction relief and remand for resentencing in accordance with *Miller* and *Montgomery*.

APPENDIX O

Arias, Arizona Supreme Court Order Reversing Relief (Sept. 19, 2023)

SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA,
v.
JONATHAN ANDREW ARIAS,

Arizona Supreme Court No. CR-22-0237-PR
Court of Appeals, Division One No. 1 CA-CR 22-0064 PRPC
Maricopa County Superior Court No. No. CR1999-012663-002

Filed 09/19/2023

ORDER

On September 1, 2022, the court of appeals issued a memorandum decision (1 CA-CR 22-0064 PRPC) on Petitioner Jonathan Arias' petition for review. The court of appeals vacated the superior court's summary dismissal of Arias' petition for post-conviction relief and remanded to the superior court for further proceedings.

On October 3, 2022, the State of Arizona filed *State's Petition for Review* requesting that this Court grant review, vacate the court of appeals' memorandum decision, and affirm the superior court's summary dismissal of Arias' petition for post-conviction relief.

On October 28, 2022, Arias filed his *Response to Petition for Review to the Arizona Supreme Court* requesting that this Court deny review. On November 4, 2022, the State filed *State's Petition for Review Reply*.

On November 14, 2022, the Arizona Attorney General filed a *Brief of Amicus Curiae Arizona Attorney General in Support of State of Arizona*.

On November 23, 2022, Arias filed a *Response to Amicus Curiae: Arizona Attorney General.*

Following the above briefing, the Court continued this matter pending its resolution of CR-22-0227-PR (*State v. Hon. Cooper/Bassett*).

On June 12, 2023, the Arizona Attorney General filed a *Motion to Withdraw Amicus Brief of Arizona Attorney General.* On June 22, 2023, the State filed *State's Response in Opposition to Motion to Withdraw Amicus Brief of Arizona Attorney General.*

The Attorney General's *Motion to Withdraw Amicus Brief of Arizona Attorney General* is untimely and contains argument on the issues before the Court in support of the party adverse to the party supported in the Attorney General's original *amicus* brief.

The Attorney General's presentation of substantive argument after the case was submitted, in a motion to withdraw, amounts to an untimely and unauthorized *amicus* brief and is therefore improper. Therefore,

IT IS ORDERED that the Arizona Attorney General's *Motion to Withdraw Amicus Brief of Arizona Attorney General* filed on June 12, 2023, is stricken from the record.

Additionally, having struck the Arizona Attorney General's motion to withdraw,

IT IS FURTHER ORDERED that the *State's Response in Opposition to Motion to Withdraw Amicus Brief of Arizona Attorney General* filed on June 22, 2023, is stricken from the record.

Further, the Court, having issued its opinion in CR-22-0227-PR (*State v. Hon. Cooper/Bassett*) on September 18, 2023,

IT IS FURTHER ORDERED granting the State's Petition for Review.

IT IS FURTHER ORDERED vacating the court of appeals' memorandum decision issued in this matter on September 1, 2022.

IT IS FURTHER ORDERED remanding this matter to the court of appeals for further proceedings on Arias' petition for review consistent with this Court's opinion in *State v. Hon. Cooper/Bassett* (CR-22-0227-PR) filed on September 18, 2023.

IT IS FURTHER ORDERED that the Arizona Attorney General's *Motion to Withdraw Amicus Brief of Arizona Attorney General* is denied as moot.

DATED this 19th day of September 2023.

/s/
ROBERT BRUTINEL
Chief Justice

Justice Lopez and Justice Montgomery did not participate in the determination of this matter.

APPENDIX P

Arias, Arizona Court of Appeals Order Denying Relief (Sept. 25, 2023)

IN THE COURT OF APPEALS
STATE OF ARIZONA
Division One

No. 1 CA-CR 22-0064 PRPC

STATE OF ARIZONA, *Respondent,*
v.
JONATHAN ANDREW ARIAS, *Petitioner*.

Maricopa County Superior Court
No. CA1999-012663-002

Filed 09/25/2023

ORDER GRANTING REVIEW/DENY RELIEF

The court, Presiding Judge Paul J. McMurdie, Chief Judge David B. Gass, and Judge Angela K. Paton participating. On September 19, 2023, the Arizona Supreme Court vacated our memorandum decision dated September 1, 2022, and returned jurisdiction to this court to reconsider our ruling based on its recent decision in State v. Hon. Cooper/Bassett (CR-22-0227-PR) filed on September 19, 2023.

IT IS ORDERED upon reconsideration granting review and denying relief.

/s/
David B. Gass, Chief Judge

APPENDIX Q

Arias, Arizona Supreme Court Denying Review (June 3, 2024)

SUPREME COURT
STATE OF ARIZONA

June 3, 2024

STATE OF ARIZONA,

v.

JONATHAN ANDREW ARIAS,

Arizona Supreme Court No. CR-24-0020-PR

Court of Appeals, Division One No. 1 CA-CR 22-0064 PRPC

Maricopa County Superior Court No. CR1999-012663-002

The following action was taken by the Supreme Court of the State of Arizona on June 3, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Lopez and Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

APPENDIX R

Odom, Arizona Superior Court Order Denying Relief (Sept. 29, 2021)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-121445-001 DT 09/29/2021

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

v.

THOMAS JAMES ODOM (001)

JAY ROBERT RADEMACHER
JULIE ANN DONE

THOMAS JAMES ODOM
ADCRR#265674 ASPC LEWIS
PO BOX 3200
BUCKEYE AZ 85326
KERRIE M DROBAN-ZHIVAGO
COURT ADMIN-CRIMINAL-PCR
JUDGE STARR

RULING ON PETITION FOR POST-CONVICTION RELIEF

The State has asked this Court to vacate the pending evidentiary hearing and dismiss Odom's petition for post-conviction relief. For the following

reasons, the Court finds that the evidentiary hearing should be vacated, and Odom's petition dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Odom of first-degree murder, a dangerous offense. At the time of the offense, Odom was 16 years old. The trial court sentenced Odom to natural life.

In September of 2016, Odom filed a successive PCR petition, arguing that he was entitled to resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 36 S. Ct. 718 (2016). In response, the State conceded that Odom was entitled to an evidentiary hearing pursuant to *State v. Valencia*, 241 Ariz. 206 (2016).

After the United States Supreme Court issued its opinion in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the State filed its Motion to Vacate and Dismiss.

II. STANDARD OF REVIEW

A defendant is entitled to post-conviction relief if there is a significant change in the law which applies to his case which would probably overturn his conviction or sentence. *State v. Shrum,* 220 Ariz. 115, 188, ¶ 13; Rule 32.1(g), Ariz. R. Crim. Pro. To be entitled to an evidentiary hearing, a defendant must present a colorable claim requiring further factual development. Rule 32.6, Ariz. R. Crim. Pro. A "colorable" claim is a factual claim that if true, would have changed the outcome of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63 (1993).

III. LEGAL ANALYSIS

A person who commits a homicide when he is under 18 may be sentenced to life without parole, but only when that sentence is not mandatory and the

sentencer has the discretion to impose a lesser sentence. *Miller v. Alabama*, 567 U.S. 460 (2012). The holding in *Miller* applies retroactively on collateral review. *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016). The question here is whether *Miller* applies to Odom's case, and if so, whether he had a sentencing that complies with *Miller*.

First, the Court finds that Odom's sentencing complied with the requirement that the sentencer have the discretion to sentence him to a sentence less than natural life. Under A.R.S. § 13-703, the sentencing options available to the trial court were natural life or life with the possibility of release after 25 years. Thus, Odom's natural life sentence was not mandatory.

Second, the Court finds that even if *Miller* applies, the trial court thoroughly considered Odom's youth and attendant characteristics, and thus satisfied *Miller*. In *Jones,* the Supreme Court found that *Miller* stood for the proposition that a sentencer need not make a finding of permanent incorrigibility to impose a sentence of life without parole, but must only consider the offender's "youth and attendant characteristics." *Jones* at 1311, quoting *Miller* at 483.

Here, the trial court considered Odom's young age of 16 at the time of the homicide, the circumstances of the offense, Odom's relationship with the victim, his dysfunctional childhood, and Dr. Toma's report and diagnosis. The parties presented the trial court with a wealth of information about Odom and how his youth affected him; the trial court noted that it had considered all that information. Thus, the trial court satisfied *Miller's* requirements.

The opinion in *State v. Valencia*, 241 Ariz. 206 (2016), does not require a different result, because the basis for that opinion no longer exists after *Jones.* In *Valencia,* the Arizona Supreme Court noted that *Montgomery* clarified that *Miller* set forth a new substantive rule of constitutional law that must be given retroactive effect.

> *Miller,* as clarified by *Montgomery*, represents a "clear break from the past" for purposes of Rule 32.1(g). Arizona law, when Healer and Valencia 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."

Valencia, 241 Ariz. at 209, ¶ 15.

In *Jones*, the Supreme Court disavowed this interpretation of *Montgomery.* According to the Supreme Court, "in making the rule retroactive, the *Montgomery* Court unsurprisingly declined to impose new requirements not already imposed by *Miller.*" *Jones*, 141 S. Ct. at 1317. A sentencer need not make a separate factual finding of permanent incorrigibility or an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility before sentencing an offender under 18 to life without parole. *Id.* at 1318-19.

The Arizona Supreme Court further explained its view of *Montgomery* in *State v. Soto-Fong*, 250 Ariz. 1 (2020). In *Soto-Fong,* the Court found that consecutive sentences imposed for separate crimes that exceed a juvenile's life expectancy do not violate the Eighth Amendment. The Court noted that "*Montgomery*

muddied the Eighth Amendment jurisprudential waters with its construction of *Miller*. *Id.* at 40, ¶ 21. The Court further opined that "*Miller* did not enact a categorical ban," instead, it mandated that trial courts consider an offender's youth and attendant characteristics before imposing a life without parole sentence. *Id.* at ¶ 22. The Court plainly stated that "*Miller*'s holding was narrow – a trial court must consider certain factors before sentencing a juvenile to life without the possibility of parole." *Id.* at ¶ 23. Finally, the Court noted that the opinions in *Miller* and *Montgomery* had left state courts "in a wake of confusion." *Id.* at ¶ 24.

Jones later addressed that confusion, clarifying the requirements for a constitutional life without parole sentence for a juvenile offender. Here, Odom's natural life sentence was constitutionally imposed. Thus, even if *Miller* applies in Odom's case, he has not asserted a colorable claim for post-conviction relief because he received a sentencing at which his youth and attendant characteristics were considered.

IV. CONCLUSION

Based on the foregoing,

IT IS ORDERED vacating the pending evidentiary hearing and dismissing Odom's petition for post-conviction relief in its entirety for failure to state a claim upon which relief could be granted.

APPENDIX S

Odom, Arizona Court of Appeals Order Granting Relief (Sept. 15, 2022)

IN THE COURT OF APPEALS
STATE OF ARIZONA
Division One

STATE OF ARIZONA, *Respondent,*
v.
THOMAS JAMES ODOM, *Petitioner*.

No. 1 CA-CR 21-0537 PRPC
FILED 09-15-2022

Petition for Review from the Superior Court in
Maricopa County
No. CR2010-121445-001
The Honorable Patricia A. Starr, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Julie A. Done, Jay Rademacher
Counsel for Respondent

Zhivago Law, PLLC, Phoenix
By Kerrie Droban Zhivago
Counsel for Petitioner

Arizona Justice Project, Phoenix
By Karen S. Smith, Randal McDonald
Counsel for Amicus Curiae Arizona Justice Project

MEMORANDUM DECISION

Vice Chief Judge David B. Gass delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge Angela K. Paton joined.

GASS, Vice Chief Judge:

¶1 Thomas James Odom petitions for review from the superior court's summary dismissal of his petition for post-conviction relief under Rule 32, Arizona Rules of Criminal Procedure. This court has jurisdiction under article VI, section 9, of the Arizona Constitution, and A.R.S. § 13-4239.C and Ariz. R. Crim. P. 32.16. We grant review. To the extent we remand for an evidentiary hearing under *State v. Valencia,* 241 Ariz. 206, 210, ¶ 18 (2016), we also grant relief.

¶2 In 2011, a jury convicted Odom of first-degree murder, an offense he committed when he was sixteen years old. The superior court imposed a term of natural life in prison without the possibility of release.

¶3 In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Miller,* 567 U.S. at 470. The United States Supreme Court's opinion in *Montgomery v. Louisiana*, 577 U.S. 190 (2016) declared *Miller* applied retroactively. Relying on *Montgomery,* Odom initiated a post-conviction relief proceeding challenging the constitutionality of his natural life sentence. At that time, the State conceded the Arizona Supreme Court's *Valencia* opinion—holding defendants were entitled to an evidentiary

hearing on post-conviction petitions—entitled Odom to an evidentiary hearing to address whether his crime reflected transient immaturity. *See Valencia,* 241 Ariz. at 210, ¶ 18. The State, however, did not concede the evidence would show Odom was entitled to resentencing under *Miller* and *Montgomery*.

¶4 Before the superior court could hold the evidentiary hearing, the United States Supreme Court issued its opinion in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), and the State moved to vacate the hearing and dismiss the post-conviction relief proceeding. The superior court granted the motion and summarily dismissed Odom's petition for post-conviction relief, finding *Jones* disavowed the *Valencia* court's application of *Miller* and *Montgomery* and the current law no longer required an evidentiary hearing. Odom timely petitioned for review.

¶5 This court recently addressed this issue and ruled *Jones* neither modified nor implicitly overruled the *Valencia* court's application of *Miller* and *Montgomery*. *See State v. Wagner,* 253 Ariz. 201, 205, ¶¶ 20–21 (App. 2022). In *Wagner,* this court remanded for a *Valencia* evidentiary hearing. *Id.* at 202, ¶ 1. We agree *Valencia* is still good law, and we decline to revisit the *Wagner* holding in this case.

¶6 Even so, courts throughout Arizona have applied *Jones* differently. Indeed, if not for the *Valencia* precedent, we would affirm the superior court's dismissal here because both the *Miller* and *Montgomery* requirements were met. It would be helpful for the Arizona Supreme Court to clarify whether it required *Valencia* hearings only based on its pre-*Jones* reading of *Miller* and *Montgomery* or wants to continue requiring the superior court to hold

Valencia hearings in light of *Jones*. *See Willis v. Bernini ex rel. Cnty. of Pima,* ___ Ariz. ___, ___, ¶ 21, 515 P.3d ___, 2022 WL 3453194 at *4 (2022) (recognizing the Arizona Supreme Court "may independently interpret and apply provisions of the Arizona Constitution in a manner that affords greater protection to individual rights than their federal counterparts") (citation omitted).

¶7 We vacate the superior court's dismissal of Odom's petition for post-conviction relief and remand for the superior court to conduct an evidentiary hearing to determine whether the crime reflected transient immaturity under *Valencia*.

APPENDIX T

Odom, Arizona Supreme Court Order Reversing Relief (Sept. 19, 2023)

SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA,
v.
THOMAS JAMES ODOM,

Arizona Supreme Court No. CR-23-0265-PR
Court of Appeals, Division One No. 1 CA-CR 21-0537 PRPC
Maricopa County Superior Court No. CR2010-121445-001

Filed 09/19/2023

ORDER

On September 15, 2022, the court of appeals issued a memorandum decision (1 CA-CR 21-0537 PRPC) on Petitioner Thomas Odom's petition for review. The court of appeals vacated the superior court's summary dismissal of Odom's petition for post-conviction relief and remanded to the superior court for further proceedings.

On November 16, 2022, after receiving an extension of the filing deadline, the State of Arizona filed *State's Petition for Review* requesting that this Court grant review, vacate the court of appeals' memorandum decision, and affirm the superior

court's dismissal of Odom's petition for post-conviction relief.

On November 29, 2022, Odom filed *Respondent's Response to State's Petition for Review* requesting that this Court deny review.

The Court has continued this matter pending its resolution of CR-22-0227-PR (*State v. Hon. Cooper/Bassett*). The Court, having issued its opinion in that matter on September 18, 2023,

IT IS ORDERED granting the State's Petition for Review.

IT IS FURTHER ORDERED vacating the court of appeals' memorandum decision issued in this matter on September 15, 2022.

IT IS FURTHER ORDERED remanding this matter to the court of appeals for further proceedings on Odom's petition for review consistent with this Court's opinion in *State v. Hon. Cooper/Bassett* (CR-22-0227-PR) filed on September 18, 2023.

DATED this 19th day of September 2023.

/s/
ROBERT BRUTINEL
Chief Justice

Justice Montgomery is recused and did not participate in the determination of this matter.

APPENDIX U

Odom, Arizona Court of Appeals Order Denying Relief (Sept. 25, 2023)

IN THE COURT OF APPEALS
STATE OF ARIZONA
Division One

No. 1 CA-CR 21-0537 PRPC

STATE OF ARIZONA, *Respondent,*
v.
THOMAS JAMES ODOM, *Petitioner*.

Maricopa County Superior Court
No. CR2010-121445-001

Filed 09/25/2023

ORDER GRANTING REVIEW/DENY RELIEF

The court, Presiding Judge Paul J. McMurdie, Chief Judge David B. Gass, and Judge Kent E. Cattani participating. On September 19, 2023, the Arizona Supreme Court vacated our memorandum decision dated September 15, 2022, and returned jurisdiction to this court to reconsider our ruling based on its recent decision in State v. Hon. Cooper/Bassett (CR-22-0227-PR) filed on September 19, 2023.

IT IS ORDERED upon reconsideration granting review and denying relief.

/s/
David B. Gass, Chief Judge

APPENDIX V

Odom, Arizona Supreme Court Order Denying Review (May 7, 2024)

SUPREME COURT
STATE OF ARIZONA

May 7, 2024

STATE OF ARIZONA,
v.
THOMAS JAMES ODOM,

Arizona Supreme Court No. CR-23-0265-PR
Court of Appeals, Division One No. 1 CA-CR 21-0537 PRPC
Maricopa County Superior Court No. CR2010-121445-001

The following action was taken by the Supreme Court of the State of Arizona on May 7, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

APPENDIX W

McLeod, Arizona Court of Appeals Order Denying Relief (Oct. 13, 2023)

IN THE COURT OF APPEALS
STATE OF ARIZONA
Division One

No. 1 CA-SA 22-0196

STATE OF ARIZONA ex rel. RACHEL H. MITCHELL,
Maricopa County Attorney,
Petitioner,

v.

THE HONORABLE JO LYNN GENTRY, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge,

CHRISTOPHER LEE MCLEOD,
Real Party in Interest.

Maricopa County Superior Court
No. CR1996-090611

Filed 10/13/2023

ORDER ACCEPTING SPECIAL ACTION JURISDICTION AND GRANTING RELIEF

The court, Presiding Judge David D. Weinzweig, Vice Chief Judge Randall M. Howe, and Judge D. Steven Williams participating stayed this matter on November 3, 2022, pending issuance of the Arizona

Supreme Court's opinion in *State ex rel. Mitchell v. Cooper*, 2023 WL 6053536 (Ariz. Sept. 18, 2023). That opinion was recently published. Therefore,

IT IS ORDERED lifting the stay entered by this court on November 3, 2022.

IT IS FURTHER ORDERED accepting jurisdiction and granting relief.

Petitioner argues that the superior court erred in granting Christopher McLeod, defendant real party in interest, an evidentiary hearing under *State v. Valencia*, which held that juvenile offenders were entitled to evidentiary hearings on their Ariz. R. Crim. P. 32.1(g) petitions after making colorable claims for relief based on *Miller v. Alabama*, 567 U.S. 460 (2012). 241 Ariz. 206, 210 ¶ 18 (2016).

In *State ex rel. Mitchell v. Cooper*, 2023 WL 6053536 (Ariz. Sept. 18, 2023, the Arizona Supreme Court overruled *Valencia,* reasoning that *Jones v. Mississippi*, 141 S. Ct. 1307 (2021)—which held that *Miller* did not require "a separate factual finding of permanent incorrigibility," nor an "on-the-record sentencing explanation with an implicit finding of permanent incorrigibility"—had "abrogated the premise of *Valencia's* holding." *Id.* at *10 ¶ 47 (cleaned up).

The trial court here, like the trial court in *Cooper,* had discretion in imposing McLeod's natural life sentence. Thus, McLeod's natural life sentence was not mandatory under *Miller.* As a result, McLeod is not entitled to a *Valencia* hearing and the trial court erred in granting the hearing.

Further, the trial court's understanding of the applicable law was erroneous. In granting the

Valencia hearing, the court reasoned that *Miller* held that "a statute requiring a life without parole sentence for a juvenile convicted of murder was unconstitutional *unless* the court first made a finding that the crime was the result of irreparable corruption as opposed to transient immaturity of the juvenile." (emphasis added). The supreme court explained in *Cooper* that "*Miller* and *Montgomery* imposed no requirement for a court to make a separate factual finding of 'permanent incorrigibility' or provide an 'on-the-record sentencing explanation with an implicit finding of permanent incorrigibility.'" *Id.* at *8 ¶ 42. Thus, the trial court erred in granting the *Valencia* hearing based on an erroneous understanding of the applicable law. We vacate the trial court's ruling granting a *Valencia* hearing.

/s/
RANDALL M. HOWE,
Vice Chief Judge

APPENDIX X

McLeod, Arizona Supreme Court Order Denying Review (June 3, 2024)

SUPREME COURT
STATE OF ARIZONA

June 3, 2024

STATE OF ARIZONA,

v.

HON. GENTRY/MCLEOD,

Arizona Supreme Court No. CR-23-0285-PR
Court of Appeals, Division One No. 1 CA-SA 22-0196
Maricopa County Superior Court No. CR1996-090611

The following action was taken by the Supreme Court of the State of Arizona on June 3, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review of a Special Action Decision of the Court of Appeals = DENIED.

Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

APPENDIX Y
Statutory Provisions Involved

Ariz. Rev. Stat. § 13-1105 (2001)

First degree murder; classification

* * *

First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.

* * *

Ariz. Rev. Stat. § 13-703 (2001)

Sentence of death or life imprisonment; aggravating and mitigating circumstances; definitions

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through H of this section. If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and

thirty-five years if the victim was under fifteen years of age.

* * *

C. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections G and H of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.

D. * * * The burden of establishing the existence of any of the circumstances set forth in subsection G of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection H of this section is on the defendant.

E. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection G of this section and as to the existence of any of the circumstances included in subsection H of this section. In evaluating the mitigating circumstances, the court shall consider any information presented by the

victim regarding the murdered person and the impact of the murder on the victim and other family members. The court shall not consider any recommendation made by the victim regarding the sentence to be imposed.

F. In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections G and H of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection G of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

G. The court shall consider the following aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.

10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

H. The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired,

but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

I. As used in this section:

1. "Mental retardation" has the same meaning as in § 13-703.02.

2. "Serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:

(a) First degree murder.

(b) Second degree murder.

(c) Manslaughter.

(d) Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.

(e) Sexual assault.

(f) Any dangerous crime against children.

(g) Arson of an occupied structure.

(h) Robbery.

(i) Burglary in the first degree.

(j) Kidnapping.

(k) Sexual conduct with a minor under fifteen years of age.

3. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.

Ariz. Rev. Stat. § 41-1604.09 (1994)

Parole eligibility certification; classifications; appeal; recertification; applicability; definition

A. The director shall develop and maintain a parole eligibility classification system. * * *

* * *

I. This section applies only to persons who commit felony offenses before January 1, 1994.

* * *