No. 24-391

In the Supreme Court of the United States

FELIPE PETRONE-CABANAS; CHARLES VINCENT WAGNER; JONATHAN ANDREW ARIAS; THOMAS JAMES ODOM; AND CHRISTOPHER LEE MCLEOD,

Petitioners,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Arizona Court of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

"*Miller* held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18." *Jones v. Mississippi*, 593 U.S. 98, 118 (2021); *Miller v. Alabama*, 567 U.S. 460 (2012). "[A] discretionary sentencing procedure," however, "suffices to ensure individualized consideration of a defendant's youth[.]" *Jones*, 593 U.S. at 118.

Petitioners' sentencers made an individualized choice between two non-capital sentencing options: (1) natural life, and (2) life with the possibility of "release" after 25 years. Although neither option provided for parole-eligibility, there was at the time of Petitioners' sentencings "pervasive confusion by both bench and bar about parole availability" and a "systemic failure to recognize" that parole was no longer available. *State v. Anderson*, 547 P.3d 345, 348 ¶ 2, 351 ¶ 25 (Ariz. 2024). Thus, all available evidence suggests that Petitioners' sentencers believed that the release-eligible option included parole-eligibility. Given the unique circumstances that existed in Arizona at the time of Petitioners' sentencings, the Arizona Supreme Court has thus explained that natural life sentences like those imposed on Petitioners were not mandatory "within the meaning of *Miller*." *State ex rel. Mitchell v. Cooper* (*Bassett*), 535 P.3d 3, 6 ¶ 2 (Ariz. 2023), *cert. denied sub nom. Bassett v. Arizona*, 144 S. Ct. 2494 (2024).

The question presented is:

Whether *Miller* permits a juvenile to be sentenced to a parole-ineligible natural life sentence when (1) a

state had multiple non-capital penalties in place at the time of sentencing, (2) judges and attorneys at the time of sentencing operated under the widespread mistaken belief that one of those penalties carried the possibility of parole, (3) all available evidence suggests that Petitioners' sentencers shared the same mistaken belief and actually considered parole-eligibility; (4) no sentencer ever affirmatively suggested that parole was not available, and (5) subsequent changes in Arizona law make enforceable any parole-eligible sentence imposed.

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INTRODUCTION

Petitioners seek to relitigate *Bassett v. Arizona*, 144 S. Ct. 2494 (2024), which this Court declined to review just months ago. But not even the State disputed that *Bassett* was the ideal vehicle to review this question if the Court was going to review it. Indeed, the Petitioner in *Bassett* noted in his reply that Arizona did "not dispute" that *Bassett* was "an *ideal vehicle* for addressing a 'recurring' question in Arizona," and that Arizona had actually earlier identified [*Bassett*] as a "'*better vehicle*' for addressing" similar issues raised in four other cases. *Bassett* Reply, at 12–13 (citation omitted; emphasis added). Nonetheless, this Court denied certiorari.[1]

Now, after this Court denied certiorari in *Bassett*—the seminal, published Arizona case on this issue—Petitioners ask for review of the unpublished, summary decisions in their cases, which uniformly follow *Bassett*. *See* Pet. App. at 46a, 74a–75a, 91a, 104a, 106a–109a. In doing so, they urge largely the same arguments urged by Bassett.

Alternatively, Petitioners attempt to distinguish their cases from *Bassett* on two fronts. First, they point out that some of them faced death as a possible sentence. But the presence (and rejection) of this third option does not change the fact that Petitioners' sentencers also rejected the option of a release-eligible life sentence in their cases. Nor does it change the

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[1] This Court also denied certiorari in the four other cases, which presented similar arguments in the context of federal habeas review. *See Jessup v. Thornell*, 143 S. Ct. 1755 (2023); *Rue v. Thornell*, 143 S. Ct. 1758 (2023); *Rojas v. Thornell*, 143 S. Ct. 1757 (2023); *Aguilar v. Thornell*, 143 S. Ct. 1757 (2023).

widespread, mistaken belief about parole-availability that existed throughout Arizona at the time. Only two of Petitioners' sentencers considered death as a possible penalty at their sentencings, Pet. at 4, 19–20, and both eliminated the option before choosing natural life from the two remaining noncapital options.

Second, Petitioners make record-intensive claims that their particular sentencers may have somehow been immune to the widespread, mistaken belief about parole availability. This ignores the systemic nature of the problem—even the Arizona Supreme Court said unequivocally and repeatedly during the relevant timeframe that parole was available. It also ignores direct and circumstantial evidence that Petitioners' sentencers actually believed parole-eligibility was available. Nor is there anything in Petitioners' records that affirmatively indicates their sentencers were uniquely aware of the systemic mistake shared by Arizona's entire judiciary.

Moreover, this latter argument amounts to a claim that there is *insufficient evidence* that their sentencers believed parole-eligibility was available, and thus insufficient evidence that their sentencings complied with *Miller*. But examining whether there is sufficient evidence in any particular case—to correct for possible errors—is emphatically *not* the purpose of this Court's review. And there is simply no error to be found.

This Court declined to grant review in five prior Arizona cases raising similar issues, including the seminal Arizona case (*Bassett*). It should do the same here.

STATEMENT OF THE CASE

A. Arizona Statutory Law.

When Petitioners were sentenced, Arizona's first-degree murder statute provided two sentencing options for juveniles convicted of first-degree murder: (1) natural life, meaning that "the defendant 'is not eligible for . . . release[ ] on any basis,'" or (2) "life without eligibility for 'release[ ] on any basis until the completion of the service of twenty-five calendar years[.]'"[2] *Bassett*, 535 P.3d at 8 ¶ 17 (quoting Ariz. Rev. Stat. § 13–703(A) (2003)). Death was also listed as a third statutory option, but it was eliminated for juvenile offenders by *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

As for the types of "release" available to those who received a release-eligible sentence, Arizona "eliminated parole for all offenses committed on or after January 1, 1994." *Bassett*, 535 P.3d at 8 ¶ 17. Thus, the only available type of "release" under the statute was executive clemency. *Id.*

However, due to a widespread, mistaken belief among Arizona judges and attorneys that the release-eligible option included parole-eligibility, Arizona judges continued to impose sentences providing for parole-eligibility despite its unavailability under Arizona's statutes.

As the State noted last year in *Bassett*, "[t]he mistaken belief appears to have been universal." Br.

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[2] Or "thirty-five years if the victim was under fifteen years of age," as was the case for McLeod. Ariz. Rev. Stat. § 13–703(A) (1995).

in Opp'n 3, *Bassett*, 144 S. Ct. 2494 (No. 23-830). During the period in which parole was not available, the Arizona Supreme Court repeatedly declared that parole was available. *See, e.g.*, *State v. Wagner*, 982 P.2d 270, 273 ¶ 11 (Ariz. 1999) ("Arizona's statute . . . states with clarity that the punishment for committing first degree murder is either death, natural life, or *life in prison with the possibility of parole*.") (emphasis added); *State v. Fell*, 115 P.3d 594, 597–98 ¶¶ 11, 14–15 (Ariz. 2005) ("[W]e today confirm" the accuracy of an earlier statement in 2001 that the statute included "*life imprisonment with the possibility of parole* or imprisonment for 'natural life' without the possibility of release.") (emphasis added).

Indeed, "[t]he Arizona reporter is full of cases in which the sentencing judge mistakenly thought that he or she had discretion to allow parole . . . . '[P]rosecutors continued to offer parole in plea agreements, and judges continued to accept such agreements and impose sentences of life with the possibility of parole.'" *Jessup v. Shinn*, 31 F.4th 1262, 1268 n.1 (9th Cir. 2022) (internal citation omitted), *cert. denied sub nom. Jessup v. Thornell*, 143 S. Ct. 1755 (2023); *see also* Katherine Puzauskas & Kevin Morrow, *No Indeterminate Sentencing Without Parole*, 44 Ohio N.U. L. Rev. 263, 288 (2018) ("[S]ince 1994 the Arizona judiciary has sentenced more than two hundred defendants to life imprisonment with a *possibility of parole*[.]").

Last year, the Arizona Supreme Court again reiterated that there was "pervasive confusion by both bench and bar about parole availability after it was abolished in Arizona[.]" *Anderson*, 547 P.3d at 348

¶ 2; *see also id.* at 350 ¶ 17 ("Appellate courts, including this Court, published decisions as late as 2013 indicating parole was still available for those convicted of felonies with the possibility of release after twenty-five years.").

The confusion likely resulted from the indirect way in which the elimination of parole-eligibility was implemented. The legislature left penalties like those in the first-degree murder statute (in Title 13, which governs criminal offenses) totally unchanged when it eliminated parole in 1994. Instead, the critical change here was implemented through the addition of a single sentence in Title 41, which governs how state agencies operate: "This section applies only to persons who commit felony offenses before January 1, 1994." Ariz. Rev. Stat. § 41–1604.09(I) (1994).[3] *See* Resp. App. at 46a–49a.

Failure to recognize the interplay between Title 13 and the changes in Title 41 resulted in a "systemic failure to recognize the effect of the change in the law regarding parole" that continued for nearly two decades. *Anderson*, 547 P.3d at 350–51 ¶¶ 17, 25. Arizona "trial courts since 1994 have interchangeably used the words 'parole' and 'release' when imposing non-natural-life sentences." *Id.* at 350 ¶ 17.

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[3] The date of the murder determined the applicable sentencing statute. *But cf.* Pet. at 10 n.1. Thus, the applicable sentencing statutes are the following versions of § 13–703: 1994 (Wagner), 1995 (McLeod), and 1999 (Petrone-Cabanas and Arias); and the renumbered, 2010 version of § 13–751(A) (Odom). *See* Resp. App. at 42a–45a.

To remedy the situation, in 2014, Arizona's legislature passed a statute granting parole-eligibility to juvenile offenders who received the release-eligible option. Ariz. Rev. Stat. § 13–716. The change applied retroactively to juveniles sentenced between 1994 and 2014.[4] *Id.*

B. Factual and Procedural Background.

In 1999, sixteen-year-old Jonathan Andrew Arias and several codefendants decided to steal marijuana and videogames belonging to one of their friends. Record on Appeal ("R.O.A.") 592, at 19–22. Arias had previously been close to the friend's mother, Christie C., and "loved her" like his "own mom." R.O.A. 712, at 2. Arias personally shot Christie in the face with a shotgun as she sat on the couch. R.O.A. 592, at 23; 712, at 2; 669, at 8; 898, at 13. Arias then shot Christie's father, James, as he was kneeling. R.O.A. 592, at 23; 712, at 2. Arias admitted killing them both with premeditation. R.O.A. 592, at 23–24. He pled guilty to two counts of first degree-murder. R.O.A. 898, at 6; 405. His plea agreement removed death from consideration at sentencing. R.O.A. 405. Arias had also committed two additional second-degree murders a week earlier. R.O.A. 592, at 15–18. Due to the many aggravating factors that outweighed his youth as a mitigator, his sentencer imposed a natural life sentence. R.O.A. 898, at 13–15.

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[4] Arizona also enforces parole-eligible sentences imposed on adult offenders when parole was unavailable. *See Chaparro v. Shinn*, 459 P.3d 50, 55 ¶ 23 (Ariz. 2020) (enforcing such sentences imposed after a trial); *see also* Ariz. Rev. Stat. § 13–718 (enforcing such sentences imposed pursuant to a plea agreement).

Also in 1999, seventeen-year-old Felipe Petrone-Cabanas murdered Phoenix Police Officer Marc Atkinson. Pet. App. 1a; R.O.A. 293, at 28–30. Officer Atkinson had been following Petrone-Cabanas, a suspected drug trafficker, and two others, in a marked patrol car. *Id.* at 26–28, 38; R.O.A. 295, at 1–3; *see also* R.O.A. 332 (Case No. CR 1999–004790), at 1. After turning a corner, Petrone-Cabanas's co-defendants stopped the vehicle and fled on foot. R.O.A. 293, at 28–30. Petrone-Cabanas stayed in the vehicle and waited for Officer Atkinson to pass before opening fire and killing the officer. *Id*. at 26–28, 38; R.O.A. 295, at 1–3. While fleeing, Petrone-Cabanas also attempted to kill a witness to the shooting. R.O.A. 293, at 31; Pet. App. 10a. Petrone-Cabanas pled guilty to first-degree murder. Pet. App. at 1a. He received a natural life sentence because his crime merited the "absolute maximum" possible sentence, according to his sentencer. Resp. App. at 18a–19a.

In 1995, fifteen-year-old Christopher Lee McLeod killed his ten-year-old sister by strangling her to death with a telephone cord and then raping her dead body. Presentence Report at 1. He then put her body in a trash can, stole a car, and fled. *Id.* at 1–2. McLeod had previously attempted to sexually assault his sister; when asked if he was sorry that he killed her, he replied, "No." *Id.* He pled guilty to first-degree murder. Plea Agreement, at 1. The death penalty was never alleged. State's Sentencing Memorandum, at 6; Plea Agreement, at 1–2. His sentencer found that he was an "extreme danger to society" and imposed a natural life sentence. Sentencing Minute Entry Feb. 6, 1998, at 4; Judi Villa, *No Mercy for Teen in Sister's*

Rape, Murder, Arizona Republic, Feb. 7, 1998, at B3 (Resp. App. at 38a–40a).

In 2010, sixteen-year-old Thomas James Odom lured his fifteen-year-old girlfriend away from a library to smoke marijuana in a nearby culvert. *State v. Odom*, 1 CA–CR 11–0609, 2012 WL 3699485, at *1 ¶¶ 4–6 (Ariz. App. Aug. 28, 2012). "[O]nce there, he choked her, wrestled her, beat her, threw stones at her head, filled her mouth with sand, and removed her clothes." *Id*. at ¶ 6. She died of "multiple blunt force traumas." *Id*. at ¶ 4. When her body was found, her shirt was pulled up and she was not wearing any pants. *Id*. Odom confessed to the murder while alone with his father in a recorded police interrogation room. *Id*. at ¶ 5. He later admitted that he had always wanted to kill someone and suggested that he should wear "gloves the next time." *Id*. at ¶ 6; R.O.A. 178, at 13. A jury found him guilty of first-degree murder. *Odom*, 2012 WL 3699485, at *1 ¶ 8. His sentencer imposed a natural life sentence. *Id.* The death penalty was never alleged. R.O.A. 178, at 13.

In 1994, sixteen-year-old Charles Vincent Wagner and three other teenagers went to a grocery store, intending to steal a purse or automobile. *Wagner*, 982 P.2d at 271 ¶ 2. Wagner was armed with a .380 semi-automatic pistol and signaled that he was going to rob a victim who was placing groceries in her car. *Id.* He pulled the driver's door open just before she closed it and struck her, knocking her back onto the passenger's seat. *State v. Wagner*, 976 P.2d 250, 252 (Ariz. App. 1998), *approved in part, vacated in part*, 982 P.2d 270 (Ariz. 1999). When she screamed, he shot her several times. 982 P.2d at 271 ¶ 2. She

managed to get out of the car, call for help, and walk towards the grocery store before collapsing and bleeding to death in the parking lot. *Id.*; R.O.A. 182, at 39. Shortly after the murder, Wagner commented to a friend, "I just popped some old lady at Smitty's." R.O.A. 182, at 40. A jury convicted Wagner of first-degree murder and attempted armed robbery. *Wagner*, 982 P.2d at 271 ¶ 3. Although his sentencer gave his youth "great weight," it found that several aggravating factors outweighed this mitigating factor and imposed a natural life sentence. R.O.A. 182, at 42, 45–47.

Petitioners later pursued post-conviction relief based on *Miller*, advancing a variety of arguments. Four of the five—relying on a now-overruled Arizona Supreme Court case that provided for evidentiary hearings on the topic of "permanent incorrigibility"—sought evidentiary hearings to prove that they were not permanently incorrigible at the time of their murders. Pet. App. at 35a, 37a–39a, 41a, 60a, 62a, 66a–68a, 94a, 96a, 99a–101a, 107a–108a; *see also State v. Valencia*, 386 P.3d 392 (Ariz. 2016) (holding before *Jones* that some juveniles were entitled to evidentiary hearings to prove they were not permanently incorrigible), *overruled by Bassett*, 535 P.3d at 14–15 ¶ 47. The fifth, Arias, sought to enforce a stipulation to resentencing, which (like the Arizona Supreme Court's decision in *Valencia*) was premised on a misunderstanding of *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Pet. App. at 80a.

The superior court denied post-conviction relief to four (Petrone-Cabanas, Wagner, Arias, and Odom), who sought further review at the Arizona Court of

Appeals. Pet. App. at 34a–39a, 59a–60a, 91a, 93a–97a. The Arizona Court of Appeals initially granted relief before the Arizona Supreme Court reversed and remanded the four cases for further consideration in light of *Bassett*. *Id.* at 40a–45a, 61a–75a, 84a–90a, 98a–103a. After the remand, the Arizona Court of Appeals denied relief and the Arizona Supreme Court summarily denied further review. *Id.* at 46a–47a, 76a–78a, 91a–92a, 104a–105a.

In the fifth case, the superior court granted McLeod an evidentiary hearing to determine whether he had been permanently incorrigible at the time of his offenses. Pet. App. at 107a. The State sought special action relief, and the Arizona Court of Appeals granted the State's petition, reversing the superior court. *Id.* at 106a–108a. The Arizona Supreme Court then summarily denied relief. *Id.* at 109a.

REASONS FOR NOT GRANTING THE WRIT

I. This case is a poor vehicle for this Court's review.

Petitioners do not dispute that the issues presented here affect only a handful of Arizona defendants, and no defendant in any other state. Moreover, some of the issues now raised by Petitioners were not raised below in some of these five separate cases. As for the specific arguments now raised by Petitioners, they are either recycled from *Bassett*, inapplicable to the majority of Petitioners, or dependent on purported peculiarities in individual records. At bottom, these five cases present a significantly *worse* vehicle than *Bassett*, in which this Court denied certiorari less than one year ago.

A. *Bassett* already clearly presented the core legal dispute at issue here, and this Court denied review.

Put simply, the core legal dispute here and in *Bassett* has been whether the systemic mistake of law made by Arizona judges on the topic of parole-eligibility matters in a *Miller* analysis. The State has not disputed that—absent unusual circumstances like those present in Arizona during the relevant timeframe—the unavailability of a parole-eligible option would typically lead to a violation of *Miller*. But in the unusual situation where judges believed that parole was available, acted as if parole was available, and parole-eligible sentences that were imposed are enforced, the State has contended that *Miller* is satisfied. In *Bassett*, the Arizona Supreme Court agreed, and this Court denied review.

Because Bassett committed two murders and received different sentences for each, *Bassett* presented a crystal-clear illustration of what Arizona's judiciary believed its sentencing options to be during the period of pervasive confusion. For one murder, his sentencer imposed a sentence of "life with the possibility of parole after 25 years." *Bassett,* 535 P.3d at 13 ¶ 39. For the other murder, Bassett's sentencer rejected his pleas for parole-eligibility and imposed a natural life sentence. *Id.* Consequently, the Arizona Supreme Court found that his natural life sentence was not mandatory "within the meaning of *Miller*." *Id.* at 6 ¶ 2.

The court observed that the state statutes at issue in *Miller* provided only a single sentencing option for juvenile homicide offenders. *Id.* at 12 ¶ 36. Thus,

those trial courts were "automatically precluded from considering whether youth and its attendant characteristics might justify a lesser sentence." *Id.*

In "stark contrast" to the state statutes at issue in *Miller*, Arizona's sentencing scheme provided "two sentencing options." *Id.* at 12 ¶¶ 36, 38–39. Thus, Bassett's sentencer made "an affirmative choice between types of sentences for Bassett's murder convictions[.]" *Id.* at 16 ¶ 52. Moreover, his sentencer "genuinely, if mistakenly, thought that he was considering a sentence of life with the possibility of *parole*." *Id.* at 12 ¶ 37. And "[r]egardless of whether parole was available at that time, Bassett would now be eligible for parole had the court imposed the lesser sentence" due to a subsequently enacted statute. *Id.* ¶ 38 (referencing Ariz. Rev. Stat. § 13–716). Thus, Bassett's sentencer was not required to sentence him to natural life, "as evidenced by its decision to sentence him to "life with the possibility of parole after 25 years" for the other murder. *Id.* at 13 ¶ 39. As a result, his "natural life sentence was not mandatory under *Miller*." *Id.*

Contrary to Petitioners' characterization, *Bassett* did *not* hold that the choice between sentencing options alone satisfied this Court's precedents. Pet. at (i), 12; *see Bassett,* 144 S. Ct. at 2496 n.1 (Sotomayor, J., dissenting) ("The State does not argue, *nor did the Arizona Supreme Court clearly hold*, that executive clemency qualifies as the equivalent of a parole-eligible sentence under *Miller*.") (emphasis added). Crucial to the Arizona Supreme Court's analysis were the two additional factors mentioned above: (1) the actual consideration of parole-eligibility and (2) the

subsequent statute implementing parole procedures. It was the combination of all three factors—not just one—that rendered Bassett's sentence *Miller*-compliant.[5]

B. Petitioners' attempts to distinguish *Bassett* based on the records in their individual cases fail, and do not merit this Court's review in any event.

Petitioners argue that because their sentencers did not impose *both* non-capital sentencing options (as Bassett's sentencer did), *Bassett*'s reasoning is "wholly inapplicable" to their cases. Pet. at 3. But, like Bassett, Petitioners received natural life sentences only after their sentencers considered their age and attendant characteristics and found that a parole-eligible sentence was inappropriate. And had their sentencers chosen the lesser sentence, they would presently be serving parole-eligible sentences, just as Bassett is for one of his two murders.

Unlike in *Miller*, Petitioners' sentencers did not automatically impose their natural life sentences. Instead, they made a meaningful choice between two apparently available sentences while considering their youth and attendant characteristics. The defendants in *Miller* came to this Court seeking a new

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[5] Petitioners suggest that *Miller*'s inclusion of Arizona on a list of mandatory life-without-parole jurisdictions is conclusive. *See* Pet. at 8, 28. But *Miller* could not possibly have accounted for all three factors, given that it was decided two years prior to Arizona's 2014 statute effectuating parole-eligibility for release-eligible sentences. Nor is there any indication in *Miller* that this Court was aware of the "pervasive confusion" regarding parole-eligibility in Arizona. *Anderson*, 547 P.3d at 348 ¶ 2.

sentencing proceeding at which their sentencers could consider, for the first time, whether parole-eligibility was appropriate and, if they concluded it was, could impose a parole-eligible sentence that would actually grant parole-eligibility. All available evidence suggests that Petitioners already received exactly what the *Miller* defendants sought.

To be sure, Arizona law did not provide a parole-eligible option at the time of Petitioners' sentencings (as was also true for Bassett). But their sentencers and countless others operated under a widespread misunderstanding of Arizona law, and thus wrongly believed that the *release*-eligible sentencing option in Arizona law included *parole*-eligibility. Dozens of other juveniles (and adults, for that matter) received parole-eligible sentences that were not legally available at the time, but which subsequent developments in Arizona law have made clear are completely enforceable.

Petitioners argue that Arizona's statutory system alone entitles them to relief under *Miller*, and that it is simply irrelevant if their sentencers rejected a parole-eligible sentence that would have actually granted parole-eligibility. Pet. at i, 26. But the same statutory system also governed Bassett, and for that matter, four prior habeas petitioners who raised similar claims. *See Jessup v. Thornell*, 143 S. Ct. 1755 (2023) (unanimously denying petition for writ of certiorari); *Rue v. Thornell*, 143 S. Ct. 1758 (2023) (same); *Rojas v. Thornell*, 143 S. Ct. 1757 (2023) (same); *Aguilar v. Thornell*, 143 S. Ct. 1757 (2023) (same).

Likewise, the same widespread mistaken belief that was present in *Bassett* was also present in Petitioners' cases. The misunderstanding is perhaps less plain than it was in *Bassett*, where the sentencer actually *imposed* a parole-eligible sentence for one murder. But the "pervasive confusion by both bench and bar about parole availability" and the "systemic failure to recognize" that parole was no longer available likewise existed at the time of Petitioners' sentencings. *Anderson*, 547 P.3d at 348 ¶ 2, 351 ¶ 25.

There is also direct and circumstantial evidence of that pervasive confusion present in the records of these five cases, and nothing suggests that Petitioners' sentencers were uniquely immune to the mistake that was shared by Arizona's entire judiciary. *See infra* at 29–34. Moreover, to the extent there is any dispute about that, it is not the proper subject of this Court's review. Even assuming Petitioners are right that some sentencers might have uniquely understood what their colleagues throughout the Arizona judiciary did not, the question of what they understood would be record-intensive and case-specific. That is not the type of issue this Court typically reviews.

C. The courts below did not rule on the specific arguments raised in the Petition.

The Petition here suffers from an additional problem: It presents new arguments for why Petitioners are entitled to relief in some of the five cases. *See Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("[W]e are a court of review, not of first view[.]"). While all Petitioners argued that their sentences did not comply with *Miller*, only Petrone-Cabanas raised

the specific argument that there was no actual consideration of parole-eligibility.[6] *See* Petition for Review to Arizona Supreme Court ("PFR"), Feb. 5, 2024, at 19–22. Only Petrone-Cabanas and Arias raised the specific argument that the death penalty distorted any consideration of youth (although Arias's sentencer did not consider the death penalty due to his plea agreement). *Id.*; Arias PFR, Feb. 20, 2024, at 21–22; Arias R.O.A. 592, at 10. The remaining Petitioners were litigating *other* types of *Miller* arguments, such as whether youth and attendant characteristics were adequately considered by the trial court, whether a finding of permanent incorrigibility was required, and whether they were entitled to an evidentiary hearing to attempt to prove that they were not permanently incorrigible. *See e.g.*, Wagner PFR, Jan. 15, 2024, at 6–10; Odom PFR, Oct. 18, 2023, at 1–6; McLeod PFR, Dec. 13, 2023, at 3. The arguments in these five cases thus have differed from each other over time, and have even differed over time within individual cases. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (noting this Court "generally do[es] not address arguments that were not the basis for the decision below").

With regard to the only two Petitioners who raised the argument that there was no actual consideration of parole-eligibility or that the death penalty

[6] At an earlier stage of Wagner's case, the Arizona Court of Appeals briefly addressed the *State's* argument that his sentencer had actually considered parole. Pet. App. at 73a. But after this decision was vacated and remanded for further consideration of *Bassett*, Wagner never argued that his sentencer had failed to actually consider a parole-eligible sentence. *See* PFR Jan. 15, 2024.

unconstitutionally distorted the sentencing decision (Petrone-Cabanas and Arias), the Arizona Supreme Court summarily denied relief. Their unpublished, summary decisions pose little danger of leading other courts astray. Even assuming the cases were wrongly decided (they were not), Petitioners ask for pure error correction and nothing else.

D. The issues raised involve only a handful of Arizona defendants and are unlikely to recur.

The systemic misunderstanding of law that led many Arizona judges to impose parole-eligible sentences that were not at the time authorized by statute is obviously unlikely to find many parallels in other states.

There is no conflict among the states on the questions Petitioners raise. They do not argue that this issue involves any other state or federal court. *See* Supreme Court Rule 10. Even within Arizona, the issues raised would not affect any post-2014 offense. *See* Ariz. Rev. Stat. § 13–716 (enacted in 2014 and authorizing parole-eligibility for juvenile offenders who receive release-eligible sentences).

As the State has said before, "Arizona alone was so mistaken about its own sentencing statutes that it fortuitously complied with *Miller*." Br. in Opp'n 27, *Bassett*, 144 S. Ct. 2494 (No. 23-830); *cf.* Pet. at 3, 13, 19, 24, 25. Within Arizona, the unique issue decided by *Bassett* affects only a handful of remaining defendants. And if this case were decided on the arguments that Petitioners now raise to distinguish their cases from *Bassett*, it would affect only a limited

subset of those individuals on a case-by-case basis. This Court's review is not warranted.

II. The presence of death as an option at two sentencings did not create a *Miller* violation.

Petitioners make much of the fact that Petrone-Cabanas and Wagner's sentencers considered the death penalty. Pet. at 19–24. While death sentences are no longer constitutionally permitted for juvenile offenders, *Roper v. Simmons*, 543 U.S. 551 (2005), this Court has never held that the mere act of considering and rejecting a death sentence for a juvenile offender renders secondary sentencing decisions unconstitutional.

If a sentencer found that death was an inappropriate penalty, it is immaterial that it was one of the three possibilities listed in Arizona's first-degree murder statute at the time the juvenile committed the crime. Merely eliminating one option did not relieve the sentencer of the need to distinguish between the other two options.

Nor was the death penalty "mandatory," as evidenced by the fact that neither petitioner received it. For the presumption in favor of death to arise, the court had to find an aggravating factor with no sufficiently substantial mitigating factors. *See* Ariz. Rev. Stat. § 13–703(E) (West 1994) (stating that sentencing court "shall impose a sentence of death if the court finds one or more of the [enumerated] aggravating circumstances … and that there are no mitigating circumstances sufficiently substantial to call for leniency").

In both cases, the sentencers chose between natural life and life with the possibility of release. And in both cases, after taking into account youth and attendant characteristics, the sentencers rejected the release-eligible option based on the specific facts of each case.

Petitioners rely on *Petrone-Cabanas* as an example of how the death penalty supposedly distorted his sentencing. Pet. at 21–23. Using the language of the death penalty sentencing statute, the special verdict found that his youth, "genuine remorse," and "amenability to rehabilitation" were mitigating factors "sufficiently substantial to call for leniency." Pet. App. 29a, 32a. This language reflects only why Petrone-Cabanas's sentencer concluded the death penalty was not an appropriate sentence; it does not suggest that the natural life sentence was automatically imposed.

Indeed, while sentencing a co-defendant, Petrone-Cabanas's sentencer later explained why he found the death penalty was not a viable option for Petrone-Cabanas and why he chose natural life:

> With regard to Felipe Patrona-Cabanas [sic], he shot Officer Atkinson. He did it and his sentence was natural life. He got natural life and not death because my analysis of the law and the facts was that *the death penalty was simply not available*. It was not a sentence that would withstand scrutiny by any higher court under the law, and his sentence was the maximum, the absolute maximum that could have been given which was natural life . . . . [S]ymbolism was important. You shot a police

> officer. You need to get the absolute maximum time that you could get. So I gave it to him.

Resp. App. at 18a–19a. Thus, despite his sentencer's recognition that youth and amenability to rehabilitation called for some leniency, they were insufficient in the sentencer's mind to outweigh the fact that he shot a police officer, which made natural life—what the sentencing judge considered the "maximum" sentence of the remaining options—the most appropriate sentence. *Id.*; Pet. App. at 29a, 32a.

After eliminating the death penalty, Wagner's sentencer confirmed that the next step was deciding between the two remaining non-capital options. R.O.A. 182, at 47–48. Despite giving "great weight" to his age, immaturity, poor judgment, and difficult family history, it found that a natural life sentence was appropriate based on a number of aggravating factors, such as "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 Wagner presented. R.O.A. 182, at 42, 45–48; *see also* R.O.A. 155, at 10.

No other sentencer considered the death penalty during sentencing. *See* McLeod, State's Sentencing Memorandum, at 6; Odom R.O.A. 178, at 13; Arias R.O.A. 592, at 10.

III. Petitioners received all that *Miller* requires.

As was true for Bassett, *Miller*'s requirements were satisfied here because Petitioners received individualized sentencing hearings at which their youth and attendant characteristics were considered before their sentencers decided that they should be sentenced to natural life without the possibility of parole. Although everyone was mistaken about the actual availability of parole at the time of sentencing, Petitioners would now be eligible for parole if their sentencers had chosen the lesser sentence.

A. *Miller* requires a discretionary sentencing process that allows for individualized sentencing and the consideration of youth and attendant circumstances.

Miller prohibits mandatory life-without-parole sentences for murders committed while the defendant is under 18. *Jones*, 593 U.S. at 103. Before sentencing a juvenile offender to a parole-ineligible sentence, *Miller* requires sentencers to conduct an individualized sentencing hearing at which they "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480.

The core problem with the mandatory sentencing schemes at issue in *Miller* was that they precluded sentencers "from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," mandatory sentencing

schemes pose "too great a risk of disproportionate punishment." *Id.* at 479.

In the years following *Miller*, this Court crystallized its requirements. In *Montgomery v. Louisiana*, this Court held that *Miller* was retroactive. 577 U.S. 190, 206 (2016). And in *Jones*, it held that "*Miller* mandated '*only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." 593 U.S. at 98, 101, 106, 108 (emphasis added) (repeating this or a near-identical phrase three times) (quoting *Miller*, 567 U.S. at 476).

Jones repeatedly emphasized that a discretionary *process* was most important:

- "*Miller* required a discretionary sentencing *procedure*." *Id.* at 110 (emphasis added).
- *"Miller* and *Montgomery* squarely rejected" the argument "that *Miller* requires more than just a discretionary sentencing *procedure*." *Id.* at 106 (emphasis added).
- "[A] discretionary sentencing *procedure* suffices to ensure individualized consideration of a defendant's youth[.]" *Id.* at 118 (emphasis added).
- "The Court's precedents require a discretionary sentencing *procedure* in a case of this kind." *Id.* at 120 (emphasis added).

There are several reasons a discretionary sentencing *process* might not occur. A state statute might allow for only a single sentencing option (as was the case for the two defendants in *Miller*). Or, perhaps, a sentencer might mistakenly believe that

only a single option is available. Despite *Jones*'s statement that "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient," *id.* at 105, a trial court that mistakenly believes it must impose a natural life sentence might create a *Miller* violation even where a discretionary *system* exists. Put differently, while *Jones*'s statement holds true in all but the rarest of circumstances, there is no reason to believe that it contemplates cases in which sentencers mistakenly misapply state law.

Thus, there is no reason to believe that *Jones* contemplated the unusual situation here—in which there was a "systemic failure to recognize the effect of the change in [state] law regarding parole," leading Arizona sentencers to impose (and appellate courts to uphold) parole-eligible sentences for nearly two decades. *Anderson*, 547 P.3d at 351 ¶ 25. In Petitioners' cases and countless others, Arizona judges engaged in the discretionary process of determining whether a parole-eligible sentence was appropriate. *See* Puzauskas, 44 Ohio N.U. L. Rev. 263, at 288 ("[S]ince 1994 the Arizona judiciary has sentenced more than two hundred defendants to life imprisonment with a *possibility of parole*[.]"). And any parole-eligible sentences imposed are given effect. *See supra* at 6 & n.4 (citing Ariz. Rev. Stat. §§ 13–716, 13–718; *Chaparro*, 459 P.3d at 55 ¶ 23).

Nothing in *Jones* indicates that a *Miller* violation results from this unique constellation of facts.

B. Petitioners' sentencers did exactly what *Miller* mandated: consider their youth and attendant characteristics before sentencing them to life in prison without the possibility of parole.

Petitioners' sentencers followed the discretionary sentencing process required by *Miller*. They considered age to be a mitigating factor. *See Miller*, 567 U.S. at 480. Only after hearing the evidence and weighing the aggravating and mitigating factors did the sentencers determine that natural life sentences were appropriate. *Id.*

Odom's sentencer considered his age, Dr. Toma's psychological evaluation, and a detailed report prepared by a mitigation specialist. R.O.A. 178, at 12. Dr. Toma's report focused on a wealth of information about how Odom's youth had affected him, including his violent and chaotic early home environment; child abuse, neglect, and sexual abuse; bonding and attachment issues; and parental attitudes. R.O.A. 310, at 6; 321, Exh. B, at 2–6. It also discussed Odom's potential rehabilitation. R.O.A. 321, Exh. B, at 7. The court confirmed that it had considered all mitigation evidence presented, including Odom's "young age," "dysfunctional childhood," and "mental health diagnosis" before ultimately concluding that natural life was appropriate. R.O.A. 178, at 20–21.

Arias's sentencer considered his age and Dr. DeLong's report, which discussed his potential for rehabilitation, as well as a detailed mitigation report detailing his "incredibly difficult life" and "dysfunctional family background," before concluding that these factors were outweighed by the aggravating

circumstances of Arias's murders (multiple victims and sole motive of pecuniary gain). R.O.A. 898 at 6–7, 13–15; 712, at 14–17, 49–50, 56.

Petrone-Cabanas's sentencer explained that his chronological age was "only the beginning of the analysis" and also considered his "level of intelligence, maturity," and "juvenile impulsivity" discussed in Dr. Fernandez-Barillas's psychological evaluation, as well as his amenability to rehabilitation. Pet. App. at 21a, 24a, 28a–29a, 31a. Though these factors called for leniency, *id.* at 32a, they were outweighed by the fact that he shot a police officer, which called for the "absolute maximum" sentence, which in his sentencer's view, was natural life. Resp. App. at 18a–19a.

McLeod's sentencer was presented with evidence about his age, the "significant dysfunction" and "physical and emotional abuses" in his upbringing, his admitted psychological problems (including "regular nightmares," auditory hallucinations, cutting, and five prior suicide attempts); his mother's previous efforts to get him help through the juvenile justice system; and his admission that he had been torturing animals since the age of ten (the 20 to 30 cats he had tortured and killed "were his favorite as he enjoyed making them scream"). Presentence Report, at 3–8; Sentencing Minute Entry, at 2; Exhibit List, at 2. His sentencer concluded that McLeod had "shown by his actions and his own words that he is a high risk to reoffend" and "an extreme danger" to society.[7]

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[7] No official transcript is available, but the sentencer's words were reported in the Arizona Republic. *See* Judi Villa, *No Mercy*

Wagner's sentencer gave "great weight" to his age and considered two psychological evaluations detailing his "impulsive and unpredictable" personality, his amenability to treatment, his numerous psychological issues, and the "severe physical and emotional abuse" he suffered "during his formative years." R.O.A. 182, at 42, 45–46; 156, at 25–33; 161, at 1. However, these mitigators were outweighed by a number of aggravating factors, including the especially cruel manner in which Wagner committed the murder, his use of a deadly weapon and accomplices, the severe emotional harm he caused the victims, and the danger he presented to the community. R.O.A. 182, at 47–48.

At no time during any sentencing proceeding did any sentencer suggest that a natural life sentence was being imposed automatically because no other sentence existed. Petitioners thus received the very individualized consideration of their youth and attendant circumstances that *Miller* demands.

C. If Petitioners' sentencers had selected the lesser sentence, Petitioners would now be serving parole-eligible sentences.

Petitioners overlook the above and claim that their sentences violated *Miller* because Arizona allegedly had a mandatory sentencing scheme just like the state schemes at issue in *Miller*. *See* Pet. at i, 1, 3, 5, 18–19, 28.

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for Teen in Sister's Rape, Murder, Arizona Republic, Feb. 7, 1998, at B3 (Resp. App. at 38a–40a).

But unlike defendants in Arizona, the two *Miller* defendants received automatic life-without-parole sentences because their state statutory schemes provided only one option for juvenile homicide offenders. *See* 567 U.S. at 474 ("[T]he mandatory penalty schemes at issue here *prevent* the sentencer from taking account" of the characteristics of youth.) (emphasis added). *Miller* made a point of highlighting that the sentencers in question imposed the sentences automatically and by necessity. For example, the Arkansas sentencing judge noted "that 'in view of the verdict, there's only one possible punishment.'" *Id.* at 466 (brackets omitted); *see id*. at 469 (discussing the Alabama sentencing proceeding: "[A] jury found Miller guilty. He was therefore sentenced to life without the possibility of parole.").

This is a far cry from the lengthy, individualized sentencings that Petitioners received. "Because of the pervasive confusion by both bench and bar about parole availability," significant efforts were expended in deciding between the two options. *Anderson*, 547 P.3d at 348 ¶ 2. For Arias, McLeod, and Odom, their entire sentencing hearing concerned the choice between the two sentences. And after eliminating the death penalty, Petrone-Cabanas and Wagner's sentencers still had to decide between the two remaining options.

Petitioners' natural life sentences were thus not imposed automatically, by default. Unlike the sentences at issue in *Miller*, they were not the only available choice because of the unique circumstances in Arizona. *Compare Miller*, 567 U.S. at 477 (under mandatory sentencing schemes "every juvenile will

receive the same sentence as every other") *with* Resp. App. at 28a–34a (documenting 28 Arizona juvenile homicide offenders who received release-eligible sentences while parole was legally unavailable; many of their sentencers used the word "parole" at sentencing, and all 28 juveniles are now serving parole-eligible sentences).

In arguing that *Miller* was nonetheless violated, Petitioners argue that the sentencers' mistaken belief in the availability of parole is irrelevant. Pet. at 5. According to Petitioners, the statutorily available options at the time of sentencing are the beginning and end of the analysis. Although this may typically be the case, it cannot be that simple in the unusual circumstance where sentencing judges misunderstand the law. Surely they would not contend, for example, that a sentencer imposing a natural life sentence under the mistaken belief that parole was *not* available would nonetheless comply with *Miller* because the relevant statutes provided a parole-eligible option.

Moreover, Arizona is not contending here that *Miller* would have been satisfied based on the mistaken beliefs of judges and parties alone. If parole truly was illusory and forever remained unavailable, a *Miller* violation might result. But here, sentencing judges not only believed they were choosing between natural life and parole-eligible sentences, the juveniles who received parole-eligible sentences will all receive parole-eligibility within 25 (or 35) years by virtue of the 2014 legislative fix. *See* Ariz. Rev. Stat. § 13–716. The functional outcome is no different than if parole-eligibility had been on the books all along.

Additionally, it would make no sense to conclude that Arizona's sentencing scheme was "mandatory" as that term is used in *Miller* for some (those who received natural life sentences) and not for others (those who received parole-eligible sentences). If this Court were to conclude that the scheme was mandatory for Petitioners' natural life sentences, it might likewise have to conclude the scheme was mandatory for those defendants who received release-eligible sentences that are now eligible for parole. Setting aside the question of prejudice for a moment, the Court could thus reach a nonsensical result by which a juvenile serving a parole-eligible sentence has a *Miller* claim.

Again, the sentencing scheme here produced a result where many juveniles received release-eligible sentences that the sentencing judges believed were parole-eligible and that are, in the end, in fact parole-eligible. *See* Resp. App. at 28a–34a. No "mandatory" scheme could produce this result.

D. All available evidence suggests that Petitioners' sentencers actually considered parole-eligibility.

Seeking to distinguish the above (and *Bassett*), Petitioners argue that their sentencers did not actually consider parole-eligibility at sentencing. *See* Pet. at 24–27. But for any of Petitioners' sentencers to learn that parole-eligibility was not available, a series of improbable events would have had to occur.

First, the sentencer would have had to conduct further research on this issue—without urging from

either party—despite it having been well-settled throughout the State.

Second, the sentencer would have had to determine that parole was in fact unavailable, and then decide to follow its own independent conclusion on this front rather than other authority, including Arizona Supreme Court precedent. *See supra* at 4 (citing Arizona Supreme Court cases from 1999 and 2005); *see also Anderson*, 547 P.3d at 355 ¶ 41 (Beene, J., dissenting) (detailing how parole was "obliquely abolished" by "negative inference" in Title 41 rather than "affirmative statement" in Title 13, and thus how individuals researching the issue during the relevant timeframe "would have reasonably concluded that [defendants were] eligible for parole"); *Jessup*, 31 F.4th at 1268 n.1 ("The Arizona reporter is full of cases in which the sentencing judge mistakenly thought that he or she had discretion to allow parole.").

Third, and perhaps most improbably, the sentencer would then have had to remain inexplicably silent about the discovery—instead of alerting the rest of Arizona's judiciary—for years.

Given the improbable nature of such a scenario, it is far more likely than not that Petitioner's sentencers—like everyone else in Arizona—believed that release-eligibility included parole-eligibility, even if they did not always affirmatively say so. *Anderson*, 547 P.3d at 351 ¶ 25 (documenting the "systemic failure to recognize" that parole was not available).

At the very least, one would expect a sentencer who uniquely understood the law to refrain from suggesting that parole was available, to abstain from

imposing "parole-eligible" sentences in future cases, and to correct others in their presence who suggest that parole-eligibility was available. Petitioners' sentencers defy all such expectations.

At Arias's change-of-plea hearing, the court and parties agreed the sentencing range for the conspiracy to commit first-degree murder charge included life with "eligibi[lity] for *parole* after 25." R.O.A. 592, at 8–9 (emphasis added). And at Petrone-Cabanas's change-of-plea hearing, while discussing the possible penalties he faced, the court equated "the possibility of *parole* after 25 years" with "release after 25 years." R.O.A. 293, at 12 (emphasis added) (discussing the applicability of community supervision; "[p]erhaps there is a Class 1 where there is a possibility of parole after 25 years, I guess it applies there, or release after 25 years").

McLeod, Wagner, and Odom's sentencers later imposed "parole-eligible" sentences on other defendants. As late as 2003, McLeod's sentencer, Judge Ishikawa, sentenced a defendant to "life in prison *with the possibility of parole* after 25 years." *State v. Terrell Jerome Hall*, 1 CA–CR 04–0731 (Nov. 3, 2005) (mem. decision), at 1, 4 (emphasis added) (Resp. App. at 22a–26a); McLeod Sentencing Minute Entry, at 1. As late as 2007, Wagner's sentencer, Judge Jarrett, sentenced a defendant to life "with possible *parole* after 25 years." *See Wagner*, CR 22-0156-PR, Docket 1, at 375–76 (emphasis added) (providing *State v. Robert Raymond Navarro,* CR2006–151062–001 SE, Minute Entry (Aug. 27, 2007)) (Resp. App. at 35a–37a); Wagner R.O.A. 182, at 1. And as late as 2011, Odom's sentencer, Judge

O'Connor, sentenced a defendant to "three life terms with the possibility of *parole* after 25 years." *See State v. Alvidrez*, 1 CA–CR 11–0102, 2011 WL 6882911, at *1 ¶ 4 (Ariz. App. Dec. 29, 2011) (mem. decision) (emphasis added); Odom R.O.A. 178, at 1.

Several of Petitioners' sentencers heard arguments in favor of parole-eligibility at Petitioners' sentencings without suggesting that it was unavailable (as a judge who correctly understood the law surely would have done on such a critical point). Arias's counsel requested "life *with eligibility for parole* after 25," and explained that this would make Arias "eligible for release" around the ages of 51 and 53, confirming that the parties viewed the terms interchangeably. R.O.A. 898, at 7–8 (emphasis added). Arias's Presentence Report noted the recommendations of Detective Caruso ("natural life with *no parole*") and defense counsel ("life, *eligible for parole after twenty-five years*"). R.OA. 712, at 4. There is no record of any objection or correction by the court.

Petrone-Cabanas's sentencer heard defense counsel argue in favor of a parole-eligible sentence three times at his co-defendant's sentencing hearing but never suggested that such a sentence was unavailable. Resp. App. at 12a–13a, 16a.

Odom's counsel repeatedly argued that Odom should be sentenced to "25 years to life with the possibility of *parole* at 25" based on his age, severe mental health problems, and dysfunctional family

background without any correction by the court. R.O.A. 178, at 4, 17, 19 (emphasis added).[8]

Wagner's counsel argued that Wagner's case should be reviewed by "a board or panel" after 25 years to evaluate how he had spent the remainder of his formative years so that he could "perhaps re-enter society," implicitly suggesting that he believed that this sentence included parole-eligibility. R.O.A. 159, at 3–4.

Psychological evaluations considering whether a defendant might be rehabilitated in 25 years provide additional circumstantial evidence of the universal belief in the availability of parole. For example, Dr. DeLong opined that while Arias had "some capacity for rehabilitation," he doubted that his "maturity would accrue" to the point that Arias could be released before the age of 50. R.O.A. 898 at 7–8; 712, at 49–50, 56. Dr. Fernandez-Barillas opined that Petrone-Cabanas's risk of criminal or violent recidivism was low because he did not appear to have "a true antisocial nor psychopathic character make up." Pet. App. at 31a. Dr. Toma recommended a rehabilitation plan for Odom to enable Odom to be a productive citizen upon his release from prison. R.O.A. 321, Exh. B, at 7. Dr. Martig explained that there was "a significant chance" of Wagner "being amenable to treatment," although it was "in the moderate to

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[8] Contrary to Petitioners' supposition, defense counsel's statement that the decision had to come from "an executive officer" does not mean that he meant clemency. Pet. at 25. In Arizona, the same executive board reviews both parole and clemency applications. *See* https://boec.az.gov/hearings/types-hearings.

moderately low range." R.O.A. 156, at 32–33. Such analyses would make little sense if everyone knew that clemency was the only available form of release.

McLeod's sentencer accepted his plea agreement, which contrasted the two sentences and implied that parole was available. It listed "natural life," which was *not* "subject to commutation *or parole*, work furlough, or work release" with "life," which meant no release "on any basis" for "thirty-five calendar years," suggesting (though not stating directly) that this sentence *was* subject to parole after the thirty-five years had passed. Plea Agreement, at 1–2.

In sum, there is direct and circumstantial evidence that Petitioners' sentencers—like the rest of Arizona's judiciary—believed that release-eligibility included parole-eligibility. Petitioners have failed to identify any instance where any of their sentencers ever suggested that parole-eligibility was unavailable.

Finally, even assuming that any particular sentencer uniquely recognized that parole was not available, and only considered clemency eligibility, Petitioners still must be wrong when they say that "there is every reason to think these judges would have imposed a parole-eligible sentence" if parole had been available. Pet. at 4. All of Petitioners' sentencers rejected the release-eligible option, and if Petitioners are correct that their sentencers uniquely and correctly understood the available options, those sentencers would have known that the release-eligible option included only clemency-eligibility. And as Petitioners themselves have noted, any grant of clemency would have been exceedingly unlikely. *See*

Pet. at 10 (noting that "the possibility of clemency was 'more theoretical than practical'" and that "[n]o one convicted of first-degree murder has received clemency in the 30 years since Arizona abolished parole" (citations omitted)). But their sentencers nonetheless rejected the release-eligible option as too lenient. Put simply, a sentencer who rejected clemency-eligibility as too lenient would not have chosen an option that was even more lenient—parole-eligibility.

CONCLUSION

The petition for writ of certiorari should be denied.

January 3, 2025 Respectfully submitted,

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APPENDIX

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Appendix A — Petrone-Cabanas Codefendant, Transcript of Sentencing Proceedings in the Maricopa County Superior Court (May 17, 2002)

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CR 1999–004790(B)
1 CA–CR 02-0456

STATE OF ARIZONA,

Plaintiff,

vs.

OBERLIN CABANAS-SALGADO,

Defendant.

Phoenix, Arizona
May 17, 2002

BEFORE: The Honorable FRANK T. GALATI,
Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SENTENCING

Appendix A

* * *

[3]PROCEEDINGS

THE COURT: This is 99-06656 and 04790, state versus Cabanas-Salgado.

MR. LEVY: Noel Levy for the state.

MR. SMITH: Michael Smith on behalf of Oberlin Cabanas-Salgado who is present, your Honor.

THE COURT: Right. This is the time that's set for sentencing. I know that we had a motion filed by the defense. First of all, Mr. Smith let us know about a week, week and a half ago that he might be filing a motion to continue and then he does and Mr. Levy indicated that his preference was to proceed at least with the state's portion of today. If defense wanted to put something on later, we can do that. I suggested to counsel that we wrap this up today. I want to know what your thoughts are now.

MR. SMITH: Judge, we did have an informal conference with counsel and the Court where this Court is obviously the trier of the fact during the trial, obviously had heard the co-defendants' matters, both the trial and the plea as well as sentencings so is imminently familiar with it. As is usual, the Court will many times give its position with information it currently has, yet being open to a change in position depending on what is presented.

[4]The Court gave us its thoughts on what it felt it would impose at this point, yet said depending on what's

presented, I may change my position. We felt that knowing that the Court is intimately familiar with all the facts that we would proceed with sentencing today. The Court did advise if it had such a huge change of heart that its initial position changed substantially, it would advise counsel. So on that, we could still proceed with mitigation.

THE COURT: That's fine.

MR. SMITH: I have discussed this with Oberlin. He understands the Court's range of sentencing discretion, its initial inclination and also that the Court would advise if the evidence presented today had such an impact to change its position that we could still make arrangements for mitigation.

THE COURT: Thank you. We usually have the formal part of the sentencing where there's certain things I have to say. Before we get to that, why don't I just ask the state if you have anything you want to present by way of argument or family members or whatever presentation you want to make, Mr. Levy. You know, the record should reflect I have read the presentence report. I have considered everything I heard at all the trials and I have letters from the family which are attached to the [5]presentence report which I have read and considered all that.

MR. LEVY: I believe some of the family members or immediate fellow officers of Officer Atkinson may wish to speak. Normally, I would defer to them first but in this case, I have read the presentence report and what I get out of it is that the defendant feels no responsibility for

what has occurred and that he simply feels bad because Officer Atkinson died, but beyond that he seems to have no particular feelings. The facts sort of go against that.

If I recall the historic workup including what went on at trial, it appears that Cabanas and Salgado were cousins and when Cabanas came up here first, he called down and invited defendant Salgado up. I surmise that he's inviting him to come and feast upon the bounty of selling drugs up here, make big money and that sort of thing in the drug trade. In any event, the defendant does come up and he joins them at the Scoreboard.

Now, he spent some time there with Zevada and stuff but on the particular day of this murder, March 26th of '99, which is just short of three years ago, the officers came there and Salgado was definitely on the scene and Salgado was around when several things were stated with uniformed police officers which is they knew the issue was selling drugs. They denied anything then. [6]Salgado was around when Officer Atkinson indicated to Zevada don't drive that Lincoln away because that was identified as being a car that was there all the time during drug transactions. They were told to leave the area. The three of them did, but then surveillance by the officers indicated that they came back, including Salgado and then they see them make movements as they sell drugs and then they get into the car and the car has got drugs in it; it's got guns in it in all the seats including the rear seat which was a fully loaded shotgun. It may be that Salgado either started to unlatch the shotgun or whatever, but it's back in the back seat and it's available to him.

When Rory Vertigan drove up, I remember -- the facts as I recollect is that he has an image of somebody running across which we surmise is Salgado, so things were happening. About that time Zevada had run off. The car was stopped. Cabanas was getting out the driver's side with his gun. They all knew each other, Cabanas was his cousin. I don't accept Salgado's statement to the APO that he didn't have a clue what was happening, because he was in the rear seat. He would have had to look back as a natural human thing to see Officer Atkinson following with lights going and so forth, so he had to have a real clue what was about to happen.

[7]THE COURT: I think any reasonable inference from the evidence is that they all knew that they were being followed at that point, as I said at the sentencing last time. I think that's so.

MR. LEVY: I am just addressing the APO thing. So I say that he's fully culpable as an accomplice as the rest of them, and I just wanted to address that because, you know, Mr. Smith in his function as defense attorney has a mitigation memorandum. I have already provided my sentencing memorandum. I gave the reasons for asking for exceptional aggravating in the case of misconduct involving weapons being dangerous, an aggravated term. I also asked for consecutive terms. I realize on the murder and perhaps even on the others, the Court must necessarily seek proportionality here, and I and the victims are ready to accept what sentence you give to the defendant here, but we just want to make the statement that we just don't accept his non-responsibility comment to the APO.

That having been said and you having had my sentencing memorandum before you and so forth, I now would like to ask if any of the victims want to come forward. Karen Atkinson.

THE COURT: Yes. Good morning.

MRS. ATKINSON: You've already read my letters. There's no point in rehashing everything. I understand [8]after talking to Mr. Levy what the possibility of the sentence would be. I know I'm to accept whatever you give him. I do ask if you have a chance to give consecutive terms that you do so and, just like I said in my letters, please keep in mind my little boy has been through so much. If he gets out on parole, it's one more thing he has to go through and he's having a hard enough time as it is. He still thinks that his father is here. So he played a part in it no matter what he says and I don't want this man out on the street. Thank you.

THE COURT: Thank you, ma'am.

MR. LEVY: Mr. Kleghorn.

MR. KLEGHORN: Good morning, your Honor. Your Honor, every working day I work with defendants from the legal justice system and the one common thread I see in so many is an unwillingness to accept responsibility for their actions. I believe he has total awareness and has had all the time of what was going to happen, and I just also ask for the maximum, whatever that might be. Thank you. Thank you, your Honor.

THE COURT: Thank you, Mr. Kleghorn.

MR. MASINO: I'm Scott Masino. I am a sergeant with the Phoenix Police Department. As you probably recall from the testimony, I was the first officer out with Mark the day this happened and, as everybody else did, I wrote [9]a letter as well. I don't want to rehash everything in the letter, but there were so many things that affected us about this event that I couldn't even begin to put in the letter.

Now, as a supervisor on the police department, I am very concerned about the officers when they go to calls, the things that they face every day. I'm worried about them getting hurt. It affects me when I hear a similar call or them doing something similar. The days the day of this event, just things come back to me. I remember a few days prior to this occurring, Mark and Trish Johnson and I were in the weight room working out. We were talking about the shoulder press machine. Never gave it a second thought. Three months after Mark's death I go back to the gym and it came back to me sitting at the weight bench. Everyday something pops back into my mind.

Last night they had the shooting in Maryvale. I'm working an off-duty job. My first response was to call and see that the people that I worked with were okay, and it's all a result of what these guys did. Every day we put on a uniform to prevent crime. We put on a uniform to stop the sale of drugs and do these type of things, and everybody knows, just like a person that drives drunk, knows they run a great risk of being involved in an accident.

Everybody who sells drugs knows they run a [10]great risk of being involved in some type of violent crime. That's exactly what they did and they showed it by being armed the way they were armed. As a result of their actions, of his actions, of the other two defendants, as a result of their actions, police officers, myself included, were trying to decide whether or not we wanted to continue a career as a police officer, not because we were afraid of being injured ourselves but because we start to doubt whether what we're doing is actually having an effect on society and whether it's making a difference.

The officers of Maryvale throughout the city every day go out and they're heros to the city. They do an excellent job. We need to send a clear message to society that it's not acceptable what they're doing. I would ask that these defendants be held to the highest standards of the Court on behalf of what we do every day. Thank you.

THE COURT: Thank you, Officer Masino.

MR. LEVY: Anyone else? Miss Collins.

MS. COLLINS : Hi. Good morning. My name is Joanna Collins. I've been a friend of of Karen's and her family. My husband is a police officer with the City of Phoenix, and before this ever happened, people used to say, oh, are you not afraid for him? And I don't know if it was naivete or what, but I was never concerned or afraid. Now [11]we all are.

I have a two-and-a-half-year-old son who plays with Karen and Mark's son Jeremy frequently and Jeremy

will never know who is daddy is. He sees the memorials, the parks. He'll know every year what people in the community thought of him, but when this gentleman chose to get in the vehicle with the other two gentlemen, he knew that something was going to happen. That's the day that Jeremy and Karen and her family and friends, they received their life sentence of sorrow and pain and grief, and I just hope that when you decide what this defendant's fate may be, that you'll consider the fact that Jeremy's really young now. He doesn't really understand the whole concept of where his daddy is, when he's coming home. He's even called my husband Daddy Kevin before, and it's very sad to see.

There's also a guilt that comes with it. You know, when my family goes to church on Sundays or to the park -- and for the longest time after Mark was killed and I would talk to Karen, I would be like, oh, we did this and there was a guilt that comes with the fact that I still had my husband and my family was still intact, and because of this defendant and, as I said, the actions of the others, she won't have that, not with the father of her child. I hope that you can and will consider this. [12]Thank you for your time.

THE COURT: Thank you very much. Patricia Knudsen. I am a Phoenix police officer. My best friend was Mark. I have yet to speak at any of these because what do you say? I have seen the pain that we've all gone through. I have seen the pain that Karen goes through and does not deserve it, her son Jeremy. Her pain is not going to go away in 25 years. She's always going to live with that pain, and I'm asking that we give the maximum

sentence that we can to him. Her pain's not going away; Mark's not coming back and he's accountable for that in one manner or another.

Every day that we go out there as police officers, we fight to eliminate people from the street that do things like this and if you're going to take a police officer's life, who's supposed to - - Mark's not coming back and it has impacted everybody, life, everybody that has sat in this courtroom. All the people that are out on the streets waiting to find out what the different verdicts are, that's not going to change and he's accountable for that and I'm just asking for the maximum sentence because we have to deal with that for the rest of our lives. I have to look at the pictures that I have of Mark and I having good times and to know that he's never coming back and Karen's going through a lifetime of [13]this. Nothing changes. He's not coming back and he's accountable for it.

THE COURT: Thank you.

MR. LEVY: Thank you.

THE COURT: Thank you. Mr. Smith, anything you want to present?

MR. SMITH: Judge, I'll be presenting just some statements myself as part of sentencing.

THE COURT: Why don't we have -- why don't you and your client both come up here.

Sir, your true name is Oberlin Cabanas-Salgado, correct?

THE DEFENDANT: Yes, sir.

THE COURT: Your date of birth is December 25th of 1980?

THE DEFENDANT: Yes, sir.

THE COURT: Based upon the previous proceedings in this Court, that is, the verdicts that I entered a while ago, it's the judgment of the Court that in 99-06656 you are guilty of Count 1, murder in the first degree, a Class 1 dangerous felony committed on or about March 26th of 1999 and in 99-04790, you're guilty of Count 1, conspiracy to sell or transport narcotic drugs, a Class 2 felony; Count 3, transportation for sale of narcotic drugs having a weight or value that exceeds the statutory threshold [14]amount, also a Class 2 felony. Both of those are non-dangerous and non-repetitive, and Count 6 is misconduct involving weapons, a Class 4 dangerous felony that was committed on that same date, March 26th, 1999.

As I said, I've read the presentence report. I have considered everything in it. Attached to it are letters from family members of Officer Atkinson and I have considered that. I have a mitigation memorandum that was submitted by your counsel, Mr. Smith. I have read that. I have the state's sentencing memorandum. I have read that. I've considered everything I heard here today, everything I heard at the trial, at your trial, but because your trial

consisted also of the transcripts of the previous trial that we had, I considered what I heard there because your lawyer and you were aware of all that, and right now I show you have spent 1147 days in custody. And Mr. Smith.

MR. SMITH: Yes, judge. That is the calculation in the presentence days that we also have. I did submit the presentence memorandum, and I asked the Court to run the sentences concurrently with each other. Also, I've asked the court to impose the minimum sentence for first degree murder which is life imprisonment, however eligibility at 25 years. Part of the reason for that is there must be a proportionality between not only co-defendants but for [15]individuals that commit this offense. Unfortunately, both the Court, the prosecutor and myself deal with homicide cases. There's normally the family that is impacted and friends and loved ones and that is the reason that first degree murder carries such a high penalty. That is life imprisonment with only the possibility of parole after 25 years.

We also must put this in perspective of the other two individuals, Felipe and Fredi, who have already been sentenced. I believe it's clear that of the three individuals, Oberlin was the, if you want to call it, flunkie, the guy that just came there, was living behind the Scoreboard bar. He was not here getting fat and rich as described by the state on the wealth of drug money. Nonetheless , this Court found and he admitted that that's -- when I said he accepts responsibility, he admitted he did sell drugs on occasion. He does not understand the concept of felony murder. It's been explained to him, but the idea of his

is I never meant to hurt anybody. I never meant to have anybody get shot. I never planned on having a gun myself, is what the statement relates to in the presentence report; that he did not know what was going to happen, nor did he ever intend for that to happen, and when there's a lack of responsibility, that is very common in felony murder [16]because you are convicted of first degree murder, yet you personally did not take these actions. It is a difficult one to explain. So I ask the Court to understand and interpret the comments of Mr. Cabanas-Salgado when it looks at that.

Oberlin expresses to the presentence report writer that he felt remorse and he felt sorrow for the Atkinson family and their friends and he does. I think the evidence did show that Oberlin never intended for anybody to be shot and killed, nor I think the evidence reasonably showed that he was aware that there was going to be a shooting, though he was aware of the weapons and that involves the reason that some of the convictions are here, and the Court found that he was aware that there was going to be drugs in that car because he had sold them on occasion. Whether he was going to sell that day or he had, that was really not something the Court needed to find. So in proportionality to other homicides and within proportionality to the co-defendants, a life sentence with eligibility of parole is an appropriate sentence given the degree of participation, the actions of Oberlin Cabanas-Salgado.

With regard to Count 1, conspiracy to sell or transport narcotic drugs for sale, I set forth what I felt were the appropriate mitigating factors. Obviously, he

[17]was just 18 years of age when this occurred. Age is a mitigating factor. He had only been in the United States for perhaps three weeks. That was established through the evidence at trial with regard to the various Lincolns, the individuals and the development of the time frame, where the observation actually took place. I list other mitigating factors. I believe actually that the mitigating factors outweigh the aggravating factors that may be applicable here. I do set forth why some of the ones listed by the state are not appropriate. So for that count, I ask the Court to impose a less than presumptive sentence concurrent to Count 1 the homicide charge Count 2, the homicide charge. Count 1 is actually the conspiracy.

Count 3, transportation for sale of narcotic drugs in an amount equally -- or exceeding the threshold of nine grams, I also set forth the same mitigating factors: age, degree of involvement, that he was not the, quote, unquote, head drug dealer. That was very apparent. It was Fredi. He was the individual that had the Lincoln. He is the individual that stored it. He is the individual that seemed to have the monetary gain, the guns, et cetera. His degree of involvement is less.

There's an issue of a fine. I ask the Court to use the street value of the drugs that's -- for the value, [18]I should say, of the drugs is for the Court to determine and then it's supposed to be three times the value of drugs or $2000, whichever is greater. The state asks for a $12,000 fine. That's giving almost a hundred dollars a gram value for cocaine which is fairly unreasonable. I only say that through my experience in dealing with drug cases also,

that that's not the reasonable value of cocaine, a hundred dollars a gram. I ask the Court to find that the value that Oberlin was convicted of was a value three times -- the value was less than 2000, so impose the minimum value or fine of $2,000. I also ask that they run concurrent to Counts 1 and 2.

Finally, misconduct involving weapons, a Class 4 dangerous felony, I ask the Court to impose a mitigated sentence for the same reasons I have already expressed, plus the misconduct involving weapons. I think it was clear he was an accomplice. He was aware that the other individuals, at least one of them, had a gun and there was one under his feet which in order to be in constructive possession, you must have the intent to possess that as your own or be using it. When the Court found that -- I know the Court found that he knew there was a gun in the car and when a drug offense -- he knew a drug offense was occurring; that there were drugs in the car and that is misconduct involving weapons and as an accomplice, I [19]believe he was convicted of that count.

What I believe is the fact that none of these guns were his. He was shown the gun by Fredi who had recently got it. It was not taken out. It was not displayed. It was not used. I can't remember. I think it was Sergeant Corcoran who probably would have testified that if it was going to be an ambush, a shotgun is the ideal weapon to use in an ambush situation but it was not.

I believe when you put it into aggravating or mitigating, the nature of the case is actually mitigating.

He did not -- the state says an argument could be made he was reaching for it. I think during the trial it showed that there's other ways that the case -- the one clasp could have been not sealed tight, could have been stepped on, et cetera. I'd ask the Court to impose the minimum or mitigated sentence concurrent to Counts 1, 2 and 3.

Finally, your Honor, the sentence that has to be imposed for first degree murder, life imprisonment, I only ask the Court to make him eligible for parole, but it's still, for the actions, a very severe punishment. So I ask the Court, for the reasons I have expressed today, the reasons I express in my presentence memorandum that the Court follow the recommendations that I've made and impose the sentences I have recommended.

Oberlin asked me, because of his inability to [20] concisely express his regrets, that he expresses the sympathies for the loss of Mr. Atkinson. It's not something that every family wants to hear or it doesn't make him come back, but he did express his regret and remorse for the loss of his life and it is a tragedy and that's not denied by anybody in this courtroom. Thank you.

THE COURT: Thank you. And, Mr. Cabanas, anything you want to say in your own behalf?

THE DEFENDANT: No sir.

THE COURT: Mr. Levy, anything more you want to say?

MR. LEVY: As the victims and the friends of Officer Atkinson indicated to the Court, we encourage you to give a sentence here that is appropriate to what happened to an officer who put his life on the line as well as all those from Maryvale precinct who are out there and we feel confident that you will.

THE COURT: Thank you. Thank you. Anything more you want to say, Mr. Smith?

MR. SMITH: No.

THE COURT: Any legal cause?

MR. SMITH: No.

THE COURT: No legal cause appearing, these are the things that go into the sentence with this individual defendant, and certainly he has to be treated individually [21]and not lumped in with the other two simply because he's lumped in with the other two. It's my responsibility to see to it that distinctions are made where appropriate, and where not appropriate, they won't be made.

But with regard to Mr. Cabanas-Salgado's participation here, just in general terms, mitigation exists. His age, the fact he's got no prior record, those are mitigating and those are always substantial mitigating factors in any case. With regard to a murder though and this murder, really his level of participation is the prime mitigator that distinguishes him from the other two defendants. I said this in chambers. I want to say it here one more time.

Appendix A

Mr. Fredi Flores-Zevada was sentenced to natural life with no probability of parole and then all the other counts were made to run -- I think I gave maximum sentences concurrent with the murder count which was natural life, and I gave him natural life despite the fact that he was not the person that shot Officer Atkinson, because he was the prime mover in the drug operation. He was one of the individuals that went to the bar owner and threatened to kill him if he went to the police. He, after engaging in the drug operation while armed, left Phoenix, went to California and came back and did it all over again. He had the chance to extricate [22]himself from the situation and he didn't and he was, without question, the prime mover in the drug operation. He was armed all the time, and to my way of thinking, that defendant was integral to the entire episode, the murder of Officer Atkinson. Officer Atkinson would not have been murdered but for Fredi Flores-Zevada's participation in the overall operation.

With regard to Felipe Patrona-Cabanas, he shot Officer Atkinson. He did it and his sentence was natural life. He got natural life and not death because my analysis of the law and the facts was that the death penalty was simply not available. It was not a sentence that would withstand scrutiny by any higher court under the law, and his sentence was the maximum, the absolute maximum that could have been given which was natural life, plus the maximum on everything else consecutive, and as I said in chambers to counsel and to Detective Olson, I realize that was symbolic. Making the sentences consecutive was only symbolic. It wasn't going to add a day to the sentence, but it was symbolism was important. You shot a police officer.

You need to get the absolute maximum time that you could get. So I gave it to him.

This defendant, he was not the prime mover in the drug operation. He came late. I don't have reason to [23] doubt his testimony that 20 days is about how long he was here. I think when the officers that testified about their observations at the Scoreboard bar starting as early as December or January I think when you get right down to it, this particular defendant was not identified as being there earlier, was not identified as being there earlier. He was not a shooter. He was not armed. I realize that the rifle was there in the back seat and the size that's where it had to be because of the size of it. That's where it had to be. Nobody can be certain about these things. We operate on proof, and I cannot say that it's been proven that this defendant was exercising dominion and control over the weapon or that he had unlatched it in an attempt to use it. Nobody saw that or said that, and that may be a surmise, but I don't think it's warranted since we have to operate on proof here and not supposition. He was not part of the threats of the bar owner. He didn't do anything like that. At the time of the shooting of Officer Atkinson, he did in fact exit the vehicle without the weapon.

My analysis of all this is that if this defendant had not arrived on the scene 20 days before the murder of Officer Atkinson, the drug operation would have gone on just like it had gone on before. Officer Atkinson would be murdered just like he was murdered in this [24]situation. It was the other two guys that were ones that set the wheels in motion and that actually executed the ultimate act that resulted

in the death of Officer Atkinson and there just has to be a way to distinguish this defendant from the others, and the way is what I indicated in chambers. I think because he was not the shooter, because his level of participation is such that -- the way I just described it, the appropriate sentence on the murder in the first degree Count 1, 99-006656 is life imprisonment, not a natural life sentence, life imprisonment. As I said in chambers, that doesn't mean -- that means he's eligible for release. That doesn't mean he will be released.

As I said in chambers, there are people in the Arizona state prison that were there when I was 15 years old and a kid in Tucson, remembering Peter Dansing convicted of murder. He's still there. That was 1964 or '5 or whatever and he didn't get a death sentence but he's still there, and Louis Taylor is still there from 1969, people that I remember when I was a kid that were convicted of murder.

With regard to the other sentences, the mitigators indicated apply, but on the conspiracy to sell, on the transportation for sale, the misconduct involving weapons, the aggravator is that all those crimes resulted [25]in the death of Officer Atkinson. That's the aggravator it seems to me and that aggravating factor outweighs any mitigation. I think maximum sentences are appropriate in those cases.

So on Count 1, conspiracy to sell or transport narcotic drugs, a Class 2 felony, the aggravated maximum of ten years; Count 3, transportation for sale of narcotic drugs, again, the aggravated maximum of ten years; Count 6,

misconduct involving weapons, Class 4 dangerous felony, the aggravated maximum of eight years. But all these things were part and parcel of one another and this defendant is legally responsible for the murder of Officer Atkinson because while these things were being committed, Officer Atkinson's death happened, was caused by his co-defendants and concurrent sentences are appropriate. Those sentences are all concurrent with one another, all four of then. There's credit for 1,174 days of previous sentence incarceration.

MR. SMITH: Judge, it's 1,147. You said 74.

THE COURT: Thank you. 1-1-4-7. Thank you. The fine on Count 3 is $3400. That's $2,000 plus the surcharge, 3400, I think that was the 70 percent surcharge then. My recollection is restitution is not an issue here, is it? Is there restitution requests in this case?

MR. LEVY: I don't believe so.

* * * *

Appendix B — *State v. Hall*,
Memorandum Decision of the
Arizona Court of Appeals (Nov. 3, 2005)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CR 04-0731
DEPARTMENT B
(Not for Publication - Rule 111, Rules of the
Arizona Supreme Court)

STATE OF ARIZONA,

Appellee,

v.

TERRELL JEROME HALL,

Appellant.

Appeal from the Superior Court in Maricopa County
Cause No. CR2003-036114-001 SE
The Honorable Brian K. Ishikawa, Judge

AFFIRMED

MEMORANDUM DECISION

WINTHROP, Judge

¶1 Terrell Jerome Hall ("Appellant") appeals from his convictions and sentences on one count of premeditated first degree murder, a class one dangerous felony, and one count of assisting a criminal street gang, a class three dangerous felony. His sole argument on appeal is that the trial court committed reversible error when it denied his motion for a jury instruction on the lesser included offenses of second degree murder and manslaughter committed in the "heat of passion." For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against Appellant. *State v. Nihiser,* 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

¶3 On May 15, 2003, the victim, Dwayne B., and some friends went to Club Freedom in Tempe to dance and enjoy a live music performance sponsored by a local radio station. They arrived at the club at approximately 9:00 or 10:00 p.m. and stayed until the club closed at 1:00 or 1:30 a.m. They then drove to the parking lot of a Taco Bell across the street to continue socializing. Other club-goers also gathered there after the club closed.

¶4 A young woman named Meka, who was in the parking lot with her friends, noticed the victim "looking at [her] crazy." Meka asked the victim, "What are you looking at?" The victim walked by and called her a "bitch."

¶5 Appellant was also at the club that night with his friends, and they too had adjourned to the Taco Bell parking lot when the club closed. Later in the evening, he asked Meka what the exchange between her and the victim had been about. Meka informed Appellant that the victim had been present during a fight in the parking lot the preceding week when "Duke," a member of the Crips street gang from Compton, California, was severely beaten. The victim prevented anyone from stepping in to help Duke, and laughed at Duke "because he was on the ground shaking, bleeding out of his mouth."

¶6 Appellant, who also hails from the vicinity of Compton, California, is a member of the Mona Park Crips gang. When Appellant heard the information related by Meka, "he got upset" and stepped out of the car. Meka told Appellant, "No, don't trip, don't trip," but Appellant "one armed [her]" and walked away. She thought Appellant was going to fight the victim.

¶7 Instead, Appellant walked up to some people in the parking lot and asked for "the heat," which Meka knew meant a gun. He then walked over to the victim, who was apparently urinating by a dumpster, and shot him once. The victim immediately fell to the ground, and Appellant shot him several more times. As Appellant shot the victim, Meka heard him say either "Compton" or "This is for Compton." She thought Appellant was "repping his 'hood, where he's from." Another witness heard Appellant call the victim a "slob ass nigga," "slob" being a derogatory Crips term for a member of the Bloods, a rival street gang.

¶8 Most of the revelers left the parking lot as soon as the shots were fired. The victim died at the scene from four bullet wounds: one to the right temple and three to the torso. The wound to the temple resulted from a bullet shot from no further than two feet away.

¶9 The police were unable to locate either the shooter or the murder weapon that night. Several weeks later, in response to a newspaper article, Lauren, a witness to the shooting, contacted police and described the shooter. Lauren ultimately selected Appellant's photograph from a photo lineup.

¶10 On July 14, police arrested Appellant at his home in California. Appellant admitted to being a Mona Park Crip and to having been at Club Freedom and at the Taco Bell on the night of the shooting. However, he maintained that he had been shooting dice when the shots rang out, and that some other person shot the victim.

¶11 The State charged Appellant with one count of premeditated murder and one count of assisting a criminal street gang,[1] each a dangerous felony. At trial, Appellant's defense was that Larry Epson, another witness who identified Appellant as the shooter, was the actual murderer. The jury found Appellant guilty as charged.

¶12 The trial court sentenced Appellant on count one to life in prison with the possibility of parole after 25 years; it

1. Prior to empaneling a jury, the State dropped a third charge for aggravated assault committed against a passenger in the car that Appellant used to leave the scene of the crime.

sentenced Appellant to concurrently serve a presumptive prison term of 7.5 years on count two. Appellant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S. ") sections 12-120.21(A)(1) (2003), 13-4031 and 13-4033 (2001).

* * *

Appendix C — Wagner, State's Petition for Review, excerpts (June 22, 2022)

ARIZONA SUPREME COURT

No. _____
No. 1 CA-CR 21-0492 PRPC
Maricopa County Superior
Court No. CR1994-092394 (A)

STATE OF ARIZONA,

Respondent,

vs.

CHARLES VINCENT WAGNER, JR.,

Petitioner.

STATE'S PETITION FOR REVIEW

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* * *

Appendix C

Addendum C

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

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

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

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

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

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

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

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

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

Appendix C

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

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

Appendix C

Addendum D

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

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

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

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

5. ***State v. Valle***, No. 1 CA–CR 15–0539 PRPC, 2017 WL 4638252, at *1, ¶2 (Ariz. App. Oct. 17, 2017)

(mem.) (sentence of life "with the possibility of release after 25 years" imposed for first-degree murder committed in 1995).

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

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

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

9. ***State v. Mendez***, No. 2 CA–CR 2016–0091–PR, 2016 WL 2855660, at *1, ¶2 (Ariz. Ct. App. May 16, 2016) (mem.) (sentence of "life in prison without the possibility of release for twenty-five years"

imposed for first-degree murder committed in 2000); *cf. Mendez v. Ryan*, CV–17–00287–DJH–MHB, 2017 WL 5514192, at *1 (D. Ariz. Oct. 18, 2017), report and recommendation adopted, CV–17–00287–PHX–DJH, 2017 WL 5496194 (D. Ariz. Nov. 16, 2017).

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

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

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

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

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

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

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

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

* * *

Appendix C

Appendix 20

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-151062-001 SE

08/27/2007

HON. BARBARA M. JARRETT

CLERK OF THE COURT
T. Soto
Deputy

STATE OF ARIZONA

v.

ROBERT RAYMOND NAVARRO (001)
DOB: 08/17/1975

SEAN KELLY

EDWARD J SUSEE

APO-SENTENCE IMPRISON-SE
APPEALS-SE
AZ DEPT OF CORRECTIONS-PHOENIX
AZ DOC
DISPOSITION CLERK-CSC
VICTIM SERVICES DIV-CA-SE

Appendix C

SENTENCE OF IMPRISONMENT

l:44P.M.

State's Attorney:	Sean Kelly
Defendant's Attorney:	Edward Susee
Defendant:	Present
Court Reporter:	Sharon Flores

The following people speak out on behalf of the Defendant: Diana Navarro, Joe Guerra, Monique Hernandez, Deborah Hernandez, Nichole Sanchez

Count(s) 1:The Defendant was found guilty after a trial by jury.

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

OFFENSE: Count 1 Aggravated Assault
Class 3 felony
A.R.S. § 12-1203, 13,-1204, 13-701, 13-702, 13-702.1, 13-801 and 13-604(P)
Date of Offense: 08/17/06
Dangerous pursuant to A.R.S. § 13-604 - Repetitive

AS PUNISHMENT, IT IS ORDERED Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

Count 1: lifetime from 08/27/07 with possible parole after 25 years
Presentence Incarceration Credit: 34 day(s

Appendix C

Pursuant to A.R.S. § 13-604(S), the Court finds that the Defendant has been convicted of the following prior serious felony offenses:

Armed robbery, a class non-dangerous felony committed on 03/12/1991 and convicted on 07/28/1994 in the Superior Court, Maricopa County, cause number CR9108947.

Armed robbery, a class Dangerous felony committed on 08/18/1993 and convicted on 07/28/1994 in the Superior Court, Maricopa County, cause number CR9306820.

Community Supervision: Count 1 - Waived due to length of imprisonment in CR 2006-151062-001SE.

IT IS ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

IT IS ORDERED the Clerk of the Superior Court remit to the Arizona Department of Corrections a copy of this Order or the Order of Confinement together with all presentence reports, probation violation reports, and medical and psychological reports that are not sealed in this cause relating to the Defendant.

2:49 P.M. Matter concludes.

ISSUED: Order of Confinement - Certified Copy to DOC via MCSO

Appendix D — Arizona Republic News Article (Judi Villa, *No Mercy for Teen in Sister's Rape, Murder*, Feb. 7, 1998)

No Mercy for teen in sister's rape, murder
Judi Villa
The Arizona Republic

There was no mercy for 10-year-old Seleana McLeod as she lay kicking and struggling against the telephone cord that slowly choked the life out of her.

Two years later, there was no mercy, either, for the 17-year-old half brother who strangled and raped the 74-pound girl, then threw her body in the trash.

Christopher McLeod was sentenced Friday to life in prison, plus an additional 27 years, for raping and killing Saleana in December 1995. He will never be eligible for parole.

What McLeod did to Saleana was a a 'hateful or shockingly evil action,' Maricopa County Superior Court Judge Brian Ishikawa said.

"During those few minutes, Saleana would have dealt with the uncertainty of whether she was going to live or die in her own home. Because of the size and weight difference, Saleana never had a chance."

Betty Chadwick, the children's mother, had asked that McLeod never be set free.

Appendix D

Evidence presented at McLeod's presentencing hearing indicated that Saleana was raped and suffered other bruises to her face, hands and back before she was killed. The girl's wrists also had been bound.

It would have taken anywhere from 90 seconds to three minutes for Saleana to lose consciousness. The girl's body was found, bathed and dressed in a clean outfit, stuffed inside a 35-gallon plastic trash can on the patio of the family's Mesa apartment.

McLeod, then 15, was arrested the next day and confessed in a police interview.

When asked whether he was sorry, the teen said, "No."

McLeod told police he killed Saleana because he was mad at her for calling him names and tattling on him.

"I just felt like it was something, the right thing to do," he said.

"The defendant has shown by his actions and his own words that he is a high risk to reoffend," Ishikawa said. "The defendant has shown by his actions and his own words that he is an extreme danger—an extreme danger—to society."

McLeod pleaded guilty in September. "I just want to say that I'm sorry for what I did," McLeod said Friday. "And I know that I should pay for what I've done. And

that sometime in the future, I would like to get help for my problems."

Defense attorneys attempted to cast some of the blame on a dysfunctional family.

But Chadwick claims it was the juvenile justice system that failed McLeod when officials "slapped him on the hand and sent him home" when he got in trouble.

Twice before the murder, McLeod had stolen his mother's car, and he had been due in court the morning of Saleana's death on a purse-snatching charge, police said. He had also been referred in the past for hitting his mother and for stealing a check from a mailbox.

A year before the murder, McLeod reportedly attempted to sexually assault Saleana but was unsuccessful. "He is a very sick child for everything he did," Chadwick said through tears Friday. "I just want to see my son get some help. Please. He is still my son."

Appendix E — Relevant Statutory Provisions

Arizona Statutes Annotated - 1993

A.R.S. § 13-703
ARIZONA REVISED STATUTES ANNOTATED
TITLE 13. CRIMINAL CODE
CHAPTER 7. IMPRISONMENT

§ 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

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 G 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.

* * *

Appendix E

Arizona Statutes Annotated - 1994

A.R.S. § 13-703
ARIZONA REVISED STATUTES ANNOTATED
TITLE 13. CRIMINAL CODE
CHAPTER 7. IMPRISONMENT

§ 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

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 G 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.

* * *

Appendix E

Arizona Statutes Annotated - 1995

A.R.S. § 13-703
ARIZONA REVISED STATUTES ANNOTATED
TITLE 13. CRIMINAL CODE
CHAPTER 7. IMPRISONMENT

§ 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

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 G 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.

* * *

Appendix E

Arizona Statutes Annotated - 1999

A.R.S. § 13-703
ARIZONA REVISED STATUTES ANNOTATED
TITLE 13. CRIMINAL CODE
CHAPTER 7. IMPRISONMENT

§ 13-703. 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 G 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.

* * *

Appendix E

Arizona Statutes Annotated - 2010

A.R.S. § 13-751
Arizona Revised Statutes Annotated Currentness
Title 13. Criminal Code (Refs & Annos)
Chapter 7.1. Capital Sentencing (Refs & Annos)

§ 13-751. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder as defined in § 13-1105, the defendant shall be sentenced to death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in § 13-752. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age or was an unborn child. In this section, for purposes of punishment an unborn child shall be treated like a minor who is under twelve years of age.

* * *

Appendix E

Arizona Statutes Annotated - 1994

A.R.S. § 41-1604.09
ARIZONA REVISED STATUTES ANNOTATED
TITLE 41. STATE GOVERNMENT
CHAPTER 11. **STATE DEPARTMENT OF CORRECTIONS**
ARTICLE 1. ORGANIZATION OF STATE DEPARTMENT OF CORRECTIONS

§ 41-1604.09. Parole eligibility certification; classifications; appeal; recertification; applicability; definition

A. The director shall develop and maintain a parole eligibility classification system. Within the system, the director shall establish two classes of parole eligibility, class one and class two, to be given effect as provided for in this section, one class of parole noneligibility for dangerous psychiatric offenders and as many other classes of noneligibility as he deems necessary or desirable. Each person committed to the state department of corrections shall be classified pursuant to the parole eligibility system established by the director.

B. The director shall establish rules pursuant to chapter 6 of this title for the classification and certification of prisoners for purposes of parole. Upon commitment to the state department of corrections each person shall be initially placed in class two. Reclassification and certification shall be based on factors related to a prisoner's record while in the custody of the department, including work performance, compliance with all rules

of the department, progress in any appropriate training or treatment programs and the performance of any assignments of confidence or trust. The director shall also establish rules governing the procedures and performance standards by which prisoners, reclassified to noneligibility classifications, may earn eligibility classification. Prisoners may be reclassified only pursuant to the rules of the department. The director shall distribute a copy of all the rules to each person committed to the department.

C. The director shall maintain two classes for parole eligibility, class one and class two. Inclusion of an inmate in class one shall be determined by adherence to the rules of the department and continual willingness to volunteer for or successful participation in a work, educational, treatment or training program established by the department, except that a person sentenced pursuant to a statute which requires that a person serve a mandatory minimum term shall not be placed in class one until one-quarter of the mandatory minimum portion of the term is served and shall not be released until the mandatory minimum portion of the term is served. Inclusion of an inmate in class two shall be determined by adherence to the rules of the department.

D. The director shall certify as eligible for parole any prisoner classified within an eligible classification five months immediately prior to the prisoner's earliest parole eligibility. The inmate shall be required to remain in a parole eligible classification from the date of certification until the date of release on parole. If the inmate does not remain in a parole eligible classification until the

date of release on parole, the entire parole process shall be rescinded. For the purposes of this subsection, the prisoner's earliest parole eligibility occurs when the prisoner has served one-half of his sentence unless the prisoner is sentenced according to any provisions of law which prohibit the release on any basis until serving not less than two-thirds of the sentence imposed by the court, the sentence imposed by the court or any other mandatory minimum term, in which case the prisoner must have served the sentence required by law.

E. Every prisoner shall be entitled to a hearing prior to reclassification of the prisoner to a lower class. The hearing shall be before a person or persons designated by the director to hold the hearings. Reasonable notice and a written statement of the alleged violation of the rules shall be distributed to the prisoner at least five days prior to the hearing. A prisoner may request a review of a decision to reclassify the prisoner by delivering a written request to the director.

F. Notwithstanding subsection D, placement of a prisoner in a noneligible parole class except placement in the noneligible parole class for dangerous psychiatric offenders shall result in an increase in the period of time the prisoner must serve before reaching his earliest parole eligibility date. The increase shall equal the number of days occurring after placement in a noneligible parole class and before the prisoner is reclassified to a parole eligible class.

G. The classification of each prisoner shall be reviewed by the director not less than once every six months. Any

prisoner who was certified as eligible for parole and denied parole and remains eligible for parole pursuant to subsection D shall be recertified by the director not less than one nor more than four months after the hearing at which the prisoner was denied parole, except that the board of executive clemency in denying parole may prescribe that the prisoner shall not be recertified for a period of up to one year after the hearing.

H. Immediately after the adoption of the rules required pursuant to this section, the director shall forward a certified copy of the rules to the legislature. The legislature may review and, by concurrent resolution, approve, disapprove or modify the rules, except that they shall be given full force and effect pending legislative review. If no concurrent resolution is passed by the legislature with respect to the rules within one year following receipt of a certified copy of the rules, they shall be deemed to have been approved by the legislature. If the legislature disapproves the rules or a section of them, the director shall immediately discontinue the use of any procedure, action or proceeding authorized or required by the rules or section of the rules.

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

J. For the purposes of this section, "dangerous psychiatric offender" means an inmate who has been placed in a psychiatric unit for psychiatric evaluation and treatment and who has been determined to present a high risk of potential violence.