No. _____

IN THE

Supreme Court of the United States

SCOTT DESHAW, BOBBY PURCELL, BOBBY TATUM, WILLIAM NAJAR, RALPH CRUZ, JOSEPH CONLEY, JOSE BOSQUEZ, & JERMAINE RUTLEDGE,

Petitioners,

v.

STATE OF ARIZONA,

Respondent.

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

APPENDIX

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Appendix A

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff,	
vs.	NO. CR 94-11396 NO. 1 CA CR 97-0727
SCOTT LEE DESHAW, Defendant.	

Phoenix, Arizona
September 5, 1997
9:20 a.m.

BEFORE: The Honorable JEFFREY A. HOTHAM, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SENTENCING

APPEARANCES:

FOR THE PLAINTIFF:
Ms. Teresa A. Sanders

FOR THE DEFENDANT:
Mr. Richard D. Gierloff

PREPARED BY:

Pamela D. Remus
Official Court Reporter

PREPARED FOR APPEAL

(ORIGINAL)

P R O C E E D I N G S

THE COURT: Would counsel please approach on Mr. Deshaw?

(Off-the-record discussion at the bench.)

THE COURT: All right. This is CR 94-11396 consolidated, State versus Scott Deshaw. This is the time set for sentencing. Parties?

MS. SANDERS: Teresa Sanders on behalf of the State.

MR. GIERLOFF: Mr. Deshaw is present, Your Honor. Mr. Gierloff appearing.

THE COURT: All right. Previously, the Court conducted the presentence hearing under ARS 13-703(B). I have today signed a Special Verdict and will be filing that with the clerk. I have given a copy of my Special Verdict to both counsel.

Prior to my rendering of the Special Verdict, Mr. Gierloff, there was the remaining issue of whether you wanted me to consider anything from the second presentence report in mitigation on behalf of your client.

MR. GIERLOFF: No, Your Honor. There is only really the one section by Ms. Lichtenfels which is duplicative of what she said on the stand.

THE COURT: All right. Any legal cause then why

we cannot proceed to sentencing on Count I?

MR. GIERLOFF: No legal cause.

THE COURT: All right. Mr. Deshaw, will you please stand? Rather than read the entirety of the Special Verdict, what I will do is just summarize some of my findings.

I have found that the State has proven beyond a reasonable doubt that the presence of the aggravating circumstance that the defendant committed this offense in the expectation of the receipt of pecuniary gain, and the State was unable to prove any of the other aggravating circumstances. The Court also has found as mitigating circumstances that the defense did prove the statutory mitigating circumstance that the defendant's age of 17 years is a mitigating circumstance. Also, the defense has proven non-statutory mitigating circumstances, number one, that the defendant comes from a dysfunctional family and had a difficult childhood which has included extreme neglect, physical and sexual abuse, and drug abuse which was facilitated by family members. Also the defense has demonstrated that the defendant demonstrated good behavior while incarcerated since his arrest three years ago and has accommodated himself to institutional life. Quite frankly, folks, the weighing and balancing of these circumstances is a difficult task for the Court. In

essence, to boil it all down for you, I have decided that there is a distinctive difference between the conduct of Aaron Hoskins and Scott Deshaw. I have given great weight to the defendant's youthful age, his emotional and moral immaturity. I have given significant weight to the defendant's difficult childhood and dysfunctional family experiences, and given some weight to the influence of the co-defendant Aaron Hoskins upon this defendant, Scott Deshaw. I have considered and weighed all of the mitigating circumstances offered by the defendant, those that were proven to exist by a preponderance of the evidence and having shown the benefits of the doubt to the defendant as required by law on all issues as required.

The Court finds that the mitigating circumstances in this case are sufficiently substantial to outweigh the aggravating circumstances proved by the State and to call for leniency. Therefore, on Count I, Mr. Deshaw, based upon the finding of the jury, it is now the judgment of the Court that you are guilty of that crime of murder in the first degree, according to the findings of the Court and the rendition of the Special Verdict. On Count I, it is the sentence of the Court that you be imprisoned in the Department of Corrections for your natural life. Natural life means that you are not to be released from prison on any basis ever. And the reason

that you should understand that this is being done is because you took this young lady's life and that was not appropriate, and it was a crime against this young lady and her family and her friends and against our entire society. It is not clear to me that you really care about any of this or really understand the depth of the horror and trauma that has been suffered because of your actions. But there are no legal reasons why you should not be sentenced to remain in prison for the rest of your life for this despicable act. I am giving you credit for 1,120 days of presentence incarceration.

Gentlemen, you may be seated. We will move next to sentencing on Counts II and III, but prior to doing that I will hear oral argument on appropriate sentences. Mr. Gierloff?

MR. GIERLOFF: Your Honor, as stated in my memorandum, I think the case law following Tison/Enmund that all sentences be concurrent.

THE COURT: Anything further, Ms. Sanders?

MS. SANDERS: I would rest on the arguments I set forth in my sentencing memorandum. That the only mitigating factor is age. And in regard to Counts II and III, that the aggravating factors far outweigh the mitigating factors, and that the defendant should be sentenced to the maximum terms on Counts II and III to run

consecutive with each other as well as consecutive to Count I.

THE COURT: I will also hear from the victim's family prior to sentencing on Counts II and II.

Go ahead.

MRS. CABRAL: Everything that needs to be said has been said for these last three years; all the facts and all the arguments. But the fact for Crystel Cabral will never change. She will still be gone. We will never have the privilege of seeing her grow, seeing her fulfill her hopes and her dreams. She wanted to be a nurse. She wanted to help people. She had wanted to travel. She had wanted to -- she told me that she had wanted some day to be a mother and to be married. She would have been a great mother, Your Honor. But the fact that Scott Deshaw and Aaron Hoskins took all her hopes, took all her dreams away, Scott and Aaron planned out this crime. They talked about it. But it was Scott who stole the gun and carried out this crime to kill Crystel. Scott had a knife and this was a weapon and this was a threat to Crystel. Scott made -- if it would have been one person, maybe Crystel would have had a fighting chance. Scott won. Your Honor, no more excuses. Anyone can claim that they have been daydreaming or dissociative reaction, but this altered state can't be present in a person who picks and chooses

what they want out of her purse. Scott had a horrible life, granted. He was a victim, but he also chose to victimize. When will all this stop? Scott Deshaw had people who cared for him. Mr. Hazelton. Scott knew where to go for a free meal. There was also Mrs. Hanson. She was even willing to keep him. There was even the Mastersons, but that's who Scott stole money and a gun from. Scott had choices, and he chose to be labeled as a thief and a murderer.

Thank you, Your Honor, for your time.

THE COURT: Mrs. Cabral, I appreciate your statements. There is absolutely nothing that I can do to grant you solace or assist you with your loss. It's been my experience, though, that after sentencing, part of the emotional issues are resolved and some stability does return to your life. I hope that that works out for you.

MRS. CABRAL: Thank you.

MS. SANDERS: And Crystel's father, Martin Cabral.

THE COURT: Yes, sir.

MR. CABRAL: My daughter Crystel Cabral was 18 years, 11 months, 23 days old when she was kidnapped and violently and cruelly murdered by Aaron Hoskins and Scott Deshaw. They both equally took part of it. For a junk Suzuki Samurai and $15 they took her life. Because they

thought they were above the law, they put the gun to her forehead and pulled trigger and took my daughter's life, the middle daughter of our family. Then they shoot her again. And it is my belief he shot her the second time to be part of the group. Crystel had just come back from Argentina. We had sent a young girl and got back a young woman who had finally found a path in life. We have hundreds of pictures of her in Argentina of the places and the people she met. But she never had time to tell us where these places were and who these people were. She had brought back all kinds of gifts for her friends, but she never marked them. So we do not know who to give them to. They put our family through three days of hell. Then we learned to find out our daughter was dead in the desert. So on August 8th the day she came into our lives we have a funeral and looking at her picture. She would have been 19 years old then. Young. These people just took her life cruelly for no reason except monetary gain. They say that he fell through the cracks. He didn't fall. He jumped. He took advantage of everything he could get while he went through them. He had people who cared for him that tried to help him. He just used them like everything else. He just used everything they gave to him and the one family that he was with the last time that was helping him and let him stay there, as soon as he had a

chance and Hoskins showed up, what did he do? He robbed them. He took the murder weapon that caused all this -- that started all this. He needs to be sentenced to the maximum what the law calls for. Thank you, sir.

THE COURT: Thank you, sir. I appreciate your thoughts.

All right. Mr. Deshaw, please stand again. Mr. Gierloff, any legal cause why sentence cannot now be prounounced on Counts II and III?

MR. GIERLOFF: No legal cause, Your Honor.

THE COURT: No legal cause appearing, the Court finds as aggravating circumstances on both Counts II and III the presence of the accomplice, Mr. Hoskins, and the extreme mental and physical trauma suffered by Crystel Cabral and her family. It is therefore the judgment of the Court that on Counts II and III after the verdict of guilt by our jury, that the sentence on each count be for 15 years in the Department of Corrections. Each sentence will run consecutively to each other sentence. In other words, the sentence in Count II will run consecutive to the natural life sentence, and the sentence in Count III will run consecutive, in other words, after any sentences in Counts I and II.

On Counts II and III, there would be a consecutive term of community supervision if the defendant

were ever to be released from prison, but I have indicated he cannot under 13-703(A). Also I am ordering that you pay, Mr. Deshaw, restitution in the amount of $5,973.24 for the benefit of the folks listed in the restitution ledger request, the Cabral family and Ms. Muir. That is a joint and several obligation between you and Mr. Hoskins.

Mr. Deshaw, you are advised that you have the right to file a Petition for Post-Conviction Relief and a separate right to file a direct appeal. Those rights are in writing. Your lawyer will explain those to you. When you understand them, I want you to sign them. The appellate right must be exercised within 20 days of today's date. The Petition for Post-Conviction Relief must be exercised within 90 days of today's date, and your lawyer will explain how those two things work.

It is the Order of the Court that the sheriff transport you to the Department of Corrections where you will remain for the rest of your life.

Court is adjourned.

(The proceedings concluded at 10:40 a.m.)

I Pamela D. Renner, do hereby certify that the foregoing pages constitute a full, accurate typewritten record of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

DATED this 20th day of January, 1998.

Pamela D. Renner
Official Court Reporter

Appendix B

Clerk of the Superior Court
*** Electronically Filed ***
11/03/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1994-011396 11/01/2021

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

MITCHELL S EISENBERG
JULIE ANN DONE

v.

SCOTT LEE DESHAW (B)

ELEANOR R KNOWLES
ALBERT H DUNCAN

COURT ADMIN-CRIMINAL-PCR
JUDGE STARR

RULING / PETITION FOR RULE 32 RELIEF DISMISSED

The State has asked this Court to allow it to withdraw from its stipulation to resentencing and vacate the pending resentencing. For the following reasons, the Court vacates the resentencing and dismisses this matter.

I. FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted DeShaw of first-degree murder, a dangerous offense. At the time of the offense, DeShaw was 17 years old. The trial court sentenced DeShaw to natural life.

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

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

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MARICOPA COUNTY

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II. LEGAL ANALYSIS

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

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

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

Here, the trial court considered DeShaw's young age of 17 at the time of the homicide, the circumstances of the offense, including DeShaw's extent of involvement in the crime, the influence of the older codefendant on DeShaw, as well as DeShaw's traumatic childhood and mental health diagnoses. The parties presented the trial court with extensive information about DeShaw and the effect of his youth on his culpability and conduct; the trial court considered all that information. Thus, the trial court satisfied *Miller*'s requirements.

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

> *Miller*, as clarified by *Montgomery*, represents a "clear break from the past" for purposes of Rule 32.1(g). Arizona law, when Healer and Valencia were sentenced, allowed a trial court to impose a natural life sentence on a juvenile convicted of first-degree murder without distinguishing crimes that reflected "irreparable corruption" rather than the "transient immaturity of youth."

Valencia, 241 Ariz. at 209, ¶ 15.

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MARICOPA COUNTY

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

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

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

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

III. CONCLUSION

Based on the foregoing,

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

Appendix C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

MARICOPA COUNTY

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	CR 98-08705
	)	
vs.	)	SPECIAL VERDICT ON
	)	COUNTS 1 and 2.
	)	
BOBBY CHARLES PURCELL,	)	
	)	
Defendant.	)	

A. BACKGROUND.

On June 21, 1999, the defendant, Bobby Charles Purcell, was found guilty by a jury of count 1, murder in the first degree of Renelyn Simmons, and count 2, murder in the first degree of Andre Bradley.[1] Each crime occurred on June 6, 1998, is a class 1 felony and was committed in violation of A.R.S. §§ 13-1105, 13-1101. 13-703, 13-704, 13-801, and 13-812.

On September 10, 1999, a separate sentencing hearing was held, as is required by A.R.S. § 13-703(B). The court has considered the evidence presented at trial and at the separate sentencing hearing, the file, both the written and oral arguments of counsel and the presentence report in making the following aggravation and mitigation findings pursuant to A.R.S. § 13-703(F) and (G). While the fathers of murder victims Renelyn Simmons and Andre Bradley made statements at the hearing the court has not considered them in conjunction with the determinations to be made pursuant to § 13-703(F) and (G).

B. AGGRAVATING CIRCUMSTANCES.

The state has alleged the existence of only one of the aggravating factors set forth in § 13-703(F). Specifically, the state has alleged that "[t]he defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense." § 13-703(F)(8). The court finds that the state has proven this aggravating circumstance beyond a reasonable doubt.

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[1] Defendant was also convicted of counts 3-11 (each count being one of attempted first degree murder), count 12 (aggravated assault) and count 13 (misconduct involving weapons).

The evidence at trial proved that defendant pointed his shotgun at a group of teenagers who were standing in the front yard of a home on a residential street in Phoenix. Defendant fired one round of double-ought buckshot at the group, fatally striking both Ms. Simmons and Mr. Bradley with shotgun pellets from the single shot. The court notes that by its guilty verdicts on counts 1 and 2, the jury has, in effect, found this aggravating circumstance to exist beyond a reasonable doubt. The aggravating circumstance supports the imposition of a death sentence on both counts 1 and 2.

Section 13-703(D) requires that the court set forth in this special verdict "its findings as to the existence or nonexistence of each of the circumstances" listed in § 13-703(F). Accordingly, the court finds that the aggravating circumstances set forth in §§ 13-703(F)(1),(2),(3),(4),(5),(6),(7),(9) and (10) do not exist.

C. STATUTORY MITIGATING CIRCUMSTANCES.

1. The court finds that the defendant has not proven by a preponderance of the evidence the existence of the mitigating circumstance specified in **A.R.S. § 13-703(G)(1).** Dr. Thal concluded that at the time defendant committed these crimes, his "capacity of appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law was lessened and diminished... [but] was not significantly impaired." Dr. Esplin testified to his overt agreement with Dr. Thal's conclusions. The court credits these expert conclusions and finds this mitigating circumstance has not been proven.

2. The court finds that the defendant has not proven by a preponderance of the evidence the existence of the mitigating circumstance specified in **A.R.S. § 13-703(G)(2).** Even though defendant was suffering from some sort of stomach pain immediately before

committing these murders, this evidence does not show that defendant was under unusual or substantial duress.

3. The court finds that the defendant has not proven by a preponderance of the evidence the mitigating circumstance specified in A.R.S. § 13-703(G)(3). Defendant alone committed these crimes. There is no proof that his participation was relatively minor, but not so minor as to constitute a defense to prosecution.

4. The court finds that the defendant has not proven by a preponderance of the evidence the mitigating circumstance specified in A.R.S. § 13-703(G)(4). Defendant fired a shotgun into a crowd of people in response to a perceived show of disrespect. There is no evidence proving that he could not reasonably have foreseen that his conduct in the course of the commission of the offenses for which he was convicted would cause, or would create a grave risk of causing, death to another person.

5. The court finds that the defendant has proven by a preponderance of the evidence the mitigating circumstance specified in A.R.S. § 13-703(G)(5). Defendant murdered Renelyn Simmons and Andre Bradley thirteen days before defendant's seventeenth birthday.

D. NONSTATUTORY MITIGATING CIRCUMSTANCES.

The court must also consider nonstatutory mitigating circumstances, including "any aspect of the defendant's character, propensities or record and any of the circumstances of the offense," A.R.S. § 13-703(G), to determine whether there are mitigating circumstances sufficiently substantial to call for leniency.

Defendant's Rule 15.2(g) disclosure urges eight individual nonstatutory mitigating factors. The court chooses to group them under three categories, as follows: (1) lack of family support; (2) amenability to rehabilitation; and (3) international law prohibits the application of the death penalty to a person who is defendant's age. Each is addressed below.

(1) Lack of family support. Defendant was born to a mother who was a child herself, approximately 14 years old. Defendant never knew his natural father. Defendant and his mother lived with his maternal grandmother, Linda McNamara, and great grandmother, who took responsibility for raising defendant. At approximately age 2 1/2 or 3, defendant's mother met David Olshefsky, who became the sole male figure in defendant's life. Defendant's mother, Dawn Olshefsky, and David Olshefsky, married and had three more children. Defendant regarded David as his father and David regarded defendant as his son. While intact, family life included church, sports and activities. The family began to disintegrate when defendant was approximately seven years old. The cause of this disintegration was Dawn Olshefsky's drug addiction. The overriding priority in Dawn Olshefsky's life was to satisfy her addiction to methamphetamine. Defendant became nothing more than an after-thought and a hinderance. Dawn Olshefsky stole from him, she lied to him, and she told him that she hated him. When David and Dawn divorced in 1991, David was awarded custody of defendant's three half-siblings, while defendant was consigned to a childhood with Dawn Olshefsky solely because she is his natural mother. In 1994, David and the other children moved to Oregon and defendant

was left to fend for himself. David left because Dawn's treatment of their children was "tormenting."

Ms. McNamara testified that defendant lived with her and that Dawn would be in the home intermittently. One witness testified that Dawn has been in-and-out of her son's life approximately 20 times. Ms. McNamara testified about the reasons why she "wasn't good" for defendant. Ms. McNamara testified to having grown up in a home devoid of affection or emotion between her parents and herself. She describes herself as having no sense of self-worth, having drunk heavily until into her 40's, having been in severe depression for years, having been married 5 times and having been abused by every man in her life. Being emotionally adrift herself, Ms. McNamara's parenting style, with both Dawn and then her grandson Bobby, was to choose the path of least resistance, to take the easy way out, a tactic wholly consistent with her prior life's history. While in Ms. McNamara's care, defendant was able to do whatever he pleased without discipline or guidance. Ms. McNamara did not chastise or correct behavior which landed defendant in trouble. She tried instead to extricate defendant from that trouble.

Dr. Esplin testified that there is a direct causal connection between defendant's abandonment and rejection by his mother and having no meaningful limits set by any adult figures and these abominable murders. Defendant is, according to Dr. Blackwood, "a young man with significant emotional and psychiatric problems." Moreover, the result of defendant's family history is plain: He is unable to emote normally. He is filled with self-hatred (as Dr. Esplin testified, defendant's internal belief is that if he were somehow better, his mother would not have abandoned him). He is extremely dangerous to the community.

A simple statement of this case sums up the result of defendant's family environment: he became a double-murderer at age 16. Nothing more need be said.

The court finds that the defendant has proven by a preponderance of the evidence that defendant's lack of family support is a mitigating circumstance.

(2) Amenability to rehabilitation. Four experts have ventured opinions on this subject. Dr. Blackwood opines that defendant "most probably has some rehabilitation potential". Dr. Esplin testified that while defendant has the ability to take advantage and profit from rehabilitation services, Dr. Esplin does not know how "salvageable" defendant is. Dr. Thal found that while defendant has the intelligence and abilities to better himself, "the missing ingredient seems to be any commitment" by defendant to do so. Tom DePaul is a social worker who counselled defendant in a juvenile boot-camp. He testified that defendant did well in one-on-one counselling and responded well to the structured environment of boot-camp.

The court finds that the defendant has proven by a preponderance of the evidence that defendant is likely to do well in the structured environment of a prison and that he possesses the capacity to be meaningfully rehabilitated. The defense has not proved by a preponderance of the evidence that defendant is likely to be rehabilitated.

(3) International law. The court declines to consider as a mitigating circumstance international law or the opinions or beliefs of people around the world concerning the potential application of capital punishment to one who was 16 years old at the time he murdered two people. Capital punishment is permitted by the United States Constitution. The people of Arizona through their elected representatives have mandated that death is

an appropriate sentence for certain aggravated first degree murders. Moreover, the court is mandated to consider in each capital sentencing whether the defendant's age, either standing alone or in conjunction with other factors, is a mitigating factor sufficiently substantial to preclude a death sentence. The court will do so here.

E. CONCLUSIONS.

The court concludes that the state has proven beyond a reasonable doubt the existence of one statutory aggravating circumstance: defendant has committed two first degree murders. § 13-703(F)(8). The court concludes that the defendant has proven by a preponderance of the evidence the existence of one statutory mitigating circumstance: defendant's age at the time of the murders. § 13-703(G)(5). The court concludes that the defendant has proven by a preponderance of the evidence the following nonstatutory mitigating circumstances: (1) lack of family support; (2) defendant is likely to do well in the structured prison environment; (3) defendant possesses the capacity to be rehabilitated.

Upon weighing these aggravating and mitigating circumstances, the court finds that two of the mitigating factors--defendant's age and his lack of family support--are sufficiently substantial to call for leniency. The court concludes that at the time of the horrible murders of Renelyn Simmons and Andre Bradley, Bobby Charles Purcell was a dangerous and pitiless child, one devoid of empathy or compassion for others, made that way by parental rejection, abandonment and abuse. Defendant was a child who simply had no adult in his life who was willing or able to make Bobby Purcell's welfare a priority. By virtue of his upbringing, defendant had no one to turn to for help and by virtue of his age, he had no reason to know how troubled he was or how to deal with his enormous

psychological problems. Virtually no sixteen year old could cope with such problems on his own.

Defendant's crimes have shocked the conscience of the community and of this court. Nonetheless, for the reasons stated in this special verdict, imposition of a sentence of death would be contrary to applicable law. However, because defendant committed two aggravated murders, because he is an extreme danger to the community and because he has no real commitment to better himself, the most severe non-capital sentence available to this court will be imposed.

F. SENTENCES.

Count 1: It is the judgment of the court that the defendant is guilty of Murder in the First Degree of Renelyn Simmons, a class one felony, in violation of A.R.S. §§ 13-1105, 13-1101, 13-703, 13-704, 13-801 and 13-812.

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

Count 2: It is the judgment of the court that the defendant is guilty of Murder in the First Degree of Andre Bradley, a class one felony, in violation of A.R.S. §§ 13-1105, 13-1101, 13-703, 13-704, 13-801, and 13-812.

It is ordered that the defendant, Bobby Charles Purcell, be imprisoned in the custody of the state department of corrections for life and not be released on any basis for the

remainder of his natural life. This sentence is not subject to commutation, parole, work furlough or work release. A.R.S. § 13-703(A).

It is further ordered that the sentence imposed on count 2 be served consecutively to the sentence imposed on count 1.

Dated this 17th day of September, 1999.

Frank T. Galati
Judge of the Superior Court

Appendix D

Clerk of the Superior Court
*** Electronically Filed ***
11/16/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1998-008705 11/10/2021

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

ERIC BASTA
JULIE ANN DONE

v.

BOBBY CHARLES PURCELL (A)

JAMAAR WILLIAMS
TARA DEGEORGE

COURT ADMIN-CRIMINAL-PCR
JUDGE STARR

RULING / RULE 32 CLAIM DISMISSED

The State has asked this Court to allow it to withdraw from its stipulation to resentencing and vacate the pending resentencing. For the following reasons, the Court vacates the resentencing and dismisses the petition for post-conviction relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Purcell of several offenses, including two counts of first-degree murder. At the time of the murders, Purcell was 16 years old. The trial court sentenced Purcell to natural life.

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

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

II. LEGAL ANALYSIS

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

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

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

Here, the trial court considered the fact that Purcell was 16 years of age at the time of the homicides, as well as his lack of family support, including "parental rejection, abandonment and abuse." (Special Verdict.) The Court considered that no adult in Purcell's life was willing or able to make Purcell a priority, and that at the age of sixteen, he could not cope with his tremendous problems on his own. (*Id.*) Thus, the trial court satisfied *Miller*'s requirements.

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

> *Miller*, as clarified by *Montgomery*, represents a "clear break from the past" for purposes of Rule 32.1(g). Arizona law, when Healer and Valencia were sentenced, allowed a trial court to impose a natural life sentence on a juvenile convicted of first-degree murder without distinguishing crimes that reflected "irreparable corruption" rather than the "transient immaturity of youth."

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Valencia, 241 Ariz. at 209, ¶ 15.

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

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

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

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

III. CONCLUSION

Based on the foregoing,

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

Appendix E

SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

HONORABLE J. KENNETH MANGUM, JUDGE

STATE OF ARIZONA, Plaintiff, v. BOBBY JERRY TATUM, Defendant.	Superior Court No. CR 94-05821 Court of Appeals No. 1 CA-CR 96-0887

Phoenix, Arizona
November 20, 1996
9:00 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON APPEAL
(Sentencing)

COPY

KITTY K. LOVEJOY
OFFICIAL COURT REPORTER

A P P E A R A N C E S

FOR THE PLAINTIFF:
Mr. William Clayton,
Deputy County Attorney.

FOR THE DEFENDANT:
Mr. Richard D. Gierloff
and Carmen Fischer,
Attorneys at Law.

Phoenix, Arizona
November 20, 1996
9:00 a.m.

(The following proceedings were held in the entitled matter before the Honorable J. Kenneth Mangum, Judge of the Superior Court:)

THE COURT: Next go to number 29 -- number 29 State of Arizona versus Bobby Jerry Tatum, a sentencing in CR 94-05821 and oral arguments on pending motion.

MR. CLAYTON: William Clayton for the State.

Good morning, Your Honor.

MR. GIERLOFF: Mr. Tatum's present.

Richard Gierloff and Carmen Fischer appearing.

We're ready to proceed. May we have Mr. Tatum down here with us, please?

I filed a written response to the State's motion to written response to vacate judgment.

THE COURT: I read the motion, response, and reply last night.

MR. CLAYTON: I haven't seen the reply. I don't think I need to. It will probably come in the mail in a few days.

THE COURT: Mr. Gierloff, do you want proceed?

MR. GIERLOFF: I have nothing to add to the

written pleadings.

I think the State has not responded to the issue raised. I think it is an error that occurred in the selection of the jury. I think it would be reversible error on the appeal, and I would ask the Court to vacate judgment in this matter.

THE COURT: Any comments from the State?

MR. CLAYTON: My comments are contained in the motion and response.

THE COURT: I considered the matters and -- addressed by the amount of research, but I do not see the -- any prejudicial error to have occurred. I am not convinced that there is procedural error at all, harmless or otherwise.

With respect to one of the observations, I think that rather than minute entries controlling the transcript, the transcript controls. It's a little bit like a conflict of sometimes develops between the written numbers on a check and the lettered statement of the check amount. And I do not believe -- if there is a problem, it would be an error in the minute entries rather than the transcript.

So it is ordered denying the defense motion to vacate judgment or set a new trial.

Ready to proceed on sentencing?

MR. CLAYTON: State's ready, Your Honor.

MR. GIERLOFF: Yes, Your Honor.

THE COURT: Okay. Do we wish to proceed with argument first?

MR. CLAYTON: Your Honor, I have filed a State's sentencing memorandum.

Did you receive that?

THE COURT: Yes, I read both the State's sentencing memorandum and the defense sentencing memorandum.

MR. CLAYTON: I believe that sets our position out very well.

THE COURT: Mr. Gierloff.

MR. GIERLOFF: Thank you, Your Honor.

Before the court today for sentencing is Bobby Tatum on the charge of murder on the felony murder position. Our position, set out in the sentencing memorandum, is that Bobby Tatum may be legally responsible for the death of Dariel Overby by virtue of felony murder rule, but his participation in the events which caused her death was minor.

If you take Bobby Tatum out of the car, that he -- what would be different?

What would be different would be the firing of the .25 caliber, semiautomatic handgun after the

events had already transpired.

If you take Bobby Tatum completely out of the equation, everything else would be the same. Only other harm visited upon the Overbys would be identical.

Bobby Tatum's role in these events is -- what it is is that Bobby Tatum should be sentenced for the rule -- rules have changed in the last few years regarding the extent to which the victims of crimes are to be heard in court. And it's a balancing of one interest against another.

The -- there was a family whose daughter was kidnapped, sexually assaulted, murdered, who were essentially the poster family for the victim's bill of rights. The plight of that family was used as an illustration of how unfairly victims are treated by the system. They appeared at press conferences, and they were used as the examiner for what wasn't fair with our system.

On the strength of that, the victim's bill of rights -- and other issues, was enacted into law. The following year the same family had another tragedy. Their son was driving an automobile. He was racing another person and the vehicles crashed and someone was killed. That same family was then to heard complain loudly of how unfair the system to their son who was now

a defendant, that he could not adequately prepare his defense because of the provisions of the victim's bill of rights.

Both positions have merit. It depends on where you sit in the courtroom as to what's fair and what you perceive as what is just.

We can't really expect the survivors of the victims of the homicide to be objective. That's an unfair burden. Sometimes situations occur in such a fashion that people's character is truly displayed. Sometimes -- in all cases I think their character is truly displayed.

Sometimes surviving matters -- surviving victims -- and that has occurred here -- are able to conduct themselves with dignity, with pride, and can comport themselves in a fashion that no matter what else happens in this system, no matter what else happens to them, they can take away a sense of their own character of having been -- of having borne up under the burdens placed on them. And sometimes people also do not rise to that.

People in their suffering cannot look at the whole person. People have to in their pain demonize the person who they see as having caused their suffering. And they demonize those around that person also. They

demonize the person who's representing them, demonize that person's family.

And they have to do that for their own peace of mind, their own emotional well-being. That is one response to the situation.

Those of us who have had loved ones been victims of crimes -- those of us who have gotten that phone call and have had to tell their brother that his only son is dead at the age of 16 know the kind of pain that that involves.

And we also know that -- and it was said to this Court that this system, you, Your Honor, can't do anything for those people. You can't make them whole. You can't make that pain better. That has been recognized here.

And that is true. Whatever occurs, the Court can do nothing but try to dispense justice.

And the question is: What is justice?

The Court can't act as the voice of vengeance because avengeance doesn't make the pain go away.

The Court account alleviate the suffering caused by this situation. All the Court can do is try to do justice. The Court is pushed from all sides in trying to arrive at what is justice. The Court received

numerous letters from persons on both sides of this situation.

And some of the letters portrayed Bobby as a kind and loving and generous son, brother, sibling, or parent.

Some of them literally characterized Bobby as a rabid dog who should be put to sleep. Persons who never met Bobby characterized him that day.

Persons have written to the Court putting every ill of society on Bobby Tatum's shoulders. Words, the Court put Bobby Tatum to death to make them feel safer or better about society. Persons who are upset with the way teenagers conduct themselves today, who are upset with gangs, who are upset with the level of violence in our society want to visit all of that on Bobby's shoulders and have you hold him responsible for all of the ills.

The Court heard this in the hearing in this matter, the litany of ills with our society, this system. How long can this take? All of those things are being -- you're being asked to make Bobby Tatum shoulder the burden for all of those things for society in general for --

There was a letter making reference to friends of Bobby spraying graffiti around the courthouse.

So a person drives down the street and sees graffiti it is this transferance to Bobby Tatum. You are being asked to punish him for that.

You're supposed to be able to cure every ill of society by punishing Bobby Tatum. You were told at the 703 hearing and after it was over that you could not do anything for the surviving victims. And that is accurate.

As an alternative, you are asked to protect society from Bobby Tatum and to at least put him in prison for the rest of his life and to stack sentences on top of that to make sure that he would never again set foot out of prison because society needed that protection from Bobby Tatum. That is really our issue.

Who is Bobby Tatum? And what is in Bobby Tatum's heart, and what is his responsibility for what occurred?

You are urged, also, to do that so that Steven Overby need never see Bobby Tatum on the street, that Dianne Keith need never appear at a parole hearing, and that society will be protected from parole hearings.

I ask the Court: How is that going to protect Steven Overby from seeing Kevin Stevenson on the street tomorrow?

Kevin Stevenson, who will never do a single

day in jail for this crime. Keven Stevenson, who went with all the other young men in that car, was one of the primary proponents of doing this jack, Kevin Stevenson who had bragged to Bobby Tatum before this occurred of having done jacks before, Kevin Stevenson who in all likelihood was with Jay Flowers in the vehicle a few weeks earlier when Mr. Bivona was shot, Kevin Stevenson who bragged to James Gray of having used Jay Flowers SKS rifle to shoot down yet another individual on another occasion.

Society -- Kevin Stevenson testified for the State, Kevin Stevenson, who is out on the street today.

How is sending Bobby to prison; now is putting Bobby Tatum to death; now is sending him to prison for the rest of his life going to protect society from John Davis, John Davis, who entered into a plea agreement with the State in which he did not even have to plead guilty to a homicide?

He had a plea agreement with the State in which he had pled guilty to a homicide to the death of Daniel Overby but stipulated to a sentence of only ten and a half years, following the acquittal of Demont Hill, the man who drove the car that was stopped behind the Overby vehicle, trapping them in their driveway. After that event, Demont Hill was acquitted of the murder.

John Davis has got a better plea agreement. John Davis, who admits he is the person who first said, "What's up with the jack?" John Davis who originated the idea to commit some sort of crime that night, John Davis who admits that he was the individual that got out of the car at the bank, John Davis who admits that he had it in his mind to commit a crime at the bank, John Davis who admits that he got out of the car at the Overby residence, will be out of prison in ten and a half years.

Sentencing Bobby Tatum to prison for life will not protect the Overbys from seeing John Davis on the street someday. It will not protect them from having to go to a parole hearing for John Davis.

You were given a quote by Mr. Truter from Leviticus from 3400 years ago about an eye for an eye, which was actually a doctrine of limitation at that time, 3400 years ago, that was meant as a restraint. It was meant as a check upon blood retribution. It was meant by way of limitation 3400 years ago. 1400 years after that in Roman's 12; 19 is vengeance is mine. I will repay sayeth the Lord.

Now, if we give that too literal a reading it reduces all of this to a nulllity that can't be given -- that can't be literally true otherwise we would do nothing. We would do nothing but the Christian

precepts of turning the other cheek, frogiving those who trespass against us, and not seeking any sort of vengeance at this level. Such is clearly not acceptable.

We could not order as a society a literal reading of that passage. What we can do is recognize that that statement means that there is a superior being who is superior to us who knows better than us the heart of another person. And what we can do is to try to do justice, to try to minimize the impact of our desire for vengeance on those decisions.

Clearly, we can't simply walk away. But what we can do is to try to do justice, to listen to all sides, to not be overborne by emotion for either side, but to try to do justice.

We heard quotes from 3400 years years ago. You have heard quotes from 2,000 years ago. I would like to give you a quote from fairly recent history, the Arizona Constitutional Convention.

There was delegate James Crutchfield. Who was talking about a juvenile justice system who. As we have recently seen, this provision has been countermanded now.

When Arizona was a territory this man in speaking of youngsters said, at a time when he is most ready to crystalize his sentiment against principles of

right, when he probably for the first time rises up in rebellion against those underlying principles of law, I believe the people of this territory ought to provide at this time a means to prevent the further degeneration of our youth and give them the opportunity which they ought to have and the privilege which every noble young man cries for and clings to, a fair deal, and opportunity to do his best and to make the best of himself in life.

You can't give Bobby Tatum a fair deal. The best you can do for Bobby Tatum is to tell him he's going to spend the next 25 years of his life in prison. More years than he's been alive. That's the very best that this court can do.

Now, this speaker here was a man speaking when Arizona was a territory. It seems remote from where we are today. It's also -- it is remote, speaking 30 or 400 years ago. The officers of the gospels seem remote speaking 2,000 years ago.

But what that is, though, is there are certain human verities that remain the same. We're essentially the same people as we were thousands of years ago. We're the same people that we were a hundred years ago.

So what's changed? Society? Has society changed that greatly? Has society changed so much from

when Arizona was a territory?

Young people, boys, young men, do -- and young women do rebell against authority, do try to see what life is all about, and do sometimes meet with horrible consequences.

Has society changed that much? Are gangs so much more of a problem than other evils that visited themselves upon society a hundred years ago, a thousand years ago or 2,000 years ago?

Certainly, it seems that our capacity to use the consequences seem severe now.

THE COURT: Excuse me, we need to have it quiet in the courtroom.

(Off-the-record discussion.)

MR. GIERLOFF: Thank you.

The killing of Dariel Overby was a horrible crime. Teenagers today, human beings today, as human beings, are not vastly different than they have ever been. It will appear sometimes the consequences of things which in a different age -- it would appear that the consequences of things that appear now are so much greater than had they occurred in a different age. But the people are the same.

That this horror visited itself upon the Overbys through Jay Flowers does not change the essential

nature of what it was that was occurring with these young men that night. And it doesn't change Bobby Tatum's level of culpability.

Again, we have this disastrous consequences. Is that a function of who we are as a society now? Teenagers -- Bobby Tatum did not make society the way it is now. Teenagers don't run the world. Teenagers don't make our gun laws. Teenagers don't pass the laws. Teenagers don't run things. They don't make the movies. They don't make the culture.

Being asked again to put on Bobby Tatum's shoulders every ill of society -- Bobby's culpability is what Bobby Tatum's culpability is.

He was a minor participant. He's going to go to prison for life. The very minimum he will be in prison for more years than he's been alive today.

For what it is that Bobby Tatum did and for who he is that Bobby Tatum is I can't really say that that's just. I think -- I think it's unjust, but it's the best that the Court can do.

The people on the other side on the courtroom will agree that it's unjust. They will tell you that it's not enough.

We tried to put before the Court who it is that Bobby Tatum is. And I do ask the Court to do

justice.

Thank you.

THE COURT: Thank you very much, Mr. Gierloff.

Very eloquent.

Let me read the special verdict.

On June 24, 1996, the defendant, Bobby Jerry Tatum, Jr., was found guilty by a jury of Count I, conspiracy to commit armed robbery, a class 2 felony; and Count II, first degree murder, a Class 1 felony, and Count III, attempted armed robbery, a Class 3 dangerous felony, and in Count IV, aggravated aassaulted, class three, dangerous felony.

Count I was committed in violation of A.R.S. Sections 13-1003, 1904, 1902, 1901, 301, 302, 303, 304, and 701, 702, 801, and 812.

Count II is committed in violation of A.R.S. sections 13-1105, 1101, 301, 302, 303, 304, 703, 801, and 812.

Count III was committed in violation of A.R.S. Sections 13-1001, 1904, 1901, 1902, 301, 302, 303 304, 306(4)(B), and 701, 702, 801 and 812.

Count IV was committed in violation of A.R.S. Sections 13-1204(A)(2) and (B), 1203(A)(2), and 301, 302, 303, 304, and 701, 702, 801, and 812 and 604(B). And based upon the evidence adduced at trial in

the sentencing hearing and review of the presentence report in the Court's file, as well as the sentencing memorandum, and the letters, multiple, dozens of letters written on behalf of the victims and the defendant, and this court now renders its special verdict as to Count II, first degree murder.

The Court conducted an aggravation/mitigation sentencing hearing pursuant to A.R.S. Sections 13-703(B) on September 20, 1996, and on September -- excuse me -- on November 15, 1996.

Both the State and the defendant were given the opportunity to present evidence and argument concerning the existence or nonexistence of the aggravating and mitigating circumstances including A.R.S. sections 13-703(F) and (G). Both parties were given the opportunity to present any other relevant and mitigating circumstances not specifically included in A.R.S. sections 13-703(G) for the Court's consideration. And all of the material and presentence report has been disclosed to the defendant's attorney and to the prosecution.

And the Court having determined from the report that none of the material was required to be withheld for the protection of human life, and with regard to Enmund-Tison findings, the State charged the

defendant with felony first degree murder: i.e., that defendant committed or attempted to commit a crime and in the course and furtherance of this crime or immediate flight from this crime the defendant caused the death of the victim. All 12 jurors find the defendant guilty of felony murder on the first degree murder count.

For the Court to justify a death sentence on the count of first degree murder the Court must find beyond a reasonable doubt that the defendant was the killer and that the defendant intended to kill or attempted to kill or that the defendant was a major participant in the shooting that led to the killing, and that the defendant exhibited a wreckless indifference for human life. The defendant in this case was not charged with premeditated first degree murder.

Having now considered all the evidence and the charges filed against the defendant, the Court did not conclude beyond a reasonable doubt that the defendant intended to kill the victim.

However, that does not end the inquiry with respect to the Enmund-Tison issue. The death penalty is still a sentencing alternative to the first degree count if the defendant was a major participant in the acts that led to the killing and he exhibited a wreckless indifference for human life.

The Court now finds beyond a reasonable doubt that this defendant was a major participant in the shooting which led to the killing. Furthermore, this Court finds beyond a reasonable doubt that the defendant's conduct displayed a complete and utter disregard for the value of human life.

Without a doubt in the Court's mind this defendant engaged in the events leading up to the death of Daniel Overby.

Accordingly, this Court conludes the death penalty remains at this point a legal sentence for the Court to impose on Count II.

Findings:

Based upon the totality of the evidence before the Court, the following findings made as to the existence or nonexistence of each of the aggravating circumstances enumerated in A.R.S. Sections 13-703(F), and proven by the State beyond a reasonable doubt, and as to the existence or nonexistence of the -- any of the mitigating circumstances which the defendant has proven beyond by a preponderance of the evidence whether or not mentioned in A.R.S. Sections 13-703(G).

With regard to aggravating circumstances, statutory:

One, the Court finds that the State has not

proved the existence of the statutory aggravating circumstances set out in A.R.S. Sections 13-703(F)(1); i.e., that the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

And two, the Court finds that the State has not proved the existence in the statutory aggravating circumstance set out in A.R.S. Section 13-803(2); i.e., that the defendant was previously convicted of a felony in the United States involving the use or threat of violence to -- on another person.

And, three, the Court finds that the State has proved the existence of the statutory aggravating circumstance set out in A.R.S. Section 13- 703(F)(3), and i.e., that in the commission of the offense the defendant knowingly created a grave risk of death to another person, Steve Overby, in addition to the victim, Dariel Overby.

Four, the State finds -- excuse me -- the Court finds that the State has not proved the existence in the statutory aggravating circumstances set out in A.R.S. Section 13-703(F)4): i.e., that the defendant procured commission of the offense by payment or promise of payment for anything of pecuniary value.

Five, the Court finds that the State has

proved the existence of the statutory aggravating circumstance set out in A.R.S. Section 13-703(F): i.e., that the defendant committed the offense and as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

Six, as to the statutory aggravating circumstance set out in A.R.S. 13-703(F)(6), the Court finds that the State has not proved beyond a reasonable doubt that the defendant committed the offense in an especially heinous, cruel, or depraved manner. And the Court does not diminish the wicked or senseless nature of the act or that Dariel Overby's survivor were not devastated by the acts of the defendant and his fellow actor.

Seven, the Court finds that the State has not proved the existence of the statutory aggravating circumstances set out in A.R.S. 13-703(F)7); i.e., that the defendant committed the offense while in custody of the State Department of Corrections, a law enforcement agency or county, city or jail.

Eight, the Court finds that the State has not proved the existence of the statutory aggravating circumstances set out in A.R.S. 13-703(F)(8); i.e.,, that the defendant has been convicted of one or more other homicides as defined in A.R.S. 13-1101, which were

committed during the commission of the offense.

Nine, as to the statutory aggravating circumstance set out in A.R.S. Section 13-703(F)(9), the Court finds that the State has not proved both, one, that the defendant was an adult at the time the offense was committed or was tried as an adult and, two, the victim was less than 15 years of age. The defendant was a 17-year-old male, and the victim was a 32-year-old victim.

The Court finds that the testimony has not proved the existence of the statutory aggravating circumstance set out in A.R.S. Section 13-703(F)(10); i.e., that the murdered individual was an on-duty peace officer who was killed in the course of his official duties and the defendant should or should have known that the victim was a peace officer.

With respect to miigating circumstances, statutory:

One, the Court finds that the statutory mitigating circumstance set out in A.R.S. Section 13-703G)(1); i.e., that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution has not been proved by a preponderance of

the evidence and does not exist.

Two, the Court finds that the statutory mitigating circumstance set out in A.R.S. Section 13-703(G)(2); i.e., that the defendant was under an unusual and substantial duress, although not such as to constitute a defense to, has not been proved by a preponderance of the evidence and does not exist.

Three, the Court finds that the statute regarding mitigating circumstance set out in A.R.S. Section 13-703,(G)(3); i.e., that the defendant was not legally accountable for the conduct of another and under the provisions of A.R.S. Sections 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution, has not been proved by a preponderance of the evidence and does not exist.

Four, the Court finds that the statutory mitigating circumstances set out in A.R.S. Section 13-703(G)(4); i.e., that the defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause or would create a grave risk of causing death to another person has not been proved by a preponderance of the evidence and does not exist.

In other words, the Court finds that it has

been proven that the defendant could have reasonably foreseen that his conduct in the course of the commission of the offense in which the defendant was convicted would cause or would create a grave risk of causing death of another person.

Five, the Court finds that the statutory mitigating circumstance set out in A.R.S. Section 13-703(G)(5); i.e., the defendant's age, has been proved and it does exist. Defendant was 17 years old when this crime was committed, and his age is a mitigating circumstance.

And with respect to mitigating circumstances nonstatutory, the Court has also considered nonstatutory mitigating circumstances, including quote, any aspect of the defendant's character, propensities or record in any of the circumstances of the offense, quote, A.R.S. Section 13-703(G), and to determine whether there are mitigating circumstances, sufficiently substantial to call for leniency.

And the Court considered the defendant's presentence memorandum with testimony and evidence presented at trial and the sentencing memoranda and the sentencing hearing and the argument of counsel.

And the Court finds by the following nonstatutory mitigating circumstances, and -- excuse

me -- the Court finds that the following nonstatutory mitigating circumstances have been proved by a preponderance of the evidence and do exist.

One, the defendant's lack of a prior criminal record, the evidence showed according to the information received that the defendant has never been before arrested nor has he been convicted of any crime.

Two, the inconsistent verdicts in the Demont Hill case.

Three, immunity given to fellow participant Kevin Stevenson.

Four, the nonhomicide plea agreement given to fellow participant John Davis.

The Court finds that the following nonstatutory mitigating circumstance has not been proved by a preponderance of the evidence and does not exist:

One, the attenuated theory of liability in this case, conclusion, the Court's statementa that the State ha proved beyond a reasonable doubt to the presence of aggravated circumstances testified by A.R.S. Sections 13-703(F)(3) and 703(F)(5) and has failed to prove the existence of aggravating circumstances set forth in A.R.S. Section 13-703(F)(1), (F)(2), (F)(4), (F)(6), (F)(7), (F)(8), (F)(9) and (F)(10).

The Court further concludes that the

defendant has proved by a preponderance of the evidence the existence of the statutory mitigating factors provided by A.R.S. Sections 13-703(G)(5).

And the Court further concludes that the defendant has failed to prove by a preponderance of the evidence the existence of any of these statutory mitigating factors provided by A.R.S. Section 13- 703(G) 1 through 4. And the Court also concludes that the defendant has not proved by a preponderance of the evidence the following nonstatutory mitigating circumstances:

One, the defendant's lack of a prior criminal record. Two, the inconsistent verdicts in the Demont Hill case; three, immunity given to fellow participant Kevin Stevenson for a nonhomicide plea agreement given to fellow participant John Davis.

Mr. Tatum, would you step forward, please.

Mr. Tatum, will you state your name.

THE DEFENDANT: Bobby Jerry Tatum, Junior.

THE COURT: What is your date of birth?

THE DEFENDANT: 8/10/76.

THE COURT: It is the sentence of the Court and as to Count I, conspiracy to commit armed robbery, a class 2 felony and Count II, first degree murder, a Class 1 felony and Count III, attempted armed robbery, a Class

3 dangerous felony and Count IV, aggravated aassault, class three felony, dangerous felony.

It is the judgment of the court that you are guilty.

With respect to Count II, it is ordered that the defendant, Bobby Jerry Tatum, Jr., be imprisononed in the Department of Corrections for the balance of your natural life without possibility of parole.

It is further ordered that you shall pay restitution in the amount of $11,846.61 to the clerk of Superior Court of Maricopa County for the benefit of the victimss set forth in the restitution ledger request form.

Payment is to be made at the rate of 30 percent of your earnings while incarcerateed beginning January 1, 1997.

It is further ordered that the defendant pay a 12-dollar time payment fee unless all fines, penalties, and sanctions are paid in full on this sentencing date.

It is further ordered that you be sentenced to the remaining counts as stated in open court.

With respect to Count I, conspiracy to commit armed robbery, it is the further judgment and sentence of the court that you be sentenced to the department of corrections for the presumptive term of

five years.

It is further ordered with respect to Count III, attempted armed robbery, that you be sentenced to the department of corrections for the aggravated term of 15 years.

The Court finds specifically aggravation, use of a weapon and the effects on the victim's family.

The aggravating circumstances outweigh the mitigating circumstances previously discussed.

With respect to Count IV, the aggravated aassault, it is the further judgment and sentence of the court that you be sentenced to the department of corrections for the aggravated term of 15 years. The same consideration of aggravating circumstance and mitigating circumstances was made.

You are committed to the Department of Corrections and given credit -- the Court has calculated 923 days of presentence presentence incarceration for each of the three respective counts.

This judgment shall be the authority for the director of the department of corrections to incarcerate you for these periods of time and the authority for the sheriff to transport you to the department of corrections.

It is further ordered remanding you to the

custody of the sheriff.

And it is further ordered that you shall serve under the supervision of the community supervision program to be served consecutive to the prison sentence imposed the terms of one-seventh of five years, one-seventh of 15 years, and one-seventh of 15 years to be served consecutive as mentioned.

With respect to the consecutive nature of the offenses, the Court considers the conspiracy to have been proven as to the events earlier in the evening.

And it is ordered that Count I be served consecutive to Count II.

The Court finds significant -- significant connection between Counts III and IV. It is further ordered that those counts be served concurrent with Count II.

The Court is satisfied that Mr. Tatum will spend the rest of his natural life in prison, that he will not be released in any fashion, that the legislature will not change the statutes which he is sentenced under and that the family need not fear that he will be paroled or have the sentence commuted in any way.

Is there any additional comments from counsel, the State?

MR. CLAYTON: No, Your Honor.

THE COURT: Anything from the defense?

MR. GIERLOFF: I can think of nothing, Your Honor.

THE COURT: Ms. Hinchcliffe, did you give your?

MS. FISCHER: Ms. Fischer.

THE COURT: Ms. Fischer, did you give your appearance for the record.

MS. FISCHER: Mr. Gierloff did.

THE COURT: Okay. Thank you.

If nothing else, then, the matter will be adjourned.

Thank you. Well take a short recess.

(Break)

THE COURT: If I can recall the Tatum matter, there are two matters that I did not cover for either counsel.

Was there any legal cause why the court could not render sentence?

MR. GIERLOFF: No, Your Honor.

MR. CLAYTON: No, Your Honor.

THE COURT: Mr. Tatum, I did not give you the right of allocution. I apologize for that.

Is there anything that you wish to say or that you had wisned to say before I began the sentencing?

THE DEFENDANT: I just like to apologize to the

victim's family for what happened, and I don't have really nothing else to say.

THE COURT: Thank you.

I am satisfied that you feel more remorse than the victim has family thought.

Thank you.

THE DEFENDANT: Thank you.

MR. GIERLOFF: Did the Court advise him of the right to appeal?

THE COURT: I did not.

THE COURT: Mr. Tatum, you have the right to appeal the verdict of the jury and sentence of this court.

If you need an attorney to assist you in that matter and if you need paperwork to assist you, they can be provided to you at no cost.

You must file your notice of appeal and begin your appeal efforts in 20 days of today or you lose that right.

Thank you very much.

MR. GIERLOFF: Thank you, Your Honor.

(Adjourned at 10:03 a.m.)

* * * *

Appendix F

Clerk of the Superior Court
*** Electronically Filed ***
01/25/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1994-005821 01/18/2022

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

CHRISTOPHER TODD SAMMONS
JULIE ANN DONE

v.

BOBBY JERRY TATUM (A)

STEPHEN L DUNCAN

JUDGE STARR

UNDER ADVISEMENT RULING

The State has asked this Court to allow it to withdraw from its stipulation to resentencing and vacate the pending resentencing. For the following reasons, the Court vacates the resentencing and affirms Tatum's natural life sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Tatum of first-degree murder, a dangerous offense. At the time of the offense, Tatum was 17 years old. The trial court sentenced Tatum to natural life.

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

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1994-005821 01/18/2022

II. LEGAL ANALYSIS

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

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

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

Here, the trial court considered Tatum's young age of 17 at the time of the homicide, the circumstances of the offense, the extent of Tatum's involvement in the crime, his ability to control his impulses, his intoxication the night of the murder, and his prior demonstration of responsible behavior. The Court also knew that Tatum did not shoot the victim. The parties presented the trial court with extensive information about Tatum and the effect of his youth on his culpability and conduct; the trial court noted that it had considered all that information. Thus, the trial court satisfied *Miller*'s requirements.

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

> *Miller*, as clarified by *Montgomery*, represents a "clear break from the past" for purposes of Rule 32.1(g). Arizona law, when Healer and Valencia were sentenced, allowed a trial court to impose a natural life sentence on a juvenile convicted of first-degree murder without distinguishing crimes that reflected "irreparable corruption" rather than the "transient immaturity of youth."

Valencia, 241 Ariz. at 209, ¶ 15.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1994-005821 01/18/2022

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

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

Jones later addressed that confusion, clarifying the requirements for a constitutional life without parole sentence for a juvenile offender. As the Ninth Circuit Court of Appeals recently explained, "*Jones* clarified that a 'discretionary sentencing system is both constitutionally necessary and constitutionally sufficient,' because such discretion 'suffices to ensure individualized consideration of a defendant's youth.'" *United States v. Briones*, 18 F.4th 1170, 1175 (9th Cir. 2021) (internal citation omitted).

Here, Tatum's natural life sentence was constitutionally imposed. Thus, even if *Miller* applies in Tatum's case, he has not asserted a colorable claim for post-conviction relief because he received a sentencing at which his youth and attendant characteristics were considered.

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1994-005821 01/18/2022

III. CONCLUSION

Based on the foregoing,

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

Appendix G

RICHARD M. ROMLEY
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. WILLIAM NAJAR, CEDRIC RUE Defendants.	NO. CR 98-93180 STATE'S NOTICE OF WITHDRAWAL OF NOTICE OF INTENT TO SEEK THE DEATH PENALTY (Assigned to the Honorable James Keppel)

Defendants, having been convicted of First Degree Murder by a jury on October 15, 2001; the State having previously filed Notice of Death Penalty; the jury's verdict having found Defendant's guilty of premeditated murder, and guilty of a lesser included Theft, the Defendants' age as well as psychological history for both Defendants, the State hereby withdraws it's Notice of Intent to Seek the Death Penalty and seeks a sentence on both Defendants of Natural Life.

Submitted October 25, 2001.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY _____
Mark L. Barry
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
25 day of October, 2001,
to:

The Honorable James Keppel
Judge of the Superior Court

Tonya McMath
Attorney at Law
111 W. Monroe, Suite 1650
Phoenix, Arizona 85003
Attorney for William Naja

Gregory T. Parzych
Attorney at Law
1811 S. Alma School road, Suite 230
Mesa, Arizona 85210
Attorney for Cedric Rue

BY _____
Mark L. Barry
Deputy County Attorney

Appendix H

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. WILLIAM FRANKLIN NAJAR (B), CEDRIC JOSEPH RUE JR. (C), Defendants.	1 CA-CR 02-0006 No. CR 98-91380

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SENTENCING

BEFORE: THE HONORABLE JAMES H. KEPPEL, Judge

APPEARANCES: Mark L. Barry
Represented the State

Tonya J. McMath
Represented Defendant Najar

Gregory T. Parzych
Represented Defendant Rue

December 20, 2001
1:35 p.m.
Mesa, Arizona

COPY

LAURIE R. YAZWA
Official Court Reporter
Certified Reporter #50184

P R O C E E D I N G S

THE COURT: Good afternoon, ladies and gentlemen. These are cause numbers CR 98-93181, State versus William Franklin Najar, and CR 98-93180, State versus William Franklin Najar and Cedric Joseph Rue.

Both defendants are present in custody. Mr. Barry is here for the State. Mr. Parzych is here on behalf of Mr. Rue and Miss McMath as to Mr. Najar on both cases.

With regard to CR 98-93181, I understand the defendant is going to plead guilty to the charges in the indictment at this time; is that correct?

MS. McMATH: That's correct, Your Honor.

THE COURT: All right. Mr. Najar, you may come down.

Sir, is your true name William Franklin Najar?

DEFENDANT NAJAR: Yes, sir.

THE COURT: Have you ever used any other name?

DEFENDANT NAJAR: No, sir.

THE COURT: What is your date of birth?

DEFENDANT NAJAR: 2-13-82.

THE COURT: How far have you gone in school?

DEFENDANT NAJAR: GED.

THE COURT: Do you read and understand English?

DEFENDANT NAJAR: Yes, sir.

THE COURT: Mr. Najar, during the past 24 hours, have you had any drugs, alcohol, or medication that would cause you to be unable to understand what we're doing?

DEFENDANT NAJAR: No, sir.

THE COURT: You've been charged in this cause number CR 98-93181 with Count 1, burglary in the first degree, a Class 2 felony, Count 2, theft, a Class 2 felony, and Count 3, criminal damage, a Class 5 felony. It's my understanding you're going to plead guilty to all three of those charges at this time; is that correct?

DEFENDANT NAJAR: Yes, sir.

THE COURT: As a result of your plea of guilty to Count 1 and 2, you could be sentenced to the Arizona Department of Corrections for anywhere from three to 12.5 years, and the presumptive term would be five years.

As to Count 3, the range would be six months up to two and a half years, and the presumptive term would be 1.5 years.

If you were sentenced to the Department of Corrections, you would have to serve terms of community supervision equal to one-seventh of your respective prison terms to be served after those terms of imprisonment. If you violated any term of your community supervision, you

could have to serve the rest of that term back in the Department of Corrections.

Also, for each of these offenses, you could be fined up to $150,000, and the surcharge would be, what, 60 percent, Counsel; is that correct? That's my recollection.

Technically, the Court would have the ability to place you on probation if certain legal and factual reasons justify doing that. If you were placed on probation, as to each count you could have to serve up to one year in the county jail as a condition of your probation.

Also, you would have to waive extradition proceedings if probation revocation proceedings were brought against you.

Also, you would have to make full restitution for any economic loss suffered by a victim.

Now, do you understand these consequences of your pleas?

DEFENDANT NAJAR: Yes, sir.

THE COURT: Are you on probation or parole in any other case at this time?

DEFENDANT NAJAR: No, sir.

THE COURT: By pleading guilty, you're giving up certain important rights, and I'm sure Miss McMath has

discussed those with you. However, I will cover them again at this time.

First, you're giving up your right to keep your pleas of not guilty and have a trial by jury at which you would be represented by your attorney.

You're giving up your right to confront and cross-examine any witnesses who would testify against you.

You're giving up your right to present your own evidence, testify in your own behalf, if you choose to do so, and compel the attendance of witnesses be subpoena.

You're giving up your right to remain silent and refuse to testify at trial.

Finally, you're giving up your right to have an appellate court review these proceedings by way of a direct appeal. Your only method for review would be pursuant to a Notice of Post-Conviction Relief, which you could bring pursuant to Rule 32 of the Rules of Criminal Procedure.

Now, do you understand all of these rights?

DEFENDANT NAJAR: Yes, sir.

THE COURT: And do you wish to give them up so you can plead guilty?

DEFENDANT NAJAR: Yes, sir.

THE COURT: Have any promises or agreements of any kind been made in this case to get to you plead guilty?

DEFENDANT NAJAR: No, sir.

THE COURT: Has any threat been made or has any force been used to get to you plead guilty?

DEFENDANT NAJAR: No, sir.

THE COURT: Do you understand that by your plea of guilty, your record will show a conviction for these offenses regardless of what your sentences are?

DEFENDANT NAJAR: Yes, sir.

THE COURT: At this time, sir, how do you plead to the charges set forth in the indictment?

DEFENDANT NAJAR: Guilty.

THE COURT: Miss McMath?

MS. McMATH: Thank you, Your Honor. With regard to Count 1, the State's evidence at trial would be that on or about the 15th day of June, 1998, Mr. Najar originally was an invited guest of Daniel W. Rees' son at their home at 743 West Roseall Place, Chandler, Maricopa County, Arizona.

During the night, Mr. Rees's son and another guest apparently fell asleep. While remaining in their home or residential structure, Mr. Najar then, without permission, took some items from the home, committing a theft. Among the items taken from the home were deadly weapons, a rifle and a shotgun, and that all happened in Maricopa County. That would be the factual basis for Count 1. And when Mr. Najar took the rifle and the

shotgun, he knowingly possessed them.

THE COURT: All right. What about Count 2?

MS. McMATH: Count 2, one of the items that Mr. Najar took from the residence was a 1998 Chevrolet truck belonging to Mr. Rees, and that had a value of $25,000 or more but less than $100,000. Well, the aggregate of all the property taken.

Subsequently, with respect to Count 3, Mr. Najar caused property damage to the 1998 Chevrolet truck belonging to Mr. Rees in an amount of 2,000 or more but less than 10,000, and all of those acts again occurred in Maricopa County, Arizona.

THE COURT: Mr. Najar, did you hear everything that Miss McMath stated about your conduct on this occasion?

DEFENDANT NAJAR: Yes, sir.

THE COURT: Is everything she stated true and correct?

DEFENDANT NAJAR: Yes, sir.

THE COURT: Anything further, Mr. Barry, or anything from the victim?

MR. BARRY: No, Your Honor, but I will point out to the Court that the victim has been notified and is present in the courtroom.

THE COURT: Thank you.

Mr. Najar, do you have any questions for the attorneys or me at this time?

DEFENDANT NAJAR: No, sir.

THE COURT: Are you in any way dissatisfied with the services of your attorney?

DEFENDANT NAJAR: No, sir.

THE COURT: All right. On the basis of the record, I find that Mr. Najar knowingly, intelligently, and voluntarily enters pleas of guilty to the three charges set forth in the indictment in this matter. I find there are factual bases for the pleas. The pleas are accepted and entered of record at this time.

You do have the right, sir, to have your sentencing not less than 15 nor more than 30 days from today's date. It's my understanding from Miss McMath that you wish to be sentenced today. Is that correct?

DEFENDANT NAJAR: Yes, sir.

THE COURT: All right. We will pronounce sentence along with the sentences on the other matters on the other case. So, we'll take a recess on this matter at this time and come back to that later.

MS. McMATH: Thank you, Your Honor.

THE COURT: The next matter on the calendar is Mr. Rue's motion for new trial presented by Mr. Parzych. I've considered the defendant's written motion, the State's

response.

Is there anything further, Mr. Parzych, in the way of oral argument?

MR. PARZYCH: No, Your Honor. I'll rely on the written motion.

THE COURT: Thank you.

Mr. Barry, anything further?

MR. BARRY: I will do the same, Judge.

THE COURT: All right. Having considered the motion and the response, it is ordered denying defendant's motion for a new trial at this time.

Having said that, are the parties ready to proceed with sentencing on all matters?

MR. BARRY: Yes, sir.

THE COURT: And, Mr. Barry, do you have anyone who wishes to address the Court other than yourself?

MR. BARRY: Yes, Your Honor. I have both Mr. Dan Rees on the burglary theft that Mr. Najar just pled to, and then I also have Mr. Decker's mother who wishes to make a statement.

THE COURT: Very well. You may proceed.

MR. BARRY: Judge, if it please the Court, can I put the microphone up at the podium?

THE COURT: There should be one there.

MR. BARRY: Oh, I'm sorry.

THE COURT: Good afternoon, sir. Would you step to the podium, please, and please state your full name?

MR. REES: Daniel Warren Rees.

THE COURT: Sir, what would you like to tell me?

MR. REES: I don't think any purpose can be served by giving him any sentencing in regards to the property and the auto theft as far as making it a concurrent sentence. I think it's obvious with the State with the way Arizona once again being found to be the number one auto theft state that the number of crimes that people are caught for are significantly higher.

Based on that presumption, we can assume that there were many more crimes committed than that which they have been found and tried for.

I really want this to be a hearing, though, for Michael Decker, and I want to defer to Mrs. Decker at this time because that's really what's important at this issue and nothing to do with personal possessions.

I only hope those people that are associated to this, not only the defendants, but those people that were friends and family of theirs, who aided and abetted them during this time, realize that they're as guilty in allowing this to occur as William and Cedric are

themselves, and that people have the opportunity to change the direction of other people's lives by supporting and defending it and making excuses for it. They only extend the lengths at which those problems will continue to grow.

And we have a perfect example right here of what the final result can be, and, unfortuately, it took a tragic series of events and bringing in -- dragging Michael Decker into this, a completely innocent victim.

I'm sorry, that's it.

THE COURT: All right. Thank you, sir. I appreciate your comments.

Mr. Barry?

MR. BARRY: Judge, Joan Decker would like to make a statement to the Court. She does have laryngitis, and that's the reason I was going to use the other microphone, if I could.

MS. DECKER: My voice is not very good today.

THE COURT: All right. Mrs. Decker, good afternoon, and, just for the record, your name is Joan Decker?

MS. DECKER: That's correct.

THE COURT: Mrs. Decker, what would you like to tell me?

MS. DECKER: This past three and a half years have been a terrible burden for me. I lost my only son,

and I only have my father left. My father's 88, and there's just me, and there's no one else in my family left, no grandchildren, no children.

And these boys did this unspeakable, cold act for no reason. It was cold and inhuman. They should never be allowed to be free, never. Thank you very much.

THE COURT: Thank you, Mrs. Decker.

Miss McMath, is there anyone you would like to present?

MS. McMATH: Briefly, Your Honor, may I inquire -- the Court didn't indicate whether it had received a sentencing submission I filed in early November with Dr. Lewis' report and Mary Durand's time line.

THE COURT: I have received the packet, and you submitted a supplemental or that was Mr. Parzych?

MS. McMATH: I submitted a supplemental yesterday.

THE COURT: That was yours. Yes, I did receive both.

MS. McMATH: With that, Your Honor, Miss Durand has some brief follow-up.

THE COURT: Good afternoon, Miss Durand.

MS. DURAND: Good afternoon, Your Honor.

THE COURT: Would you please state your full name for the record?

MS. DURAND: Yes, Mary Patricia Durand.

THE COURT: What would you like to tell me?

MS. DURAND: Your Honor, when I got involved in this case at the behest of Miss McMath after the notice of intent to seek the death penalty had been filed, I did an extensive family history, and I believe that you probably have a very large packet of the time line. The time line was done because the records of this young man's problemed life were so voluminous that to bring them in would have been stacked from the top of that table to the computer.

I've been doing this a long time, and I'm not sure I've had a client who at such a young age had been -- I hate to say predestined to be in front of you, but I think I would have to say that.

I am not excusing his behavior, but it certainly is important for us in determining social policy and how we treat youth that are as abused, neglected, abandoned, and emotionally and mentally disturbed that he started attempting suicide at age four that we need to know why people end up doing what they did.

My heart goes out to Mrs. Decker. She is terribly alone because it was, in fact, her only son. This is also the only son of the Patka family. However, even though some valiant efforts were made by the family to correct damage that had been done, it came too little and

way too late, and the result is that Billy's here.

When Dr. Lewis, who has done these kinds of cases all over the country and is considered one of the top experts in juvenile violence, reviewed this case, and I worked with her for four straight days when she was here, both of us were astounded that Billy had not done something like this long before, given the history of violence that he himself had lived in.

I know that you're going to make your decision. I just wanted you to know that while there is tremendous mitigation to save him from the death penalty, I would make no other recommendation than that.

THE COURT: Thank you, Miss Durand. I appreciate your comments.

Mr. Parzych or Miss McMath, is there anyone else who wishes to address the Court?

MS. McMATH: I just need to check with the family.

I guess Mr. Najar's maternal grandmother Judy Gagnier also wishes to make a brief statement.

THE COURT: Very well.

Good afternoon, ma'am.

MS. GAGNIER: Good afternoon, Judge Keppel.

THE COURT: What is your full name, please?

MS. GAGNIER: Judith Gagnier.

THE COURT: How do you spell your last name?

MS. GAGNIER: G-a-g-n-i-e-r.

THE COURT: Thank you. What would you like to tell me?

MS. GAGNIER: I'm Billy Najar's grandmother. He was my firstborn grandchild. He has probably lived more than one-half his life with me. I've never been far away from him. I've always been there for him. He and I have bonded as closely as a mother and a child.

I wanted you to know that, even though Billy was raised in a dysfunctional family, I've never witnessed in all his life him to be a violent person, to be cruel to animals or to small children, take advantage of someone that was defenseless. He was afraid of violence. I've seen him be very kind and gentle to his younger cousins, so much as feeding them, carrying them in his arms when they are fussy until they fell asleep.

The heartache began and his trouble began as he neared being a teenager. We went to help many times and many places. Some of those were individual counselors, Al-A-Teen. I took him to Al-A-Teen, and he was placed in a daily in-house counseling, Parc House, as an outpatient. At that time he was 12 or 13, and we were going to ComCare, a state agency in Tempe. At that time I pleaded at a staff meeting for an evaluation with Billy that he would be

placed in a locked-down facility because I knew he was troubled, and they told me at that time that his behavior was not bad enough to place him in a lock-down facility.

I knew that he needed help, but we ran out of resources. So, Billy's life escalated, drugs, a lot of use of drugs for many years starting at 11, and then skipping school, dropping out of school, running away, and sometimes living in the streets, but, again, during this time I and many of his friends told me that they never saw Billy be violent. He tried to stop fights, not provoke them.

And during that time he was never involved in trouble with the law except that when we reported him missing because he had run away. But like a ball running down a hill that you can't stop, Billy's use of drugs and his bad behavior escalated, and it was hard to stop his choices and his behaviors, and then came June of 1998.

I want to tell Mrs. Decker that I'm so sorry -- excuse me -- that I'm very sorry for her pain and her loss. I know of that pain and sorrow because I have lost my grandson in many ways. Mike Decker should have never lost his life, and really my grandson should not be here pleading for his.

My sorrow, Judge Keppel, is so deep that if I had known in the beginning as a young person that the history of depression and addiction in my family genes

would have passed to my children and then to my grandchildren, and even though they've given me much joy, I would have not had children to prevent this tragedy from happening.

I believe that Billy did not understand cause and effect. He did not understand cause and consequences. I truly believe his brain was not developed, like they are proving. He was unable to help himself or allow us to help him to stop what happened.

I have visited Billy every week for the last three years, and I have been -- week after week, month after month, year after year I have seen him grow into an astounding young man in spite of living in a jail and in spite of what has happened in his life. I've witnessed and shared and prayed and discussed with him his steps to maturity.

I've watched him grieve for Mike Decker. I've seen him come -- try to come to a struggle with peace for his part of the tragedy, and I've seen him come to peace with his God, and, beyond belief, my grandson has become the man that has comforted me many times.

I would like to tell you one more thing. When Billy was three, he and I went camping alone together. It was the first time. We went many times, and we found a little place up in the mountains near Young, Arizona. We

discovered together a piece of heaven on earth, and there was a little creek, and we sailed twig and grass boats that we had made together.

Judge Keppel, I ask your mercy at sentencing Billy. Please give him a ray of hope and give me a ray of hope that someday he and I can return to our favorite spot. I truly believe that he has become a good citizen. He has made many accomplishments in prison already, and I know that Billy has made a change in this world, and he will make a difference in this world if given a chance. Thank you.

THE COURT: Thank you, ma'am. I appreciate your comments.

Miss McMath?

MS. McMATH: Nothing further.

THE COURT: Mr. Parzych?

MR. PARZYCH: Your Honor, did the Court receive Dr. Parrish's report that was provided not only yesterday but awhile ago?

THE COURT: Yes.

MR. PARZYCH: I believe Mr. Barry has that, as well. That contains a lot of the history we would give the Court's attention. We have nothing else.

THE COURT: All right. Mr. Barry, do you have anything you'd like to say?

MR. BARRY: Yes, Judge, I do. First of all, did you receive my sentencing memorandum?

THE COURT: I did.

MR. BARRY: Thank you, Judge. Addressing the change of plea just a few moments ago, I don't know if we mentioned that we had discussed restitution being something less than $12,000.

THE COURT: All right. Going back to CR 98-93181, I did confer briefly with counsel in chambers before we came in and understand that, although there's not a plea agreement in this case, the parties have agreed with regard to restitution there will be a cap on restitution, and that cap will be how much?

MR. BARRY: $12,000.

THE COURT: Is that correct?

MS. McMATH: It is, Your Honor.

MR. BARRY: Judge, I did confirm it was 60 percent, the surcharge on that.

THE COURT: All right.

MR. BARRY: In terms of the death of Michael Decker, Judge, I've set forth my position in the sentencing memorandum, but I've also read thoroughly through the presentence report.

Some of the letters -- the letters are very touching and moving to me, and they certainly demonstrate

what perhaps they can't demonstrate, what society is going to be losing with the death of Michael Decker.

But one of the things that perhaps stood out in my mind is in reviewing these letters there's a letter by Kimberly Geyer. I don't know how to pronounce that, but, in any event, she talks about how Michael Decker saved her life one time when she was swimming, and it sort of brought to my mind, this being the season, that Jimmy Stewart movie about a wonderful life where he saves his brother from drowning who then goes on and saves a whole ship of men from being destroyed during the war.

And so, my point is this. We never really know the impact the loss of a human life has on our society as a whole, but we do know that when we look at these two defendants and the circumstances that we have in this offense and what they did, and we consider the aggravating factors that I've set forth, that these two young men should never have an opportunity to be out in society at large again, that they should always remain in the custody of the Department of Corrections.

Judge, the other thing that I wanted to point out to the Court, I did not notice a letter from Mr. Gary Meinders, who appeared during the -- for interviews during the course of the trial and also made statements, also appeared to testify during trial, and one of the things

that perhaps hasn't been said that needs to be said, and I notice there's a little mention of it in Mr. Engdahl's letter, is that this takes away, at least for campers like Gary Meinders, the idea or the ability to go out and relax by oneself out in a campground without being approached by individuals like these two defendants. It forever changes his outlook, and I'm sure in terms of Mr. Engdahl, his outlook, as well as in terms of his ability to go out in the great outdoors, as Mr. Decker obviously enjoyed a great deal in the great outdoors, and have an opportunity to get away from city life and enjoy those outdoors, can't be done anymore.

The last thing I wanted to say, Judge, is over the course of the last two and a half years in dealing with Mrs. Decker from the beginning of this case, I've observed her physical health essentially deteriorate. Her emotional -- the emotional impact on her throughout the course of these proceedings, you had an opportunity to see, not only in the trial, but today. It hasn't changed. It's been there constantly.

Judge, I implore the Court to sentence both defendants in this case, Mr. Rue and Mr. Najar, to a sentence of natural life on the murder counts. Thank you.

THE COURT: Thank you.

Miss McMath?

MS. McMATH: Yes, Your Honor. Turning, first of all, to the indictment that Billy just pled guilty to today, we would just point out in that particular case that Billy had no prior record, and we would ask the Court to sentence him to terms of not more than presumptive terms and suggest that as to Counts 1 and 2 at least that they be required by law to run concurrently.

As Mr. Rees has candidly acknowledged on the more serious case, the grave case that brings us here today, really I would point out in addition to Miss Gagnier who spoke, Billy has a number of other family members present, his aunt, his mother, who wanted to speak previously, but, because they feel so much emotion or don't want to be duplicative, have chosen not to address the Court directly.

In Billy's case, he comes before you -- this case comes before you with a number of aggravating factors present and a number of mitigating factors present, and that's what I want to talk about.

We don't deny that there are aggravating factors present. Turning to the State's sentencing memorandum, we agree that the acting in concert -- no, the first one is the physical, emotional, and financial harm caused to the victim's family. Undoubtedly, unquestionably that's present in this case.

The presence and participation of an accomplice we agree is an aggravating factor that is present in this case.

The senselessness and helplessness of the killing is an aggravating factor which is present in this case, although we do take issue somewhat with the State's characterization of the reason why the killing was senseless.

Mr. Barry asserts that it was senseless in part because the defendants could have taken the victim's property and left; instead, they chose to kill the victim and take his property. I think that's one of the fundamental differences that Mr. Najar and the State have had since the inception of this case, which is what, in fact, motivated the shootings.

Our position would be that the jury verdicts of not guilty, unanimous verdicts of not guilty on the conspiracy count and the armed robbery count should indicate that the State has not proven at least beyond a reasonable doubt that the killing was motivated by the expectation of pecuniary gain, and, for that reason, we would disagree with the fourth aggravating factor that the State indicates is present, which is pecuniary gain.

There are, however, a number of mitigating factors present in this case which the State hasn't taken

into account, many of which the probation officer has not taken into account.

The probation officer asserts that Billy's youthful age is a mitigating factor, and we wholeheartedly agree with that. As the Court knows from the trial, Billy was 16 years of age when this offense occurred.

The probation officer suggests that none of the other statutory mitigating factors are present in this case, and with that we would disagree. Specifically, we would urge the Court to find that subsection H11 is present, that is, the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, was significantly impaired, but not so impaired as to constitute a defense to prosecution.

That is the bottomline finding of Dr. Dorothy Lewis in her evaluation of Billy after having spent hours and hours and hours with Billy and with his family, and I quote from page 16 of her report, "Given Billy's long-standing untreated manic depressive (bipolar) mood disorder and his peculiar mental condition at the time of the shooting, it is accurate to say that he was suffering from a mental disease or diseases that significantly impaired his ability to appreciate the wrongfulness of his act and to conform his conduct to the requirements of law."

I do not believe that this Court has been

presented with any information from any party to refute that finding by Dr. Lewis. In observing that there's no similar finding in the probation officer's report, that may be in some fashion me being remiss on my part, because I don't believe I provided the presentence writer with a copy of Dr. Lewis' report.

Other mitigating factors that we believe are present that were related to Billy's mental state at the time is alcohol and drug impairment, and the Court heard a wealth of testimony at trial, principally from Brian Mackey and Greg Richmond, about the drugs that Billy and the others had been doing leading up to the shooting.

The Court heard some evidence through -- and his name presently escapes -- Ryan Major that Billy told him in confessing to the killing afterwards before his arrest that at the time of the killing Billy had been hallucinating, taking LSD, and that evidence came through Ryan Majors So, we would suggest that is a mitigating factor.

In general, the dysfunctional lifestyle in which Billy was raised, and the Court's got all that information before it, but we believe those are all mitigating factors that the Court needs to weigh in determining the appropriate sentence in this case in the admitted light of the presence of aggravating factors.

Finally, I'd ask the Court to recall Dr. Wellek's testimony that was referenced briefly by Miss Gagnier about the prefrontal lobe development of adolescents and that at age 16 Billy's prefrontal lobe -- well, the doctor didn't testify to Billy specifically, but in general terms the prefrontal lobes of 16-year-olds are undeveloped, and I would ask the Court to take that into account in considering whether it's appropriate to render Billy eligible for parole. Obviously, not mandating his parole, but rendering him eligible for parole many years down the road at a time when his brain development will have completed and at a time that we don't know what the state of psychiatric and other mental health services might be available.

And, for those reasons, we would ask the Court to on Count 1 impose a sentence of life imprisonment with the possibility of parole. Thank you.

THE COURT: Thank you, Miss McMath.

Mr. Parzych?

MR. PARZYCH: Judge, one of the things Mr. Barry said, he actually made a good point, actually, not one, but one in particular that, quite frankly, kind of made me think, is he talked about Michael Decker and the fact that we now will never know what Michael Decker's future would be and what Michael Decker -- how many people

he would have affected in a positive light if he would still be alive.

And I guess I'm asking the Court to consider that when it's considering the sentence of Mr. Rue. We don't know what 25 years from now is going to bring, and, clearly, the Court has two options, natural life or the possibility of parole in 25 years.

We have a kid that had just turned 16 when this occurred that had been on drugs since age 10, and, again, we presented Dr. Parrish's report, and it seems like almost every 16 and 17-year-old that was involved in this case has that same background and same history.

We don't know what Mr. Rue's going to be like once he's finished his education in DOC and completed his GED, once he's cleaned up and been off drugs for a number of years, once he's become an adult, and, as Dr. Wellek testified, his brain is fully developed.

We don't know that, and to predict that, as the presentence report writer does on page 12, "Were Cedric ever allowed back in society, it is entirely likely that Cedric would kill again," we don't know that, and what we're asking this Court to do is to not make that determination yet, but give somebody else that chance 25 years from now.

Obviously, if Cedric goes off to prison and

gets in trouble in prison and doesn't do anything but sit around and get in trouble, he's never going to get that chance at parole, and they're going to deny parole anyway, but if Cedric changes his life and becomes the person that it seems like he can become, at least 25 years from now somebody can look at it and say, "Look, here's the positive things he's done since. Here's what happened since he became older, since he got off drugs. He still can be somebody that can be helpful to society." At that point they can make that recommendation to the parole board and the parole board can decide.

That's all we're asking for from this Court is not to release him in 25 years, but give him that opportunity, actually give somebody else that opportunity.

Regarding the mitigating factors, I think age is a clear mitigating factor. Again, he had just turned 16. You heard testimony from Dr. Wellek about the prefrontal cortex and how it's not fully developed. In Cedric's case, in addition, you have the report from Dr. Parrish that specifically ran the full neuropsych battery on Cedric and found that he does suffer from impulsivity and, again, that he can change given his age. We ask you to consider that.

We also ask you to consider remorse, and I know there's been letters in here that indicate that Cedric has

shown no remorse. In these types of cases, Judge, if Cedric gets up and says, "I'm sorry" right now, the argument goes from the State he's sorry that he got caught and he's sorry that he got convicted. If he doesn't say he's sorry, he's not showing any remorse.

What I ask the Court to do is consider what the testimony was, that immediately after the shooting what the look on Cedric's face was. It was basically what did we just do, and, in fact, the quote he said is "What the hell did we just do?" That shows at the time immediately after that that at some point after it occurred Cedric realized what did we just do. I think that's a clear indication of remorse in thinking that, listen, we just murdered somebody. So, I would ask the Court to consider that.

I'd also ask the Court to consider at least at this point family support, and I know the Court's been aware on both sides a number of family members that have been not only for sentencing but throughout the trial. Cedric's mother's been here every day of trial, and, again, that goes for all the family members.

Aggravating factors, Judge, absolutely this had an adverse effect on Mrs. Decker and the family and his friends. I mean, unfortuately, in every murder that happens. There's a tremendous impact on Mr. Decker's family and friends. You're going to get that in every

murder case. We acknowledge that, just like we acknowledge the senselessness of this.

I think that's one of the biggest problems we all had with this case when we started hearing the testimony, how this all started with Josh and everyone said no, no, no, including Cedric and Billy, and it just happened. But, again, in a murder case you get that. What murder isn't senseless? And, clearly, this is senseless, too.

So, when you consider those as aggravating factors, I'd ask the Court to consider that that's going to happen in every one of these cases, and that's why the sentence is so extreme on murder.

The question is whether you aggravate that murder to natural life as opposed to 25 to life. I think you have to consider how strong those aggravators are.

Finally, pecuniary gain. I agree with Mrs. McMath; that's one of the things we asked the Court to make a motion for the jury to determine sentencing. We wanted the jury to make that determination. I think it's clear from their verdicts of acquitting on the armed robbery but convicting on the theft that, yes, property was taken, and we've never disputed that, but it was after the fact, not the motive for. If I could tell you what the motive was for what happened, Judge, I would, but that goes

back to the senselessness, and we admit that why this happened or how this happened, well, we now how, but why I don't think we'll ever know other than the fact that these young kids were on drugs and this idea was implanted in their head from Josh and it took off.

So, I would ask the Court to consider all those factors in making the determination. I would ask the Court to sentence Mr. Rue to at least the possibility of parole 25 years from now, or, if the Court deems further out, the Court can certainly stack on the other two counts that he's been convicted of. Thank you.

THE COURT: Thank you.

Does either defendant wish to address the Court?

DEFENDANT NAJAR: Yes, I'll address the Court.

THE COURT: All right, Mr. Najar. You may step down.

MR. BARRY: Judge, can I be given an opportunity to reply briefly?

THE COURT: After the defendants speak.

MR. BARRY: Yes sir.

THE COURT: Mr. Najar, you have the right to remain silent. You also have the right to address the Court. If you wish to address the Court, you may do so.

DEFENDANT NAJAR: I wish to address the Court.

Your Honor, I've spent three years in jail, gone from a child to a man almost, matured around criminals, and I've realized that's not who I want to be.

I've started hope in jail. I did the Alpha Program. I got my GED. I've sought God. I've done everything I can in there to better myself. I've sought help before from my family. I've done everything I can.

I can't turn back time. I can't do anything. I just want to let you know that I've changed. I grieve for Miss Decker the loss. I didn't understand anything back then. That's all I got to say.

MS. McMATH: Your Honor, I know the Court's going to allow Mr. Barry to reply, and Mr. Parzych just reminded me of two brief points I forgot to make on Mr. Najar's behalf, the first being remorse as a mitigating factor. Like Mr. Rue, the testimony immediately after the shooting coming from Brian Mackey was that Billy had an astonished look on his face, made an astonished remark like, "What did we just do?"

There, additionally, was testimony that he, like Mr. Rue, is remorseful when Mr. Najar, within a few days of the shooting, but prior to his apprehension, confessed, for lack of a better term, to Ryan Major, and Ryan Major was specific that it was not a -- he wasn't confessing in a braggart way; he was confessing in a

remorseful, rueful way, in a reflective way, like, again, confusion, what did I just do.

And, additionally, like Mr. Rue, we'd ask the Court to consider Mr. Najar's family support. They've been with him throughout all of these proceedings.

THE COURT: Thank you.

Mr. Parzych, does Mr. Rue wish to address the Court?

MR. PARZYCH: Judge, Mr. Rue did want the Court to know and the Decker family to know that he's sorry, but he's afraid what he wants to say will come out the wrong way, but he does want the Court to know and Mrs. Decker's family to know that he is sorry.

THE COURT: All right. Thank you.

Mr. Barry?

MR. BARRY: Judge, a couple of issues I wanted to address. First of all, the argument concerning pecuniary gain and the fact that this came back first degree murder by the jury, under the felony murder I had proved in furtherance of the armed robbery. The shooting certainly did appear to be in furtherance of that armed robbery. Not to say that these defendants didn't have pecuniary gain on their mind. I just could not prove that beyond a reasonable doubt. Recent law indicates in terms of 703 that I have to show it's a primary motivating

factor. I don't think that's the case under 702, which is basically what I'm citing it under.

It's another consideration this Court should take into account, and I take that in conjunction with the defendants' claims of remorse. They obviously were not too remorseful. They gathered up the victim's property. They helped themselves, and they continued to share in the victim's property after the offense occurred.

As to Mr. Rue and the remorse aspect, I just have trouble with that when I think about how Mr. Rue and his friends went back to the same campground less than a week later to celebrate a birthday party, and Mr. Rue took two individuals over to show them the gravesite. I just have trouble with the concept of remorse when that is offered.

In terms of the other mitigating factors counsel has attempted to point out, I also note in the review of the materials provided by Mr. Najar in the defendant's sentencing materials, it appears to me as I'm going through these things that Mr. Najar's mother remained in constant contact with the people that were trying to assist her son, and she was a single mother, and she attempted to do her best with reference to keeping in contact. There wasn't neglect here.

Bottom line is, Judge, I do believe that the

aggravating factors certainly outweigh the mitigating factors, and the sentence of natural life in this case to protect society 25 years from now or 50 years from now is warranted. Thank you.

THE COURT: Thank you.

Mr. Najar, would you step down, please?

Mr. Najar, are you in any way dissatisfied or unhappy with your attorneys' services?

DEFENDANT NAJAR: No, sir.

THE COURT: Is there any legal cause, Counsel, why we can't proceed?

MS. McMATH: Not that I'm aware of, Your Honor.

MR. BARRY: No, Your Honor.

THE COURT: No legal cause appearing, I have considered all of the circumstances presented. I have reviewed the files. I've read the presentence report. I've considered the letters from the victim's mother, the victim's family and friends, the State's sentencing memorandum, the evidence presented here today, the evidence presented at trial, the defendant's sentencing submission and supplement to that submission.

I've also considered the fact that the defendant has spent a lengthy time in jail up to this point.

Miss McMath, do you have that figure with you

at this time?

MS. McMATH: Yes.

THE COURT: It's set forth in the presentence report. I just want to make sure it's correct.

MS. McMATH: I believe it is correct, Your Honor, the 1,242 days.

THE COURT: Having considered all of these factors, I find the following mitigating factors do exist, that being, first, the defendant's age. At the time of the offense in question, or the offenses, I should say, he was 16 years of age.

I also find that Mr. Najar did have a very dysfunctional family experience as a young child and teenager, which obviously resulted in psychological and emotional problems for him. Those problems did have an impact upon him, as indicated in the defendant's sentencing submission.

However, I do find that Dr. Lewis' conclusion on page 16 of her report that Mr. Najar's state of mind was such that he really wasn't responsible for his actions, that essentially what it's saying is not supported by the evidence, and I think the evidence is quite clear in this case that Mr. Najar had ample time, and, in fact, did consider the wrongfulness of his acts and had plenty of time to think about it beforehand.

The evidence was that the day before the incident Mr. Marshall brought this plan to the forefront, expressed it to the defendants and others, and they at that time rejected his plan. The next day Mr. Marshall went to Mr. Decker's campsite. Again, Mr. Najar and Mr. Rue both rejected the plan. In fact, they had planned to leave in the truck if they heard shots. They were going to take off, but they didn't. In fact, they went to Mr. Decker's campsite after Mr. Marshall advised them that it was okay to come over. They went over to the campsite, and Mr. Najar, before Mr. Decker was finally shot, pointed the gun at Mr. Decker's head, raised it at least one time and lowered it one time before he raised it again and shot Mr. Decker.

All of these factors point clearly to the conclusion that Mr. Najar did appreciate the wrongfulness of his act in shooting Mr. Decker. So, I do not find Dr. Lewis' conclusion in that regard persuasive.

As far as the alleged alcohol and drug impairment, I do find that the evidence was clear that there was use of alcohol and drugs, both the day before and the day of the murder, but I find that that usage did not substantially affect the defendant's judgment as far as the actual murder itself.

The same is true with regard to his age in this

case.

As far as the argument regarding the underdeveloped prefrontal cortex, I also find that factor unpersuasive. I do not find that it substantially affected the defendant's ability to appreciate what he was doing.

Mr. Barry had a good point as to the defendant's alleged remorse. Obviously, he's remorseful here today, having had three years to think about what he's done, but at the time immediately upon the shooting of Mr. Decker, everybody involved leaped into action doing the things that they had planned to do before the shooting. A couple of them took the body away from the campsite and buried it. The others busied themselves with collecting the items they had planned to take and covering up the trail of blood. So, I do not find the argument regarding remorse to be persuasive.

As to the aggravating factors, I do find that obviously there was the presence of an accomplice at the time of the murder. Mr. Najar's accomplices were, obviously, Mr. Rue, Mr. Mackey, and Mr. Marshall.

I also find that, contrary to the defense position that the murder was committed in expectation of the receipt of items of pecuniary value, specifically it was planned ahead of time that Mr. Mackey was to get the handgun; Mr. Mackey did get the handgun. Mr. Rue wanted

the AK-47, and he got the AK-47. Mr. Najar wanted the drugs; he got the drugs. Mr. Marshall wanted the truck, and he got the truck, just like it was planned.

I further find the emotional harm to Mrs. Decker to be severe. Mrs. Decker lost her only son. This is a son that was going to care for her in her golden years. Now she will not have that companionship.

I also find that in the interest of justice that the victim was helpless at the time of the murder. His back was turned when Mr. Najar fired the shot into the back of his head, and there was no need to kill Mr. Decker to accomplish the purpose of stealing his property.

I find that the aggravating circumstances outweigh the mitigating circumstances to the extent that, as to Count 1, it is the judgment and sentence of the Court that Mr. Najar be sentenced to natural life in the Arizona Department of Corrections.

As to Count 3, it is ordered that the defendant be incarcerated in the Department of Corrections for the presumptive term of one year to date from today's date. The offense is designated a Class 6 felony.

I do find that based upon the prior determination of guilt that Mr. Najar is guilty of Count 1, first degree murder, a Class 1 felony, in violation of the statutes set forth in the indictment, and Count 3, theft, a

Class 6 felony, in violation of -- that's a non-dangerous felony committed in violation of ARS 13-1801, 13-1802(A)(1),(E), 13-701, 13-702, 13-801, and 13-301 through 304, these crimes having been committed on June 16th of 1998.

It is further ordered as to Count 1 -- and before I say this, Counsel, is the agreement that the restitution for Mrs. Decker is to be $2,500?

MS. McMATH: Judge, I neglected to discuss that with Mr. Najar. If I could just have a moment.

(Mr. Najar conferred with his attorney.)

MS. McMATH: Yes, that's the agreement, Your Honor.

THE COURT: It is further ordered that Mr. Najar pay restitution in this matter to Mrs. Decker in the sum of $2,500. Payment is to be 30 percent of the defendant's earnings while incarcerated at the Department of Corrections beginning February 1st of next year, and said payments shall continue until the full amount is paid.

As to cause number CR 98-93181, defendant having entered pleas of guilty to the charges set forth in that indictment, it is the judgment of the Court he is guilty of said offenses committed in violation of the statutes set forth in that indictment, said offenses having occurred on or about June 15, 1998.

Again I've considered all of the factors concerning the case, and with regard to that case, Miss McMath, how much time has the defendant spent in custody?

MS. McMATH: Judge, I'm not certain, but that was the offense he was taken into custody with. So, if the deputy knows what date he was originally taken into custody.

THE COURT: It would be 1,242, wouldn't it?

MS. McMATH: No, Your Honor. He was indicted on the homicide charge after he'd been held.

THE COURT: So, we don't have a presentence report in that case. So, I don't have the figure. If you don't have it filled out now, what you can do is submit it to me following the sentencing proceedings, and we can amend the order.

MS. McMATH: Okay, Your Honor. I've got the date he was arrested, and I'll figure out the credit when Mr. Rue's being sentenced.

THE COURT: All right.

Based upon that determination of guilt in that cause number, it is ordered as to Counts 1 and 2 that the defendant be imprisoned in the Arizona Department of Corrections for the presumptive terms of five years on each count, Count 1 and Count 2, to date from today's date, and

the amount of credit for time served will be provided by Miss McMath to the Court at a later date, and I will amend this order upon receipt of that additional information.

As to Count 3, it is the judgment and sentence of the Court that the defendant be imprisoned in the Arizona Department of Corrections for the presumptive term of 1.5 years to date from today's date, and he's to receive credit for the time served to be determined.

As to all three counts in that case and as to Count 3 in the other case, Count 3 being theft, a Class 6 designated felony, as to those four counts, it's ordered that the defendant serve terms of community supervision equal to one-seventh of the prison terms imposed to be served after those terms of imprisonment.

These judgments shall be the authority for the Director of the Department of Corrections to incarcerate the defendant for the periods of time ordered and the authority for the sheriff of Maricopa County to transport him to the Department of Corrections.

As to CR 98-93181, Counsel, do you have a proposal for a restitution hearing date in that matter since you don't have a specific amount at this time?

MR. BARRY: Judge, I would suggest setting it the second Friday of January.

THE COURT: Will that give you time to complete

your --

MR. BARRY: Yes, Your Honor. I believe Mr. Rees will be able to gather that documentation by that time.

THE COURT: Second Friday, Miss McMath, will that work?

MS. McMATH: That will work.

MR. BARRY: Judge the other issue is Count 1 and Count 3 on the murder case, is that concurrent or consecutive, and then Counts 1, 2, 3 in the other case, are those concurrent or consecutive?

THE COURT: I'm getting to that.

What's the date, Teresa?

THE BAILIFF: Friday, January 11th at 9:00 a.m.

THE COURT: All right. It's ordered in CR 98-93181 setting that matter for restitution hearing at 9:00 a.m. on January 11th of next year. Counsel are encouraged to meet and confer and reach a stipulation regarding restitution. If they do that, you may submit a stipulation and order for the Court's signature, and it will not be necessary to appear at that time.

Mr. Najar, you have the right to be present if we do have a hearing at that time or you can waive your presence, whichever you prefer.

With regard to all the charges in these two

cases, it is ordered that the terms of imprisonment are to run concurrently to each other based upon the defendant's age.

Is there anything further at this time, Miss McMath?

MS. McMATH: Judge, just that Mr. Najar would like to put on the record now that he wishes to waive his presence for the restitution hearing so he not be transported.

THE COURT: Is that correct, Mr. Najar?

DEFENDANT NAJAR: Yes, sir.

THE COURT: All right. Mr. Najar's presence will be waived for purposes of any restitution hearing if one is needed.

Anything further, Counsel?

MS. McMATH: No, Your Honor.

THE COURT: Thank you.

Mr. Parzych?

Sir, is your true name Cedric Rue Jr.?

DEFENDANT RUE: Yes, sir.

THE COURT: Mr. Rue, in previous proceedings in CR 98-93180, determinations were made that you're guilty of Count 1, first degree murder, a Class 1 felony, in violation of the statutes set forth in the indictment, also Count 3, theft, a Class 6 undesignated offense, which is

designated at this time as a Class 6 felony, that being a nondangerous offense, committed in violation of Arizona Revised Statutes 13-1801, 13-1802(A)(1), (E), 13-701, 13-702, 13-801, 13-301 through 304, also Count 5, arson of a structure, a Class 4 nondangerous felony, committed in violation of ARS 13-1701, 13-1703, 13-701, 13-702, and 13-801.

Based upon those determinations of guilt, it is the judgment of the Court that you're guilty of said offenses committed in violation of those statutes on June 16th of 1998.

I have reviewed the file. I've read the presentence report. I've considered again the letters from defendant's mother, family and friends, the State's sentencing memorandum, the evidence presented at trial and this presentence hearing, also Dr. Parrish's report.

I have considered the fact that you have also spent extensive time in custody.

Mr. Parzych, do you have the correct figure?

MR. PARZYCH: 1,248 days. Also, Your Honor, we're not disputing restitution.

THE COURT: All right. I have considered in mitigation Mr. Rue's age, which at the time of the offense was 16 years.

I've considered the fact that prior to the

offenses being committed he did consume a lot of alcohol and drugs.

I've considered the defendant's argument regarding the underdeveloped prefrontal cortex.

I've also considered the mitigating factors set forth by defendant in their argument regarding family support.

I've also considered defendant's argument regarding remorse. As Mr. Parzych indicated, Mr. Rue, according to at least one witness, had a look on his face like what did we just do after he shot the victim in this case, but I also note that immediately after the shooting, after Mr. Rue fired the shotgun at point blank range into Mr. Decker's face, that Mr. Rue joined his accomplices and went about disposing of the body, covering up the blood trail, and collecting the items that they had decided to steal. I do not find the argument persuasive on behalf of defendant in that regard.

I further find that Mr. Rue's conduct in going back to the scene of the murder several days later to have a party and to take a couple of his friends over to the gravesite and show them where Mr. Decker was buried to be nothing less than ghoulish. So, I do not find any remorse having been shown on behalf of defendant.

I do find that the mitigating circumstances

that I mentioned do not substantially or did not substantially affect Mr. Rue's judgment when he committed the murder in this case.

In aggravation, I find that there was the presence of an accomplice, specifically, Mr. Najar, Mr. Mackey, and Mr. Marshall.

I further find the murder was committed in expectation of the receipt of items of pecuniary value. As I indicated before as to Mr. Najar, Mr. Mackey was to get the handgun; he got it; Mr. Rue the AK-47, and he got it; Mr. Najar, the drugs; he got the drugs; and Mr. Marshall was to get the truck, and he got the truck.

There's no question in my mind that the theft was committed or the murder was committed to commit either the theft of the items in question, if not the robbery. The jury found the defendants not guilty of robbery, but they did find them guilty of theft. I find the thefts were committed as a result of the murder, which was designed to make it easier for the defendants to take Mr. Decker's property.

I further find in aggravation the emotional harm to Mrs. Decker, as indicated by her statements to the Court here today and her letter to the Court.

Again, I find in aggravation that the victim was helpless at the time of the murder. His back was

turned when the first shot was fired by Mr. Najar, and there's no question that Mr. Decker was incapacitated lying on the ground with a bullet in his head when Mr. Rue fired the shotgun into his face. There was absolutely no need to kill the victim to accomplish the purpose of stealing his property. The whole murder was senseless.

I do find that the aggravating factors outweigh the mitigating factors to the extent that as to Count 1, it's the judgment of the Court that the defendant be imprisoned in the Arizona Department of Corrections for the rest of his natural life without the possibility of release on any basis.

As to Count 3, theft, it is ordered that the defendant be imprisoned in the Arizona Department of Corrections for the presumptive term of one year to date from today's date, and he is given credit for 1,248 days of presentence incarceration, and that will apply as to all three counts.

Further as to Count 5, it's the judgment of the Court that the defendant be imprisoned in the Arizona Department of Corrections for the presumptive term of 2.5 years to date from today's date.

It is ordered that all three counts are to run concurrently to each other due to the defendant's age.

It is further ordered that as to Count 1, the

defendant shall pay restitution to Mrs. Decker in the sum of $2,500 and as to Count 5 the sum of $8,314.60 payable to the U.S. Forest Service. The restitution as to Count 1 shall be joint and several liability with codefendant Najar and also Mr. Marshall.

And was there an agreement, Counsel, do you know, Mr. Barry, as to what Mr. Mackey's agreement was as to any restitution?

MR. BARRY: I don't have a specific sum. He hasn't been sentenced yet, but there is an agreement to pay restitution. So, it should be joint and several as to all four.

THE COURT: The restitution as to Count 1 shall be joint and several as to Mr. Najar and Mr. Rue, Mr. Marshall, and Mr. Mackey.

What about as to Count 5?

MR. BARRY: As to Count 5, Mackey, Marshall both have agreed to pay restitution, but, of course, Mr. Najar it doesn't apply.

THE COURT: All right. As to Count 5, the restitution ordered shall be joint and several liability with Mr. Marshall and Mr. Mackey and Mr. Rue. The payment of restitution shall be 30 percent of the defendant's earnings while incarcerated at the Department of Corrections beginning February 1st of next year and shall

continue until the full amounts of the restitution are paid.

These judgments shall be the authority for the Director of the Department of Corrections to incarcerate Mr. Rue for the periods of time ordered and the authority for the sheriff of Maricopa County to transport Mr. Rue to the Department of Corrections.

Now, as to both defendants, you're both advised that you do have rights of appeal. In order to do that, you must file your Notice of Appeal within 20 days of today's date.

If you cannot afford an attorney to do that for you, one would be appointed to represent you, and also transcripts of these proceedings would be prepared at county expense.

If you don't take advantage of this opportunity, you will lose any right to have any error corrected by appeal.

Do you understand these rights, Mr. Rue?

DEFENDANT RUE: Yes, sir.

THE COURT: Is Mr. Najar still here?

MS. McMATH: He's been taken out of the room, Your Honor. I have prepared a Notice of Appeal, though, if I could give the original to your clerk for filing on his behalf.

THE COURT: You may do so.

MS. McMATH: As well a motion for my withdrawal and for appointment of appellate counsel as I was appointed on the trial contract.

THE COURT: All right. Is there anything further at this time, Mr. Parzych?

MR. PARZYCH: No, Your Honor.

THE COURT: Mr. Barry, anything further?

MR. BARRY: Not on Mr. Rue, Judge.

THE COURT: Miss McMath?

MS. McMATH: Just 1,277 days is the appropriate credit on the burglary case.

THE COURT: 1,277?

MS. McMATH: 1,277, yes, Your Honor.

THE COURT: All right. In CR 98-93181 it's ordered defendant shall receive credit for time served in the amount of 1,277 days of presentence incarceration.

MR. BARRY: Judge, and as to the restitution on that matter, I believe we haven't ordered it yet.

MS. McMATH: Right, set for January 11th.

THE COURT: Anything further?

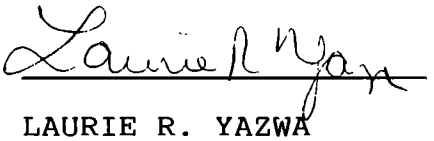
MS. McMATH: No, thank you, Your Honor.

MR. BARRY: No, Judge.

THE COURT: We'll stand at recess.

(The proceedings were recessed.)

I, LAURIE R. YAZWA, an Official Court Reporter and Notary Public, in and for the County of Maricopa, State of Arizona, hereby certify that the foregoing 51 pages are a true and accurate transcription of the proceedings, prepared to the best of my ability.



LAURIE R. YAZWA
Official Court Reporter
Certified Reporter #50184

My Commission Expires:
July 17, 2003

Appendix I

Clerk of the Superior Court
*** Electronically Filed ***
01/25/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1998-093180 01/24/2022

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

JENNIFER NICOLE CARPER
JULIE ANN DONE
KIRSTEN VALENZUELA

v.

WILLIAM FRANKLIN NAJAR (B)

DANIELA H DE LA TORRE
KAITLIN S DIMAGGIO

COURT ADMIN-CRIMINAL-PCR
JUDGE STARR

UNDER ADVISEMENT RULING

The State has asked this Court to allow it to withdraw from its stipulation to resentencing and vacate the pending resentencing. For the following reasons, the Court vacates the resentencing and affirms Najar's natural life sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

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

A first post-conviction relief petition resulted in a resentencing; Najar was again sentenced to natural life.

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

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

II. LEGAL ANALYSIS

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

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

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

Here, the trial court considered Najar's young age of 16 at the time of the homicide, the circumstances of the offense, Najar's lack of prior record, and family background, including the trauma he suffered as a child. The court heard specific information about Najar's brain development, substance abuse, and mental illness. The parties presented the trial court with extensive information about Najar and the effect of his youth on his culpability and conduct; the trial court noted that it had considered all that information. Thus, the trial court satisfied *Miller*'s requirements.

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

> *Miller*, as clarified by *Montgomery*, represents a "clear break from the past" for purposes of Rule 32.1(g). Arizona law, when Healer and Valencia were sentenced, allowed a trial court to impose a natural life sentence on a juvenile convicted of

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> first-degree murder without distinguishing crimes that reflected "irreparable corruption" rather than the "transient immaturity of youth."

Valencia, 241 Ariz. at 209, ¶ 15.

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

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

Jones later addressed that confusion, clarifying the requirements for a constitutional life without parole sentence for a juvenile offender. As the Ninth Circuit Court of Appeals recently explained, "*Jones* clarified that a 'discretionary sentencing system is both constitutionally necessary and constitutionally sufficient,' because such discretion 'suffices to ensure individualized consideration of a defendant's youth.'" *United States v. Briones*, 18 F.4th 1170, 1175 (9th Cir. 2021) (internal citation omitted).

Here, Najar's natural life sentence was constitutionally imposed. Thus, even if *Miller* applies in Najar's case, he has not asserted a colorable claim for post-conviction relief because he received a sentencing at which his youth and attendant characteristics were considered.

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

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III. CONCLUSION

Based on the foregoing,

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

Appendix J

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

SCOTT LEE DESHAW, *Appellant*.

STATE OF ARIZONA, *Appellee*,

v.

BOBBY CHARLES PURCELL, *Appellant.*

STATE OF ARIZONA, *Appellee,*

v.

BOBBY JERRY TATUM, *Appellant*.

STATE OF ARIZONA, *Appellee*,

v.

WILLIAM FRANKLIN NAJAR, *Appellant*.

No. 1 CA-CR 21-0512 (Deshaw), 1 CA-CR 21-0541 (Purcell)
1 CA-CR 22-0061 (Tatum), 1 CA-CR 22-0071 (Najar)

FILED 06-25-2024

Appeal from the Superior Court in Maricopa County
No. CR1994-011396 (Deshaw), CR1998-008705 (Purcell),
CR1998-005821 (Tatum), CR1998-093180 (Najar)
The Honorable Patricia A. Starr, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza C. Ybarra
Counsel for Appellee

Maricopa Public Defender's Office, Phoenix
By Mikel Steinfeld, Tara R. DeGeorge
Counsel for Appellant DeShaw and Purcell

Law Offices of Stephen L. Duncan PLC, Scottsdale
By Stephen L. Duncan
Counsel for Appellant Tatum

DiMaggio Law Office, Phoenix
By Kaitlin DiMaggio
Co-Counsel for Appellant Najar

Brown & Little PLC, Chandler
By Matthew Brown
Co-Counsel for Appellant Najar

Maricopa County Attorney's Office
By Julie A. Done, Mitchell S. Eisenberg
Counsel for Amicus Curiae

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Angela K. Paton and Judge Michael S. Catlett joined.

M O R S E, Judge:

¶1 The Arizona Supreme Court has remanded to us to decide if the superior court erred when it reinstated Scott Lee Deshaw, Bobby Charles Purcell, Bobby Jerry Tatum, and William Franklin Najar's (collectively, "Defendants") sentences pursuant to *Jones v. Mississippi*, 593 U.S. 98 (2021). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The Defendants were all convicted of unrelated first-degree murders as well as other crimes while they were juveniles. Each received "natural life" without the possibility of parole sentences.

¶3 While the Defendants were serving their sentences, the U.S. Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). *Miller* prohibited the imposition of mandatory life-without-parole sentences for juvenile offenders. 567 U.S. at 465, 479. *Montgomery* made *Miller* retroactive. 577 U.S. at 200.

¶4 After *Miller*, the Defendants filed petitions for post-conviction relief ("PCR"), which the superior court and our Court denied because the Defendants' sentencing complied with *Miller*. *See State v. Deshaw*, 1 CA-CR 13-0635 PRPC, 2015 WL 1833801, at *1, ¶ 4 (Ariz. App. Apr. 21, 2015) (mem. decision); *State v. Purcell*, 1 CA-CR 13-0614 PRPC, 2015 WL 2453192, at *1, ¶ 4 (Ariz. App. May 21, 2015) (mem. decision); *State v. Tatum*, 2 CA-CR 2014-0460-PR, 2015 WL 728080, at *2, ¶ 9 (Ariz. App. Feb. 18, 2015) (mem. decision); *State v. Najar*, 1 CA-CR 13-0686 PRPC, 2015 WL 3540196, at *2, ¶ 9 (Ariz. App. June 2, 2015) (mem. decision). The Defendants applied for certiorari to the U.S. Supreme Court which granted certiorari, reversed our decision, and remanded the case back to our Court for the Defendants to be resentenced, reasoning that none of the sentencing courts decided if the Defendants were "child[ren] 'whose crimes reflect transient immaturity' or [are] one of 'those rare children whose crimes reflect irreparable corruption' for whom a life without parole sentence may be appropriate." *Tatum v. Arizona*, 580 U.S. 952, 952 (2016) (Sotomayor, J., concurring) (quoting *Montgomery*, 577 U.S. at 209); *see DeShaw v. Arizona*, 580 U.S. 951 (2016); *Najar v. Arizona*, 580 U.S. 951 (2016); *Purcell v. Arizona*, 580 U.S. 951 (2016).

¶5 Shortly after, the Arizona Supreme Court decided *State v. Valencia*, 241 Ariz. 206, 210, ¶ 18 (2016), which held that juveniles sentenced

to life without parole were entitled to an evidentiary hearing to "have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." The State then stipulated to resentence the Defendants, and we granted review and relief in each of the Defendants' PCR petitions and remanded to the superior court for resentencing "in light of *Montgomery*" *See State v. Purcell*, 1 CA-CR 13-0614 PRPC, at 1 (Ariz. App. Feb. 16, 2018) (decision order); *State v. DeShaw*, 1 CA-CR 13-0635 PRPC, at 1 (Ariz. App. Feb. 15, 2018) (decision order); *State v. Tatum*, 2 CA-CR 14-0460 PRPC, at 1 (Ariz. App. Feb. 16, 2018) (decision order); *State v. Najar*, 1 CA-CR 13-0686 PRPC, at 1 (Ariz. App. Feb. 16, 2018) (decision order).

¶6 But before the superior court resentenced the Defendants, the U.S. Supreme Court decided *Jones v. Mississippi*, 593 U.S. 98 (2021). In *Jones*, the Supreme Court clarified *Montgomery* and *Miller*, and held that a life-without-parole sentence is constitutional "so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment." 593 U.S. at 106 (quoting *Miller*, 567 U.S. at 476). *Jones* clarified that a sentencing court is not required to "make a separate finding of permanent incorrigibility," but need only consider "'an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Id.* at 108–09 (quoting *Miller*, 567 U.S. at 483).

¶7 Subsequently, the State moved to withdraw from its prior stipulations for resentencing and argued that the Defendants' original sentences were constitutional under *Jones*. The superior court granted the State's motion, dismissed the PCR petitions, and issued identically worded orders in all four cases, reasoning that each defendant's sentence "was constitutionally imposed" and even if *Miller* applied, the Defendants failed to assert a "colorable claim for post-conviction relief because [they] received a sentencing at which [their] youth and attendant characteristics were considered."

¶8 The Defendants appealed pursuant to A.R.S. § 13-4033(A)(3). We dismissed the appeals for lack of jurisdiction because a "superior court's final decision in a [PCR] proceeding is not an appealable order." We reasoned that appellate review is not proper when a superior court denies a PCR petition, and the Defendants should have filed a petition for review pursuant to Arizona Rule of Criminal Procedure ("Rule") 32.16(a)(1). The Defendants appealed that decision, and the Arizona Supreme Court reversed, reasoning that when we granted review and relief of the Defendants' PCR petitions, they had "secured full relief" in their post-conviction proceeding and were "restored to the status of convicted

but unsentenced defendants." *State v. Purcell*, 255 Ariz. 1, 4, ¶ 16 (2023). The court noted that by "restoring a prior sentence," the superior court made a "decision on the merits" equivalent to "resentencing even if it is the same as the original sentence rendered." *Id.* at ¶¶ 17–18. Thus, the court concluded the order vacating the resentencing was appealable pursuant to A.R.S. § 13-4033(A)(3). *Id.* at ¶ 19.

¶9 Soon after, the Arizona Supreme Court decided *State ex rel. Mitchell v. Cooper*, which overturned *Valencia* because "*Jones* abrogated the premise of *Valencia*'s holding that juvenile offenders are entitled to evidentiary hearings where they will have 'an opportunity to establish . . . that their crimes did not reflect irreparable corruption but instead transient immaturity.'" 256 Ariz. 1, 12, ¶ 47 (2023) (quoting *Valencia*, 241 Ariz. at 210, ¶ 18).

¶10 On remand, we have been tasked with deciding if the superior court erred in allowing the State to withdraw its stipulation to resentencing and vacating the Defendants' resentencing hearings. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(3).

DISCUSSION

¶11 The Defendants contend that (1) the superior court erred by allowing the State to withdraw the resentencing stipulation and reimposing their original natural life sentences; (2) *Cooper* was incorrectly decided because it allows juveniles to be sentenced to mandatory life sentences without parole if commutation is available; and (3) they were sentenced before the juvenile death penalty was abolished which "threw the balancing askew" during their sentencing.

¶12 The Maricopa County Attorney's Office ("MCAO") has submitted an amicus curiae brief and seeks to intervene. The Defendants oppose MCAO's amicus brief contending Rule 31.15(b)(1) does not grant MCAO the authority to submit an amicus brief, and the State and the Defendants oppose MCAO's intervention. We accept MCAO's amicus brief[1] but decline to allow it to intervene because it is neither "necessary or

[1] Rule 31.15 allows an applicant to file a brief as an amicus curiae only if: "(A) the brief is filed with the parties' written consent, which is separately filed; (B) the applicant is the State of Arizona or an officer or agency of the State of Arizona, or is an Arizona county, city, or town; or (C) the appellate court grants a motion to file it." The Defendants contend that MCAO is a

appropriate to facilitate or expedite the appeal's consideration." Ariz. R. Crim. P. 31.19(a); *see State v. Reed*, 248 Ariz. 72, 81, ¶ 31 (2020) (noting that pursuant to Rule 31.19, the court may permit an "other interested party to intervene in the appeal" if deemed "necessary or appropriate to facilitate or expedite the appeal's consideration").

I. Stipulation to Resentencing.

¶13 On appeal, the State, now represented by the Attorney General, concedes error, and agrees with the Defendants that there was no legal basis to allow it to withdraw from its stipulation and that it should "remain[] bound by its stipulation to resentencing." Both the Defendants and the State ask us to remand to the superior court so the Defendants can be resentenced. However, we are not bound by the State's concession of error and will examine the record ourselves to ensure "applicable legal principles" support their concession. *Lopez v. Kearney*, 222 Ariz. 133, 136, ¶ 10 (App. 2009); *see State v. Rogers*, 2 Ariz. App. 232, 235 (1965) ("This Court is not bound by a confession of error in a criminal case and it has undertaken to examine the record."), *overruled on other grounds by State v. Mallory*, 19 Ariz. App. 15 (1972); *State v. McCormick*, 7 Ariz. App. 576, 579 n.1 (1968) ("[I]t is the practice [of our jurisdiction] to examine the record even though the error has been confessed."), *vacated on other grounds by* 104 Ariz. 18 (1968).

¶14 We review the superior court's legal conclusions de novo. *State v. Angulo-Chavez*, 247 Ariz. 255, 258, ¶ 6 (App. 2019). Stipulations are generally binding on parties and are "favored by the law because they reduce the time of trial and narrow the issues." *Pulliam v. Pulliam*, 139 Ariz. 343, 345 (App. 1984). However, a court may "relieve a party of a stipulation on a motion for good cause shown." *State v. West*, 176 Ariz. 432, 447 (1993),

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county agency, not a county, and therefore has no standing to file an amicus brief without first filing a motion. But a county attorney's office represents the county in legal matters and Arizona appellate courts regularly accept amicus briefs filed by county attorney's offices without motion or leave. *E.g. State v. Anderson*, --- Ariz. ---, ---, ¶ 19, 547 P.3d 345, 350 (2024); *Draper v. Gentry*, 255 Ariz. 417, 420 (2023) (accepting MCAO amicus briefs without first filing a motion); *White Mountain Health Ctr., Inc. v. Maricopa County*, 1 CA-CV 12-0831, at 1 (Ariz. App. Apr. 30, 2013) (decision order) (allowing Yavapai County Attorney to submit an amicus curiae brief without leave because the brief "is presented by a county").

overruled on other grounds by State v. Rodriguez, 192 Ariz. 58 (1998). Further, in general, "on remand the lower tribunal has no choice but to enter a judgment which complies exactly with that which the higher court has ordered." *Jordan v. Jordan*, 132 Ariz. 38, 40 (1982). But "lower court[s] may deviate from [a] mandate and apply different law from that specified by the appellate court where, while the case is still pending, and in the interim between the rendition and implementation of the mandate, there has been a change in controlling law." *Id.* at 44.

¶15 The Defendants raise various arguments contending that the State should be bound by their stipulation and the superior court erred in vacating the resentencing. Specifically, they contend that (1) *Jones* did not constitute a change in the law such that the State should remain bound to its stipulation; (2) the State was untimely in its motion to withdraw; (3) this Court mandated resentencing and "the only mechanism to impose a sentence is to go forward with the new sentencing." Nearly all these arguments have recently been addressed and decided by another panel of this Court in *State v. Arias* (*Arias IV*), 1 CA-CR 22-0064 PRPC, at 1–2 (Ariz. App. Jan. 9, 2024) (decision order) (review denied June 3, 2024).[2]

¶16 In *Arias*, the defendant was found guilty of first-degree murder as a juvenile and sentenced to natural life without the possibility of

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[2] Timeliness was not addressed in *Arias IV*, but neither of the two Arizona cases cited by the Defendants to argue that the State did not act timely involved a party's request to withdraw from a stipulation. *See Higgins v. Guerin*, 74 Ariz. 187, 191 (1952) (noting that "no effort was made by the plaintiff to be relieved of the effect of the stipulation"); *Gangadean v. Flori Inv. Co.*, 106 Ariz. 245, 248 (1970) (noting that because "no motion was made to be relieved from the effect thereof, the stipulation is binding upon this court on appeal"). Further, *Jones* was published on April 22, 2021, and the State submitted motions to withdraw its stipulation for each defendant between June 2021 and September 2021. The Defendants have not argued that they were prejudiced by any delay nor shown that the superior court abused its discretion in finding the State timely moved to withdraw. *See Town of Gila Bend v. Hughes*, 13 Ariz. App. 447, 449 (1970) (noting that the power to "relieve a party from a stipulation lies within the discretion of the trial court upon an appropriate and timely motion and a showing of good cause"); *cf. State ex rel. Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, 384, ¶ 5 (2000) (describing whether delay prejudiced the opposing party as the "most important consideration" in measuring the timeliness of a motion to intervene).

release. *See State v. Arias* (*Arias I*), 1 CA-CR 22-0064 PRPC, 2022 WL 3973488, at *1, ¶ 2 (Ariz. App. Sept. 1, 2022) (mem. decision) (review granted Sept. 19, 2023). After *Valencia*, the State stipulated to a resentencing hearing. *Id.* at ¶ 4. Then, after *Jones* was decided, the superior court granted the State's motion to withdraw its stipulation and vacated the defendant's resentencing hearing. *Id.* at ¶ 5. The superior court then denied the defendant's subsequent PCR petition challenging that ruling. *Id*. We granted review of the PCR decision and remanded the case for resentencing. *Id.* at ¶ 7. The State then filed a petition for review with the Arizona Supreme Court, which vacated our memorandum decision and remanded "for further proceedings on [the defendant's] petition for review consistent with this Court's opinion in [*Cooper*]." *State v. Arias* (*Arias II*), CR-22-0237-PR, at 3 (Ariz. Sept. 19, 2023) (decision order). After considering *Cooper*, we granted review and denied relief. *State v. Arias* (*Arias III*), 1 CA-CR 22-0064 PRPC, at 1 (Ariz. App. Sept. 25, 2023) (decision order).

¶17 In light of the procedural history in *Arias IV* (including our supreme court's decision order in *Arias II*), and the similarities with this case, we elect to adhere to the reasoning adopted in *Arias IV*. *See State v. Patterson*, 222 Ariz. 574, 580, ¶ 19 (App. 2009) (noting that unless convinced otherwise, we consider decisions of our Court as "highly persuasive and binding"). Accordingly, we do not accept the State's concession of error and find no abuse of discretion by the superior court in relieving the State from its stipulation.

II. Constitutional Claims.

¶18 The Defendants also argue that *Cooper* was incorrectly decided and that a "*Miller*-compliant" sentence was impossible because the Defendants were sentenced before *Roper v. Simmons*, 543 U.S. 551 (2005).[3] We review constitutional claims de novo. *State v. Champagne*, 247 Ariz. 116, 139, ¶ 70 (2019).

A. *Cooper*.

¶19 The Defendants concede that we are bound by our supreme court's decisions. *See State v. Smyers*, 207 Ariz. 314, 318, ¶ 15 n.4 (2004) ("The courts of this state are bound by the decisions of [the Arizona Supreme Court] and do not have the authority to modify or disregard this court's

[3] In *Roper*, the U.S. Supreme Court held that the death penalty was unconstitutional for juvenile offenders. 543 U.S. at 568.

rulings."). Whether *Cooper* was wrongly decided is not a question for us to decide because we lack the "power to overturn a decision of the supreme court." *State v. Anderson*, 185 Ariz. 454, 456 (App. 1996).

B. Original Sentences.

¶20 The Defendants argue their sentences were not *Miller* compliant, because the availability of the death penalty at their sentencing "threw the balancing askew" and a life-without-parole sentence "is disproportionate under the Eighth Amendment if the crime reflects transient immaturity." Specifically, the Defendants contend that the sentencing courts deviated from the death penalty to natural life "on the basis of youth and its transient nature," however, after *Roper*, *Miller*, and *Montgomery*, a finding of transient immaturity "requires a parole-eligible sentence." Thus, the Defendants argue that by contemplating the death penalty, the sentencing courts were unable to consider a sentence of life with the possibility of release, rendering the Defendants' sentences unconstitutional. The State argues that "it is immaterial" that death was originally a sentencing option because the options presented to the sentencing courts included a "release-eligible option based on the specific facts of each case after taking into account the [Defendants'] youth and attendant characteristics."

¶21 The State is correct. *Miller* does not suggest that the presence of a death penalty option rendered any non-death sentence unconstitutional. Instead, *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." *Jones*, 593 U.S. at 106 (emphasis added) (quoting *Miller*, 567 U.S. at 483); *see State ex rel. Mitchell v. Gentry*, 1 CA-SA 22-0196, at 2–3 (Ariz. App. Oct. 13, 2023) (decision order) (review denied June 3, 2024) (overturning the superior court's grant of a *Valencia* hearing because the "trial court . . . had discretion in imposing [the defendant's] natural life sentence," and *Miller* and *Montgomery* did not impose a requirement for a finding of permanent incorrigibility (citing *Cooper*, 256 Ariz. at 12, ¶ 47)). Because each sentencing court had the discretion to sentence the Defendants to less than life without parole and carefully considered their youth as mitigating factors, the Defendants' sentences were proper.

CONCLUSION

¶22 For the foregoing reasons, we affirm the superior court's restoration of the Defendants' original sentences.

AMY M. WOOD • Clerk of the Court
FILED: TM

Appendix K

Supreme Court

STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

December 16, 2024

RE: STATE OF ARIZONA v DESHAW et al.
Arizona Supreme Court No. CR-24-0175-PR
Court of Appeals, Division One No. 1 CA-CR 21-0512
Maricopa County Superior Court No. CR1994-011396
Court of Appeals, Division One No. 1 CA-CR 21-0541
Maricopa County Superior Court No. CR1998-008705
Court of Appeals, Division One No. 1 CA-CR 22-0061
Maricopa County Superior Court No. CR1994-005821
Maricopa County Superior Court No. CR1998-005821
Court of Appeals, Division One No. 1 CA-CR 22-0071
Maricopa County Superior Court No. CR1998-093180

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 13, 2024, in regard to the above-referenced cause:

ORDERED: Joint Petition for Review = DENIED.

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

Tracie K. Lindeman, Clerk

TO:
Alice Jones
Alexander W. Samuels
Eliza Ybarra
Mikel Steinfeld
Stephen L. Duncan
Kaitlin DiMaggio
Matthew O. Brown
Julie A. Done
Amy M. Wood
eg

Appendix L

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. JERMAINE LAMAR RUTLEDGE, Defendant.	Court of Appeals No. 1 CA-CR 99-0182 Superior Court No. CR 97-05555

Phoenix, Arizona
February 12, 1999
11:00 a.m.

BEFORE: THE HONORABLE FRANK T. GALATI,
JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Sentencing/Mitigation Hearing)

Melinda Setterman, RPR
Court Reporter

Prepared for:
Court of Appeals

ORIGINAL

A P P E A R A N C E S

On Behalf of the State:

Vince H. Imbordino
Elizabeth B. Ortiz
Deputy County Attorneys

On Behalf of the Defendant:

Catherine M. Hughes
Attorney at Law

I N D E X

* * * *

P R O C E E D I N G S

(Whereupon, the following proceedings took place in open court:)

THE COURT: 97-05555, State versus Jermaine Rutledge.

MR. IMBORDINO: Vincent Imbordino.

MS. HUGHES: Cathy Hughes on behalf of Mr. Rutledge, present in custody. Ready to proceed.

THE COURT: You want to have him down here with you?

MS. HUGHES: Yes, please.

THE COURT: Mr. Rutledge, you can come down here with your attorney, please.

Let me ask her, if we're going to have people to say things, why don't we do it before we have Mr. Rutledge here.

MR. IMBORDINO: Your Honor, we also have two juvenile POs that I would like to put on for some testimony concerning the defendant's history as a juvenile. I think it would be helpful for the Court.

THE COURT: That's fine. That's fine.

MR. IMBORDINO: Miss Ortiz is going to conduct the examination.

THE COURT: Why don't we do that.

MS. ORTIZ: The State calls Grace Ku.

THE COURT: Miss Ku, would you come up here and be sworn in, please.

(Whereupon, the clerk administered the oath to the witness.)

THE COURT: Have a seat right there, please.

MS. ORTIZ: Your Honor, before I begin, I just wanted to confirm that the Court had, in fact, received the sentencing memorandum that I filed on or about January 29th.

THE COURT: Yes. I read it all.

MS. ORTIZ: Thank you, Your Honor.

GRACE KU,

having been first duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ORTIZ:

Q. What is your name?

A. Grace Ku.

Q. What is your job?

A. Juvenile PO.

Q. Miss Ku, how long have you been a juvenile PO for?

A. Approximately seven and a half years.

THE COURT: Miss Ku, pull that a little closer to your mouth. Thank you very much.

Go ahead.

Q. BY MS. ORTIZ: And has all that time been as a juvenile PO in Maricopa County?

A. Yes.

Q. Miss Ku, as a juvenile PO did you have a person on your caseload by the name of Jermaine Rutledge?

A. Yes.

Q. Approximately when did Mr. Rutledge come on your caseload?

A. June of '95.

Q. And at that time in June of '95, Miss Ku, what specific position did you have as a juvenile PO?

A. A juvenile intensive PO.

Q. When Mr. Rutledge came to you, what had been his prior probationary status? Was he on standard probation?

A. Yes.

Q. Basically what is standard juvenile probation entail?

A. It entailed the PO monitoring his behavior. There is approximately one or two contacts per month with the juvenile. He is ordered to follow all laws, all

standard conditions of probation.

Q. When he came to your caseload in June of '95, he had been placed on what type of probation then?

A. Intensive probation.

Q. And that was pursuant to committing a new offense?

A. Yes.

Q. Please describe for us what juvenile intensive probation entails, how it differs from standard probation?

A. On juvenile intensive probation -- we call it JIPS for short -- there are two POs assigned to the juvenile's case, along with a surveillance officer. Between the JIPS team we're required to have personal contacts with the juvenile at least four times a week.

He is on house arrest. He is required to do at least 32 hours a week of some court-approved activity, which would include things like school, having a paid job, doing community service work, going to drug treatment or counseling. He's required to provide the POs with proof of how he got those hours done.

The JIPS team is also required to meet with a parent at least once a week.

Q. Miss Ku, are you also familiar with the home detention program that the juvenile court runs?

A. Yes.

Q. What is, basically, home detention?

A. Home detention is very similar to being on house arrest, except for we have a group of employees who are designated into that program. They are responsible for going to go the home at least once a day, as well as making telephone calls throughout the day when the child is supposed to be home.

A contract is written up spelling out where the child can go in terms of school or work or other court-approved activities. And the child can also leave the home if he is accompanied by a parent.

Q. Is home detention a regular or even a normal part of a court order when a juvenile is also placed on JIPS?

A. No.

Q. Is that a rather unusual combination?

A. Yes.

Q. When you received Jermaine Rutledge's case in June of 1995, he was placed on JIPS and home detention?

A. Yes.

Q. What efforts did you, Miss Ku, undertake to inform Mr. Rutledge of exactly what was expected of him at that time?

A. When we get any new kid on JIPS, we go into

great detail about what is required and how JIPS is different from the home -- from standard probation. We go into a lot of detail about the child's accountability, how the child has to contact us every time they leave the home, every time they get home.

And then we also discuss other court orders, such as community service or something that might be special to that child's probation.

Q. When you discussed this with Mr. Rutledge, did you also have some written terms regarding all of this that you reviewed with him?

A. Yes.

Q. Did he sign those written terms?

A. Yes.

Q. Also were the specifics of the home detention program discussed with him?

A. Yes.

Q. At the time that Mr. Rutledge was put on intensive probation and home detention in June of 1995, did he have any other pending matters before juvenile court, unresolved matters?

A. Yes.

Q. What was that?

A. He was pending disposition or sentencing. I don't recall the exact offense. Would you like to know

the exact offense?

Q. He was pending a future sentencing?

A. Yes, in July.

Q. So he was put on intensive probation in June, and he had a future sentencing in July. Did you make mention of how his performance on JIPS may, in fact, impact the sentencing outcome in July?

A. Yes.

Q. How did Mr. Rutledge do when he was put on intensive probation?

A. He did very poorly on intensive probation. Within three days he had numerous house arrest violations, not only through our -- the JIPS's team's efforts to contact him at home, but also numerous violations of the home detention program when the home detention officer went by.

Q. Were you -- did his lack of compliance with court orders cause you to take some action even before he was set for his sentencing?

A. Yes.

Q. What did you do?

A. I submitted a motion to the Court to revoke his release status because he was blatantly violating all the JIPS conditions, and I asked that the Court issue a temporary custody warrant.

Q. Was that done, Miss Ku?
A. Yes.
Q. Did Mr. Rutledge self-surrender on that warrant?
A. No.
Q. How did he eventually get picked up on that warrant?
A. He got picked up on a new referral, and the police found out that he had a warrant out for his arrest, and they picked him up on both of those things.
Q. When Mr. Rutledge came before the juvenile court again in July of 1995 for that sentencing, what was your recommendation?
A. Commitment to Department of Juvenile Corrections.
Q. And one of the juvenile correction facilities is called Adobe -- Adobe Mountain?
A. Yes.
Q. And you recommended that he be committed to Adobe Mountain?
A. Yes.
Q. Miss Ku, isn't it common for the juvenile court, in fact, to give juveniles who are before them more than one opportunity to succeed on JIPS?
A. In some cases, yes.

Q. Why did you not recommend that Jermaine -- he had only been on JIPS for a month. Why did you not recommend that he be given another opportunity to show the Court he could succeed? Why did you recommend the harshish penalty that the court has to offer?

A. There were a number of recommendations that went in. Number one, his overall performance, it was terrible. There were, you know, frequently -- there were frequent attempts to locate him, and we weren't always able to find him that day.

When we would find him, we go over and say to him, come on, you have to follow the rules; you have court coming up; you leave nothing but to recommend detention unless you get on the ball. He still didn't comply.

Also, there was the issue of -- there was very little cooperation on the part of the parent in the home, and the JIPS program in order for that to be successful relies a great deal on parental involvement and how actively they are willing to provide us with information on their child's progress at home because we can't be there 24 hours a day.

I wouldn't say the mother was greatly uncooperative, but she was pretty much uninvolved. We know if he were to go back home on JIPS, he wouldn't have

the parental support.

The other issue was he didn't turn himself in on the warrant. He ended up getting a new charge. And the other issue was when he was in custody on the warrant and on that new charge, he didn't show a lot of remorse for his behaviors on JIPS.

Q. Miss Ku, I neglected to ask you a question. When Jermaine -- when Mr. Rutledge came to your case load in June of 1995, you said that he had previously been on standard probation; is that correct?

A. Yes.

Q. Also had he served any time in the juvenile detention facility?

A. Yes.

Q. Approximately how much time immediately proceeding him coming on your JIPS caseload had he been in been on detention in juvenile court?

A. About 18 days.

Q. For the juvenile court practices, is it your opinion that that's a significant or not significant amount of time?

A. Well, I think it depends on the child. But in Jermaine's case, he had been detained previously before so that it may not have been very significant to him.

Q. So he had multiple days juvenile detention?

A. Yes.

Q. Miss Ku, other than detention, standard probation, and intensive probation and house arrest -- or home detention, does the juvenile court have any other services that they could realistically offer beyond commitment to Adobe Mountain?

A. For Jermaine?

Q. For Jermaine.

A. No.

Q. Was he, in fact, committed to the Juvenile Department of Corrections in June of 1995?

A. I believe it was August.

Q. Excuse me. In August of 1995?

A. Yes.

Q. Was that for a determinant or an indeterminate, unspecified amount of time?

A. It was for an indeterminate amount of time.

MS. ORTIZ: Thank you. No further questions.

THE COURT: Miss Hughes.

CROSS-EXAMINATION

BY MS. HUGHES:

Q. Miss Ku, when Jermaine Rutledge came on to your caseload it was June of 1995?

A. Yes.

Q. Was that the end of June of 1995?
A. Yes.
Q. And at the time he was 14 years of age?
A. Thirteen.
Q. Thirteen years of age. And you had indicated that he was unsuccessful on the JIPS program?
A. Yes.
Q. And one of the reasons that you thought he was unsuccessful was because his mother wasn't able to become as involved as you would have liked?
A. Yes.
Q. And you had him on your caseload for, what, approximately a month or less before a warrant was issued?
A. Yes.
Q. And a warrant was issued for a new referral?
A. No. The warrant was issued because he failed to comply with his probation terms, and he had a pending referral.
Q. And when he was picked up on the warrant, it was on the occasion that he was picked up on something different?
A. Yes.
Q. And that new charge was ultimately dismissed?
A. Yes.

Q. And it was dismissed according to the court records for lack of sufficient evidence to proceed?

A. Yes.

Q. All right. When Jermaine was picked up on the warrant in July of 1995 did he remain in custody?

A. Yes.

Q. And did he remain in custody for the entire period of time before he was ultimately sent to the Department of Corrections?

A. Yes.

Q. And when you indicated that Jermaine received an indeterminate sentence, does that mean it was up to the discretion of the Department of Corrections as to when to release him?

A. Yes.

MS. HUGHES: I have nothing further.

THE COURT: Thank you.

MS. ORTIZ: Nothing further, Your Honor.

THE COURT: Thank you, Miss Ortiz.

MS. ORTIZ: The State calls PO James Polis.

(Whereupon, the clerk administered the oath to the witness.)

THE COURT: Have a seat right there, please. Go ahead.

(Next page, please.)

JAMES D. POLIS,

having been first duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ORTIZ:

Q. What is your name?

A. James D. Polis.

Q. What is your job?

A. I'm a juvenile PO.

Q. And is that with Maricopa County?

A. That is.

Q. How long have you been a juvenile PO?

A. Twenty-seven years.

Q. Mr. Polis, during your career as a juvenile PO, have you at one time had to review and do a report on an individual by the name of Jermaine Rutledge?

A. Yes, I did.

Q. And approximately when was that, sir?

A. I believe I was assigned the case in August of 1997.

Q. At that time what was your specific job within the Juvenile Probation Department?

A. I am what they call a transfer officer. Specifically what I do is provide a document called a

transfer report to the hearing officers when the county attorney has filed a motion to remand that case to the adult court system.

Q. Can you tell us very briefly how you go about preparing the transfer report.

A. What we do is review all the prior juvenile records. If the juvenile has been with the Department of Corrections, we contact the parole officers and the institution to get information about their -- what they've done with the juvenile there with the juvenile in the system.

If there are records in other counties, we contact them. If there are records in other states, we get that information. But it's primarily reviewing all the history we can about that individual.

Q. Is it correct, Mr. Polis, that, in fact, you generated a transfer report regarding Mr. Rutledge in your transfer report which is dated as being prepared on or about September 7th, 1997?

A. The actual date of the report is 09/04/97.

Q. And did you go through all of that process that you just described regarding contacting the Department of Juvenile Corrections and what have you in making a report on Mr. Rutledge?

A. Yes, I did.

Q. Now, Miss Ku testified just a minute ago that Mr. Rutledge was sent to the Juvenile Department of Corrections for the first time in approximately August of 1995.

Did you review his interaction with the Department of Juvenile Corrections from 1995 until the time of your report?

A. Yes, I did.

Q. Miss Ku had testified a minute ago that he was sent there with an indeterminate sentence. According to your review, Mr. Polis, approximately how long did he stay in secure care at the Department of Corrections or Adobe Mountain?

A. I would have to look at my report to refresh my memory on that.

Q. Go ahead.

A. The juvenile was actually committed on 08/21/95. He actually arrived at Adobe Mountain School on 08/24/95. He was then released on parole on 03/21/96.

Q. So he was paroled initially from Adobe Mountain in March of 1996?

A. Yes, he was.

Q. According to your research, Mr. Polis, how did you determine -- what did you determine he had done upon being released in March of '96. Did he do good? Did

he do bad? Did he follow his parole terms?

A. He did not follow the parole terms.

Q. What were the specific concerns, Mr. Polis?

A. Well, records indicated that the juvenile was released. He actually -- I believe initially left with his mother. Mother reported that he would not follow her rules at home. He was -- she indicated that he was taking her car without permission and had stolen money from her residence.

He also lived briefly with a cousin, and the same behavior was there. He apparently was taking the cousin's vehicle without permission and also stole money from the residence, according to the juvenile's mother.

Q. So he was paroled in March of '96 and had these problems with his mother and his cousin. What happened around July of '96, Mr. Polis?

A. He was, I believe, re-arrested.

Q. And what was the nature of that new charge? Was it a car theft? Was it an assault? What was just the general nature of it?

A. I believe that was a weapons charge.

Q. When the weapons charge was resolved, what was the sentence, what was his disposition?

A. He -- on August 12 of '96 he was re-awarded or recommitted back to the Department of Corrections.

Q. Was that for a determinate or indeterminate term?

A. That also was an indeterminate term.

An indeterminate term means the juvenile is committed until the age of 18. The Department of Corrections then determines how long he'll actually stay in a secure facility.

Q. And in this particular situation, Mr. Polis, when did the Department of Corrections decide to release Mr. Rutledge back out into parole for the second time?

A. He was paroled on 10/3/96.

Q. And was he sent home again to be with his mother or another relative?

A. No. He was placed in a transitional group home called Park Place.

Q. A treatment facility of sorts?

A. Yes, a part of Department of Corrections' treatment.

Q. And approximately how long did he stay at Park Place?

A. He was there until 10/20/96.

Q. What happened then, sir?

A. Then he was placed in a -- the facility ABC Alternative Behavior residential treatment program. It is actually a residential treatment center.

Q. So he's now given an opportunity at yet another treatment center in March of 1997. After he's been at that treatment center for quite a few months, what happens, Mr. Polis?

A. My understanding from the parole officer was that actually while he was in that placement he was doing fairly well. However, sometime in March, I believe it was, his brother Sherman got out of jail, and his behavior then started to deteriorate. I assume there was some contact with his brother.

On 03/07/96 his brother Sherman and his mother removed him from placement. He went with them somewhere and never returned.

Q. Did the Juvenile Department of Corrections issue a warrant for him at that point?

A. They did.

Q. Did he self-surrender on that warrant?

A. No, he did not.

Q. And is it your understanding that essentially he was captured on that warrant?

A. On 05/13/97 he was arrested on an attempted murder charge and that brought him back to detention. On that same day he was released to his parole officer that took him back to DOC at Adobe Mountain.

Q. It wasn't until his subsequent arrest that

he was taken into custody on that warrant?

A. That's correct.

Q. Mr. Polis, when you did his transfer report -- when you did the transfer report regarding Mr. Rutledge in September of 1997, did you recommend that he be transferred or not transferred to the adult court?

A. I recommended that he be transferred to the adult court.

Q. Why?

A. This juvenile had -- his first contact with the juvenile system was in, I believe it was November of 1992. He was just barely 11 years -- I think 11 years 2 months of age. The juvenile system had worked with this individual for approximately four and a half years.

He was 15 -- I think 15 and a half when I did my transfer report. We had -- we had him in many counseling-type of programs, five or six I believe. He had been -- through the Department of Corrections, he had been in placement residential treatment.

Essentially everything the juvenile system had to offer had been attempted to deal with this individual, and, obviously, none of that worked. His behavior continued -- in fact, his behavior became more aggressive and more hostile, became more serious-types of offenses; weapons were involved.

And there was just no indication at all that this person was able to be further rehabilitated or any type of -- any type of rehabilitation would be done by the juvenile system.

Q. Was it even a close call for you, Mr. Polis?

A. No, it wasn't.

MS. ORTIZ: I have no further questions.

THE COURT: Miss Hughes.

CROSS-EXAMINATION

BY MS. HUGHES:

Q. At the time that you did the transfer court, you knew that Mr. Rutledge was in adult court?

A. Yes, at Madison Street Jail.

Q. He had been automatically transferred on related charges?

A. Yes.

Q. He had already been automatically transferred on a murder charge?

A. Yes.

Q. And the charges that you were considering in your recommendation were charges that were directly related to the same crime?

A. That's correct.

Q. Did that play a role in your decision to

recommend transfer?

A. That was not the only concern, no. Obviously we had tried everything we could with the juvenile prior to that.

Q. My question was, Mr. Polis, and that played a role in your recommendation for transfer?

A. Yes, it did.

MS. HUGHES: Thank you.

Nothing further.

THE COURT: Miss Ortiz.

MS. ORTIZ: Nothing further, Your Honor. I ask if Miss Ku and Mr. Polis be released.

THE COURT: Thank you very much.

MS. HUGHES: No objection.

THE COURT: Folks, because we're just on the testimony, I want to interrupt this matter and take one other matter.

(Brief recess ensued.)

THE COURT: We can resume again with the Rutledge matter.

Mr. Imbordino.

MR. IMBORDINO: We don't have any other witnesses. We have family members that want to address the Court.

THE COURT: Miss Hughes, do you have anything else you want to present? Let's have The state present the

family members and give you the last word here.

MS. HUGHES: Judge, you've received my sentencing memorandum as well and the attachments?

THE COURT: Yes, yes.

MS. HUGHES: And I'm assuming you have read them?

THE COURT: Yes, I have. I have everything.

MS. HUGHES: Mr. Rutledge's mother and grandmother are both here this morning, and Mrs. Cobb does not wish to address the Court. However, his grandmother, Maggy Sanders, presented me with a letter this morning, which I shared with Mr. Imbordino. I would like you to take that into account.

Other than that, we would just have argument.

THE COURT: Why don't you let me have this.

MS. HUGHES: This is a fairly long letter. It may give you some insight.

THE COURT: Yes. Thank you. Tell you what, let me read this. It will take me a couple minutes. Let me read this. Then we'll get to you.

(Brief recess ensued.)

THE COURT: All right. I have read it. Thank you very much.

Mr. Imbordino.

MR. IMBORDINO: Thank you.

THE COURT: Ma'am, tell me your full name.

MS. HARRIS: Toni Harris.

THE COURT: Yes, Miss Harris.

MS. HARRIS: I'm Ryan's mom.

THE COURT: Yes.

MS. HARRIS: All they had to do, Jermaine and his brother Sherman, all they had to do, Your Honor, was take that gun and say give me the keys, because Chase and Ryan, they weren't tough kids, but I will speak for my son Ryan.

Ryan was a little bit of a chicken. Ryan and I would talk about things like, you know, we would see things on Unsolved Mysteries and we would think about the paranormal and metaphysics and reincarnation and where do you go when you die, and we're Irish, so we'd embellish, and I'd try to scare him, and he'd get so scared.

He was six-three, and he had size 14 shoes, and he would say to me, mommy, can I sleep with you tonight? And he would get in my bed, and I would say, Ryan, get out of my bed. You are 20 years old. It is not right. You can't sleep with your mother at 20. They say that's wrong.

Ryan was 21 years old. He was supposed to be a man. We were married by then. We were starting to have babies. But Ryan wasn't a man. He was a boy. He was a little boy. He had learning disabilities. He was

the one child that I have, and I have three, but he was the one who needed me the most, and I devoted my whole life to helping him.

They said he wouldn't talk. They said he wouldn't graduate from high school, but he reached the mountain top before he was murdered.

Jermaine is 17 years old. He's supposed to be at boy. He's supposed to be the child. He's not a child. He has done very bad things. You know what, I don't think it is about age. I think it is what is in your genes, could have something to do with your upbringing, but he's a bad seed. He's a killer.

And after what I just heard today, I mean, I can't believe that he just -- he just dropped through the -- the system. I haven't seen Ryan in a year and nine months. And you know what, sometimes I do -- I pretend that he's an archaeologist and that he is on a dig in India to get through the day. I pretend he is just on a trip.

I have two children left. And I have a son that sent Ryan home to me to be with me on Mother's Day, and now I have broken children who lives with this horrible, horrible guilt because Todd sent Ryan home to be with me on Mother's Day.

Jermaine Rutledge did that to me. He did it

to me. He did it to Chip. He did it to Todd. And he did it to Poppy.

When Ryan and Chase left that night at 10:00 o'clock, I walked into the elevator, and Ryan said to me, you know, I'm going out to celebrate my 21st birthday, and I'm not going to take daddy's Jeep. Chase is going to be the designated driver. And I looked at him and I said, wow, Ryan, you are finally going up.

But, you know what, I'm 52 years old, and why didn't I just give him a $100 dollar, a $100 bill for cab fare? Why didn't I have that wisdom? And he was such a trusting child, and he gave him a ride, and he hung out with him.

So I ask you, Your Honor, I want you to give him the same sentence that I have, that Chip has, that Poppy has, and that Todd has. We have a life sentence without Ryan, life. We're never going to see him again. I have no chance.

And I don't want him to have a chance either. I want him to go to prison for the rest of his life without parole, because, you know what, he'll get out and he'll do it again. And I don't want him ever, ever to hurt another child and to cause pain to anybody.

There's no win here, no win. His mom, she'll lose him. She's got regrets. I got regrets. I

have a regret over a $100 bill for cab fare. Well, she should have regrets for having guns and bullets in her house so her children can go out and shoot other children. That's her regret, so we all lose.

Please put him away. Don't let me have to worry about him getting out on parole. He has no remorse. He's strutted into this courtroom cockier than hell, and -- I'm sorry. I'm angry. But that's all I ask of you, Your Honor. Thank you.

THE COURT: Thank you.

Mr. Harris, state your name for the record.

MR. HARRIS: My name is John David Harris.

Your Honor, I know that's my name, but I really come here today as Ryan's daddy. I have been working with this system of yours and mine for many decades.

I have never seen anything like today. I finally entered this courtroom at about 10 minutes to 10:00, and I can't believe what you've been through. So I say good morning, but it must be horrible.

I've watched all these people, a 14-year-old boy and what looked like the agony that you were going through and his family and his family and the girl. I can't believe you have to decide that.

Vince told me to please try to take about 10

minutes, and Chip, no more, so I'm going to try to do that. I didn't want you to think, oh, my god, he's going to be here the rest of the day.

THE COURT: Say whatever you like.

MR. HARRIS: I won't, sir. I recognize that our loss here is no greater than that of any other parent that's been through this kind of a nightmare, that our tears are no more frequent, that our sadness is no deeper.

I have volumes of notes that I have prepared for this 10 minutes. I can't begin to use them all, and I won't.

We're not any better than any of these other poor parents and no worse. But I heard you say this morning, and I wrote it down at the back of the courtroom, when you spoke to somebody, and you said to the defendant, "It's not about you; it's about everybody else." And if that's true, then I belong here.

Whether you made up your mind about what you will do with reference to your discretion or whether you haven't, and I don't know that, but I have to take a chance that you haven't made up your mind, and that perhaps something that Toni has said or I will say will make a difference.

I gave you the photographs with a note that I shared with defense counsel. The very act is filled

with such sadness, because you see it's the only way that I knew to try to add a third dimension to the loss.

The whole system up to this point has been so clinical and needs to be, and I understand that, about life and about death. The enormity of the loss is inadmissible to this point in time, and perhaps that makes sense, but it is not any more.

The enormity of the loss is prejudicial. It is too emotional. But the real losers here, as awful as we feel, is not Ryan's daddy or mom or siblings, it is Ryan. This isn't a wrongful death action. We're not being compensated for our loss. It is about his loss.

Toni said something to you here a few minutes ago that was wrong, and I mean in error, not that what she said was wrong. It was just in error. It wasn't Todd who sent Ryan home.

Ryan had just finished his school year. The kid was never supposed to finish high school. He just finished the school year with a 3.4 GPA and wanted to go see his brother, so I -- I let him go. That was sort of a grown up thing to do, you know.

And I knew he was going to be gone for his birthday day, but I thought he deserved it. He had such a good time with Todd. He didn't want to come home, and asked me if he could stay another week. It was me who

made him come home, because I said it is Mother's Day, be here for your mother, and we miss you too much. It is time to come home. And with that I will forever live.

Two of the last conversations that I had with Ryan was three days before this happened on his 21st birthday, and I even remember where it was, from my car phone, because I got a little emotional and pulled over to the side of the road on Osborn. And I said to him, Ryan, my baby is now 21. It sure feels funny. Can you believe it Ryan?

And his response was -- and I wrote it down the day this happened. His response was "Am I still your baby daddy?" And I said, "You'll always be."

The last time I saw him, the day before this happened, he had come to see me again, and his little brother, Andrew, my 10 year old. And Toni says this was not a tough kid. This was not a smart ass, you know.

The last thing that he did the last time that I touched him was because he said -- I was a little aggravated that he was leaving, frankly. I wanted him to stay longer at the house. So when he was leaving, he said, "Let's do a family hug."

And Andrew was sitting up at the kitchen, and I was down in the family room, and I never heard of a family hug before, never heard of it since, but thank god

that I did it then.

Your Honor, I have -- I have. I have pieces that Ryan wrote because I didn't know what to do here today. I have never done anything like this, and I'm not going to do that now, but I have stuff here.

I can't believe that Toni said that, what she said to you, a note that says, "Can only poppy and me sleep in your bed tonight?" This was two years before he died, a composition that he did, I guess, when he got in trouble, that I kept always, which is, "Why I don't flick spit." I guess he did that in class and had to write this as punishment. I even have a paper on capital punishment.

This isn't just about anger. It is about fairness. Ryan is gone forever. Toni was right. He is forever separated from us, which must break his heart, if there is a god, as much as it does ours.

And I ask you to, on behalf of my family and everyone that's been so devastated by this loss, to separate this defendant forever from us and the remainder of society. Please, Judge Galati, even inadvertently make your ruling with at least the thought in mind that there should be, in our respectful opinion, no more senselessness, no unneeded sadness added to this in order to allow us to sleep at night until we die.

Please hold our hands, by doing what Ryan

still deserves, and that's the fullness of justice from this system of which we're all a part. The ultimate unfairness here, if any more can be rendered, would be one day me walking down the street with my family, with little Andrew 30, 40, years from now, and seeing this man laughing and smiling and happy with his son or his family.

That's not about hate. It is not about anger. It is about the fairness that we ask from you. If Ryan is watching, listening, and hearing me talk to you, as I believe he is, then I ask you to smile back at him with your sentence with the same way in the same manner that the jury smiled to us with its verdict.

I have -- I have here Ryan's earring that he wore that night and his ring that he was so proud of at Brophy in the police folder that I don't have the strength or the courage to yet open. I don't know when I will have it. Maybe it is not about me either. Maybe it is about all of us.

This is an unbelievable job that you have. Wow, I had no idea, and I don't apologize for anything that I have said. But there is a part of me that is very sad for continuing to put you through all of this. Thank you, sir. I appreciate it.

THE COURT: Thank you. Thank you, Mr. Harris.

Mr. Imbordino.

MR. IMBORDINO: I don't think -- is there anyone else that wanted to address the Court? I don't believe there is.

THE COURT: And Miss Hughes, did you have anyone that wanted to say something?

MS. HUGHES: Betty Cobb would like to speak on behalf of her son.

THE COURT: Yes. Miss Cobbs, come forward, please. Good morning.

MS. COBBS: Thank you, Your Honor.

THE COURT: What did you want to say, ma'am?

MS. COBBS: I just want to say to the family, the Harrises the Claytons, that I am truly sorry for what you are going through and your suffering, because, you see, I had an 18-year-old sister that life was taken too, so wishing me to suffer, I'm already suffering.

But I want to say to you, that wasn't said to us when my sister was taken from us, is that how sorry I truly feel, and that I have seen tears of my son, Jermaine.

As far as my son, Sherman, he is unknown to me, because when they released him, that was not my son that come home to me, no emotions. My Jermaine has emotions. He has never physically hurt anyone. He did not shoot or pull. He was not the trigger man of this.

And all I could do is apologize for my son, Sherman, and hope the judge will have mercy on my Jermaine, because he is truly not a bad kid.

It's been -- you would think he would have tattoos like gang members, but from the time we got here, he fought off gang members -- he was assaulted and beaten up by six gang members -- our home was burnt to keep from joining them. In order to protect himself, he felt a weapon was something that he needed.

But he never pointed it, and he only took it once. There was witnesses of that. He never pointed it, never. He also prevented a young man from shooting a bunch of gang members, even though he was punished for taking that gun and running to keep this boy from shooting these people.

Like I say, I'm saying I'm sorry because it wasn't safe for us. Thank you, Your Honor.

THE COURT: Thank you, ma'am. Thank you.

Anyone else?

Miss Hughes and Mr. Rutledge, why don't you come up here.

Your true name is Jermaine L. Rutledge?

THE DEFENDANT: Yes.

THE COURT: Is your date of birth the 9th day of October of 1981?

THE DEFENDANT: Yes.

THE COURT: Mr. Rutledge, based upon the previous proceedings in this court, that being the trial and the verdict of the jury, it's the judgment of the Court that you are guilty in Count 1 of murder in the first degree, class one, dangerous felony; Count 2 and Count 3, armed robbery, each of those are class 2, dangerous felony offenses; and Count 4, attempted murder in the first degree, class 2, dangerous felony offense; each of these offenses committed on or about the 13th day of May of 1997.

I have read the presentence report and everything attached to it. I have read everything submitted to me, including the sentencing memorandum from Miss Hughes and all attached to it. I have considered the testimony that I have heard today. Miss Ortiz submitted a memorandum earlier which I read.

I did get -- yesterday I looked at the booklet that Mr. Harris submitted. And as I said, I have considered what I heard here today.

I show that you have spent a total of 639 days in custody up to this point.

MS. HUGHES: That's what I have.

THE COURT: Miss Hughes, anything you want to say on behalf of Mr. Rutledge?

MS. HUGHES: Judge, there is no way that I could match the eloquence of the parents that spoke before you today, and that would include Mrs. Cobbs in her own way spoke as eloquently I think as Mr. and Mrs. Harris.

And there is no way that I can match the eloquence of the United States Supreme Court when they discussed the meaning of age in sentencing and why we do treat younger offenders differently than we do adults. And I think nothing illustrates the need to do that more than this case.

It is clear in this case that the person who was primarily responsible for the events that occurred that night was Sherman Rutledge, the person who was older than his brother, Jermaine, by as by at least 10 years and maybe more. He was the person who should have been looking after his younger brother and instead led him into this or horrible, horrible crime.

I listened as well this morning, as Mr. Harris did, to the sentencing that you were faced with the 14 year old boy, and I listened to you tell the 14-year-old boy, as did Mr. Harris, "It is not about you," and I understand that.

And I would agree that, to an extent, except that you were a judge invested with discretion and you are a judge who is required to take into account the person

who is standing before you to be sentenced. You are required to take into account his age, and you are required to take into account the circumstances of the offense.

It may not be all about Jermaine, but it is not all about vengeance either. Not all murders are the same, and not all persons who are convicted of murder are the same. And if we ever approach our judicial system in that fashion where all murders are treated the same and everyone is given a natural life sentence because they are involved in a murder, then it is a system that I don't think I want to participate in.

You have discretion in this case. You listened to the evidence. You know that Jermaine Rutledge was not the moving force behind this murder. You know that he was influenced by the actions of his older brother.

You know that his juvenile record is, as bad as it is, is not as bad as it might be -- it has been portrayed. It is true that in his most recent brush with the juvenile system when he had a weapon that he did try to prevent bloodshed, and it's granted -- I grant that he shouldn't have had the weapon to begin with, but I think that that showed his character.

Jermaine has a problem with theft.

Jermaine -- he has a larcenist heart, as I said in my memorandum, but I don't believe that he has a murdererist heart. I ask the judge to do the fullness of justice as Mr. Harris indicated, and the fullness of justice takes into account Jermaine as a person, his age, his background, his participation in the offense, and give this case some proportionality.

Twenty-five years is a long time. And we all know the statistics that most violent crime is committed by younger people, juveniles, that not much is committed by the older adult. If you sentence Jermaine with the possibility of parole, he is still going to be in his 40s if he is released, if ever. He may not be released.

In fact, I would say in this political climate, the chances of anyone getting a life sentence even with the possibility of parole does not -- it does not does not bode well for release at any time.

What I'm asking the Court to do is give Jermaine some hope that there is some future for him, and I'm asking the court to sentence him to life with the possibility of parole.

THE COURT: Thank you. Thank you.

Mr. Rutledge, is there anything you want to say?

THE DEFENDANT: Yes, Your Honor. I understand that what happened here with my -- in the trial and all that was wrong, and I'm truly sorry for what happened that night, regardless of what happened in the trial being found guilty, whatever.

I still feel -- believe in my innocence, that I'm innocent, even though -- even though one person was killed. I'm sorry for that. I'm sorry it had to happen. Maybe at the time if I knew it was going to happen or have anything to do with it I wouldn't.

The Harris family is sad, and I feel -- I feel for them, but -- but them hating me isn't going to hurt me. It is going to hurt them. Sending me to prison for life, natural life, 25 years, whatever you decide is -- it is your decision.

It is not necessarily going to take me away from my family. My family will always be there. I will always be around. What they need to understand, that sending me to prison is not going to change what happened to their son and them thinking that I killed or had anything to do with the murder of their son or the other victim Chase Clayton getting shot.

I'm sorry for what happened, but I still have to say I don't have anything to do with it. I don't know about it beforehand. Like I say, I don't hate the

family. I really don't know the family or the victims who are deceased, so I can't say I hate them, but I feel sorry for what happened.

I know they are going through a lot of pain and hate and a lot is going through their mind. I would like to say it is odd Miss Toni Harris to consider me a cold-blooded killer, a killer, whatever, in her eyes. I know she has much hate for me. I could feel the vibes, the way she was talking. I could feel it, but that doesn't mean I have to hate them.

I feel for them. I'm sorry it had to have happened. Saying that I still believe myself to be innocent regardless of the verdict, whatever they said, regardless what they said, sending me to prison isn't going to bring back their son. I know they realized that, and it has hurt me sending me to prison for something I didn't do.

Life, you know, in prison, it could be worse; I could be dead. I'm still alive. So if that's supposed to give them satisfaction of depriving them of their son having satisfaction for their son's death, then I don't have much to say about that. Like I say, I feel sorry for what happened, you know.

I came into the court with -- saying I came into the court with an attitude, smirking, that I did some

kind of obscene gestures to the victim, the father, that I smiled and smirking, whatever he said, you know. I would like to say that is -- that isn't true.

I came to the courtroom with much respect for this Court, much respect for you. I sat there and listened to what was going on. You know, as far as smirking, smiling and smirking, you know, flipping the victims off or whatever, that's not me. This is my life right here. Why would I do something such as that? Why would I even do anything like that?

So, maybe your decision is, what I get, it is up to you. Like I say, I'm sorry for what happened that night, but I don't have anything to do with it.

THE COURT: Thank you.

MS. HUGHES: Judge, could I just add one thing?

THE COURT: Yes, yes.

MS. HUGHES: I just want the Court to know, at least from my perspective for, Judge, having done defense work for as long as I have done now, that every single client that I have been involved in a felony-type murder situation doesn't understand it, doesn't understand how they could be found guilty of murder when they weren't actually involved in the murder.

THE COURT: I understand. Thank you.

Mr. Imbordino.

MR. IMBORDINO: Your Honor, I think that the State's position has been made fairly clear. We believe that the defendant should be sentenced to natural life, and I don't think that -- and I know that we don't take any great joy or satisfaction in doing that.

It is not really going to change, obviously, what has happened. I won't feel better, but it is the appropriate thing to do, given the circumstances, the impact on the victim's family, the numerous attempts to intercede in this young man's life.

My understanding is that his father is in prison. He's going to be in prison. And even if you give him the possibility of parole, 25 years, as Miss Hughes pointed out, he might not ever be paroled, and as you know his brother may follow him to prison if he is convicted.

And quite frankly, I'm not sure, you know, I don't know whose fault that is, but that probably doesn't matter. But I believe that in the interest of the community and the safety of the community it requires the natural life sentence.

I again stress to you, as again, you know -- and I think Mr. Harris said and Mrs. Harris both said that's not going to bring Ryan back. It is not going to bring anyone any satisfaction.

I recently attended an execution of someone

that I had convicted in -- a long time ago. It didn't bring me any satisfaction. Thank you.

THE COURT: Thank you.

Miss Hughes, any last words?

MS. HUGHES: No, Your Honor.

THE COURT: Is there any legal cause?

MS. HUGHES: No.

THE COURT: No legal cause appearing, before -- before I list the aggravating and mitigating factors here, let me say a couple things. One, since you all quoted it, when I said earlier that "It's not about you" to Mr. Johnson, what I attempted to convey there is this:

The sentencing function is a vindication of the community's interest; it is not a vindication of the individuals; and my job is not to do what is best for the defendant. That is what I tried to convey.

That is the difference between the juvenile court and here. The defendant is due a full evaluation of what he did. And you say to your yourself, that is the defendant, that is what he did. And you ask yourself, what is now the best interest of the community?

That is the way I approach sentencing on something like this, and that is the way I approach sentencing on possession of marijuana, three grams of marijuana. When you treat the defendant leniently, that

is because that is in the community's best interest. If you treat them harshly, that is in the best interest of the community. If you sentence him to what he wants, that is coincidental.

Secondly, yes, you quoted from the U.S. Supreme Court case concerning youth. I agree with all that. What they were explaining in that case is why we don't execute 15 year olds. I agree with that. We don't execute 15 years old. I haven't had a 15 year old for first degree murder before.

I have thought about all those things many times before with regard to the sentence about to be imposed -- for the Harris family, particularly a couple things, Mr. Harris, I did recognize in what he said -- one is when I list the aggravating and mitigating factors, you are not going to hear me say sympathy. Of course, I do I have it, but the law does not permit me to act on that. I'm not going to submit on that.

Secondly, the value of Ryan Harris' life is not to be measured by the sentence. Don't think that it does. I recognize that also. You folks all know what was important about him, and you adequately demonstrated to me that he was an important person.

With regard to the actual aggravating and mitigating factors, on the mitigating side, I think

everybody is aware of what it is, first and foremost, the defendant's age, 15 years and 7 months at the time that this happened; secondly, I would say he grew up without any adult role models or mentored without doubt; and thirdly, he was not the prime mover here. He did not shoot Ryan Harris. He did not shoot Chase Clayton.

Those are the mitigating factors that I could find. I have found them to be in due consideration -- I have given them due consideration. I don't think any one of them is necessarily or collectively available for the significant mitigating sentence, significantly it is not.

I find the aggravating factors: One, this murder was done to steal a car; and the senselessness of that can't be understated -- overstated, I'm sorry; secondly, the presence of accomplices, at least one, that's a statutory aggravator that I considered; thirdly, this defendant was not a minor participant in this -- in this event.

Without a doubt from the testimony I heard here -- without prejudging any other trials that are going to take place -- Sherman Rutledge was the prime mover, but this defendant, he hit Chase Clayton over the -- the head with a bottle. He attacked him with a knife. I think the fair reading is that he intended to do serious bodily

injury without a doubt on Chase Clayton, and the jury found attempted first degree murder was a crime of attempt.

His juvenile record: 1992, he threatened to kill fellow students, had a list of kids that he wanted to kill; 1995, an aggravated assault with a gun which led to the Juvenile Department of Corrections and a parole; and in 1996, a gun offense.

He was on juvenile probation and warrant status when this event happened. That's an aggravator. There's been a significant impact on the victims family. That is an aggravator that I can consider.

What I earlier said about Ryan or how good he was or whatever, that's something that I can't consider. I think the law is such that whether the victim is Mother Theresa or Charles Manson, doesn't affect the sentence, but the effect on the victim's family is significant.

Five -- Number 7 here, poor performance on probation that was testified to here today, at least at this stage of his life indicating that this defendant is not amenable to any kind of supervision.

Lastly, the events of the next day to me demonstrate more about this defendant than almost anything else, and that is, he drove the fruits of this

cold-blooded murder around Mesa the next day showing it off, showed that he was pitiless, remorseful, no conscience whatsoever.

I think that depravity is the way that I would characterize his mental state as characterized by his conduct the next day on. I don't see how anyone can claim to the Court, hey, I didn't know it was going to happen; hey, hey, I didn't want it to happen; hey, I'm sorry what happened, but look what I got as a result of it; I got a car to drive around in Mesa.

To me what that says about the defendant is perhaps the most aggravating factor here. The aggravators that I have set forth I think clearly and significantly outweigh the mitigation. I think that the maximum sentence available to me is the appropriate sentence in this case, and that's the sentence I'm going to impose.

On Count 1, it is the judgment of the Court that you be sentenced to life imprisonment. The defendant shall not be released on any basis for the remainder of his natural life. These orders are not subject to commutation or parole, work furlough, or work release.

Counts 2 and 3 are: Armed robbery, class 2, dangerous offenses. For the reasons I have set forth, the maximum aggravated sentence of 21 years is imposed on each of them.

Count 4 is also a class 2, dangerous offense. The aggravated maximum of 21 years is imposed.

These sentences are to run concurrently. That is in recognition of the defendant's age, the significance I understand -- or the lack thereof, I understand.

The defendant is entitled to credit for 639 days of presentence incarceration.

There is a restitution request here for $324.

Mr. Imbordino, is that what the State is requesting? That is all that I have.

MR. IMBORDINO: No, we're not. We're not requesting that at all.

THE COURT: All right. No restitution will be ordered.

Mr. Rutledge, you have the right to file a notice of appeal in this case. You have to do it within 20 days of today's date. If you fail to file it within that period of time, you lose the right to do so. You have a right to have a lawyer represent you during the proceedings. If you can't afford one, one will be appointed to you free of charge.

Those rights are in writing. Go over them with your attorney. Read them and sign them when you

understand them. Sign it and return it to the Court.

We're in recess.

(Whereupon, the proceedings concluded at 12:20 p.m.)

C E R T I F I C A T E

I, MELINDA S. SETTERMAN, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 3rd day of June, 1999.

Melinda S Setterman

MELINDA S. SETTERMAN, RPR

Appendix M

Clerk of the Superior Court
*** Electronically Filed ***
01/25/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1997-005555 01/21/2022

HONORABLE GEOFFREY FISH

CLERK OF THE COURT
A. Dvornsky
Deputy

STATE OF ARIZONA

JULIE ANN DONE

v.

JERMAINE L RUTLEDGE (B)

JERMAINE L RUTLEDGE
142462 ASPC EYMAN BROWNING
P O BOX 3400
FLORENCE AZ 85132
NATALEE SEGAL

COURT ADMIN-CRIMINAL-PCR
JUDGE FISH

JESSICA ANN GATTUSO

RULE 32 PROCEEDING DISMISSED

The Court has considered the State's Motion Reconsider Ruling, Ordering Evidentiary Hearing, Vacate the Evidentiary Hearing, and Dismiss Jermaine Rutledge's Petition for Post-Conviction Relief filed August 12, 202, the Defendant's Response to State's Motion to Reconsider filed October 20, 2021, the State's Reply to Rutledge's Response to State's Motion Reconsider Ruling, Ordering Evidentiary Hearing, Vacate the Evidentiary Hearing, and Dismiss Jermaine Rutledge's Petition for Post-Conviction Relief filed November 1, 2021 and State's Notice of Supplemental Authority to State's Motion Reconsider Ruling, Ordering Evidentiary Hearing, Vacate the Evidentiary Hearing, and Dismiss Jermaine Rutledge's Petition for Post-Conviction Relief filed January 12, 2022.

The Court finds that *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), made clear that *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), do not constitute a significant change in the law that would probably overturn the Defendant's natural life sentence. The Court further finds that *Miller* is not applicable to the Defendant's situation

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1997-005555 01/21/2022

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

IT IS ORDERED granting the State's Motion Reconsider.

I**T IS FURTHER ORDERED** summarily dismissing the Defendant's Petition for Post-Conviction Relief filed on August 21, 2019.

Appendix N

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JERMAINE LAMAR RUTLEDGE, *Petitioner*.

No. 1 CA-CR 22-0169 PRPC
FILED 5-16-2024

Petition for Review from the Superior Court in Maricopa County
No. CR1997-005555
The Honorable Geoffrey Fish, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Ballecer & Segal, LLP, Phoenix
By Natalee Segal
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma, Judge Jennifer B. Campbell, and Michael J. Brown delivered the following decision.

PER CURIAM:

¶1 Petitioner Jermain Lamar Rutledge seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is Rutledge's third petition.

¶2 Absent an abuse of discretion or legal error, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *See State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Petitioner has the burden to show that the superior court erred in denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538 ¶ 1 (App. 2011).

¶3 This court has reviewed the record in this matter, the order denying the petition for post-conviction relief and the petition for review. This court finds the petitioner has not established error.

¶4 This court grants review but denies relief.

AMY M. WOOD • Clerk of the Court
FILED: AA

Appendix O

Supreme Court
STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

November 7, 2024

RE: STATE OF ARIZONA v JERMAINE LAMAR RUTLEDGE
Arizona Supreme Court No. CR-24-0141-PR
Court of Appeals, Division One No. 1 CA-CR 22-0169 PRPC
Maricopa County Superior Court No. CR1997-005555

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 6, 2024, in regard to the above-referenced cause:

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

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

Tracie K. Lindeman, Clerk

TO:
Alice Jones
Julie A Done
Vince H Imbordino
Natalee E Segal
Amy M Wood
lg

Appendix P

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

THE STATE OF ARIZONA, Plaintiff, vs. JOSEPH LEE CONLEY, Defendant.	CR2004-035015-001 **~~[PROPOSED]~~ ORDER** (Assigned to the Honorable David K Udall, Div. JUJ14)

This Court finds that after *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), Conley has failed to raise a colorable claim for relief regarding his post-conviction *Miller v. Alabama*, 567 U.S. 460 (2012)/*Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)/*Tatum v. Arizona*, 137 S. Ct. 11 (2016) claim, and therefore is not entitled to an evidentiary hearing. To obtain an evidentiary hearing on non-precluded claims presenting a material issue, a defendant must present a "colorable" claim that requires further factual development. *See* Ariz. R. Crim. P. 32.6; *State v. Borbon*, 146 Ariz. 392, 399 (1985). A colorable claim consists of factual allegations that, if true, would have changed the outcome of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63 (1993).

This Court finds no material issue of fact or law that would entitle Conley to relief because, as this Court already found in 2012, *Miller* was not a significant change in the law applicable to Conley's case that would probably overturn his natural life sentence. *Miller* did not place a categorical ban on juvenile life without parole. Rather the Supreme Court held that mandatory natural life sentences were unconstitutional. *Miller*, 567 U.S. at 480. Because this Court had discretion to sentence Conley to life with the possibility of release

after 25 years–a sentence less than natural life—his natural life sentence was not mandatory.

Montgomery thereafter *only* made *Miller* retroactive, and thus, does not change this Court's previous finding that *Miller* was not applicable to Conley because his natural life sentence was not mandatory. *Jones*, 141 S. Ct. at 1314-16. Nor does *Tatum v. Arizona*, change this Court's previous finding because its broadened interpretation of *Miller* by *Montgomery* was implicitly overruled by *Jones*. Likewise, *State v. Valencia*, 241 Ariz. 206 (2016)'s interpretation of *Montgomery* as clarifying or broadening *Miller*, based in part on *Tatum*, was implicitly overruled by *Jones*. *Jones* clarified that *Miller* was narrow and that a natural life sentence for juveniles is constitutional "only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment." 141 S. Ct. at 1314 (quoting *Miller*, 567 U.S. at 476.) *See also State v. Soto-Fong*, 474 P.3d 34, 40, ¶¶ 19, 22-23 (2020) (confirming *Jones*'s narrow interpretation of *Miller*, that a sentencer must only "consider 'an offender's youth and attendant characteristics' before sentencing a juvenile to life without the possible of parole," and agreeing with Justice Scalia's dissent in *Montgomery* that *Miller*'s holding was narrow and "merely mandated that trial courts '*follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty.'").

Even assuming, without deciding, that *Miller* represents a significant change in the law applicable to Conley, it would *not* probably overturn his natural life sentence because this Court considered Conley's "youth and attendant characteristics" before imposing the sentence. *Jones*, 141 S. Ct. at 1313, 1316. This is all *Miller* requires. *Id. Miller* does not require a "sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence," find that Conley is the "rarest of juvenile offenders," or provide any on-the-record sentencing explanation. *Id.* at 1319-21. And "*Montgomery* did not purport to add to *Miller*'s requirements." *Id.* at 1316. Thus, even assuming *Miller* applied to Conley's case, *Miller* was satisfied when this Court considered Conley's youth and attendant characteristics as outlined in *Miller*. 567 U.S. at 477-78.

IT IS ORDERED granting the State's motion to vacate the evidentiary hearing and dismiss Conley's petition for postconviction relief; and

IT IS THEREFORE ORDERED dismissing Conley's Successive Petition for Post-Conviction Relief in its entirety.

SIGNED this 8th day of September, 2021.

HONORABLE DAVID K. UDALL
JUDGE OF THE SUPERIOR COURT

Appendix Q

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOSEPH LEE CONLEY, *Petitioner*.

No. 1 CA-CR 22-0266 PRPC
FILED 2-6-2024

Petition for Review from the Superior Court in Maricopa County
No. CR2004-035015-001
The Honorable Patricia A. Starr, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Julie A. Done, Jessi C. Wade
Counsel for Respondent

Zhivago Law, Phoenix
By Kerrie M. Droban Zhivago
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Andrew M. Jacobs, Judge Jennifer M. Perkins, and Judge David D. Weinzweig delivered the following decision.

PER CURIAM:

¶1 Petitioner Joseph Conley seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is Conley's third petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). It is the petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, the petition for review, and response. We find the petitioner has not established an abuse of discretion.

¶4 We grant review but deny relief.

AMY M. WOOD • Clerk of the Court
FILED: AA

Appendix R

Supreme Court

STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
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TRACIE K. LINDEMAN
Clerk of the Court

November 8, 2024

RE: STATE OF ARIZONA v JOSEPH LEE CONLEY
Arizona Supreme Court No. CR-24-0075-PR
Court of Appeals, Division One No. 1 CA-CR 22-0266 PRPC
Maricopa County Superior Court No. CR2004-035015-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 6, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

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

Tracie K. Lindeman, Clerk

TO:
Alice Jones
Julie A Done
Jessi C Wade
Kerrie M Droban Zhivago
Amy M Wood
ga

Appendix S

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. JOSE LEWIS BOSQUEZ, Defendant.	CR 2010-013094-001 DT

Phoenix, Arizona
May 25, 2012

BEFORE: THE HONORABLE PAUL MCMURDIE
Superior Court Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SENTENCING

PREPARED FOR PCR

HELENE PAUSTIAN, RPR
Certified Court Reporter
No. 50072

A P P E A R A N C E S

FOR THE STATE:

KIRSTEN VALENZUELA
Deputy County Attorney

FOR THE DEFENDANT:

LAUREL A. WORKMAN
Attorney at Law

Phoenix, Arizona
May 25, 2012

(The following proceedings took place in open court:)

THE COURT: CR 2010-013094-001, CR 2009-005043-001, CR 2009-006958-001. Counsel.

MS. VALENZUELA: Kirsten Valenzuela on behalf of the State.

MS. WORKMAN: Good morning, Judge. Laurel Workman on behalf of Mr. Bosquez who is present in custody. Do you want him up at the podium?

THE COURT: I do.

Sir, what is your date of birth?

THE DEFENDANT: 9-1-92.

THE COURT: Based upon the acceptance your plea, it is the judgment of this Court you are guilty on Count 1 for the crime of conspiracy to commit aggravated robbery, a class 3 dangerous felony, committed on June 8th, 2010.

That you are guilty on Count 2, for the crime of armed robbery, a class 2 dangerous felony, submitted on June 8th, 2010.

That you are guilty on Count 3 for the crime of kidnapping, a class 2 dangerous felony, committed on June 8th, 2010.

That you are guilty on Count 4 for the crime

of theft of means of transportation, a class 3 dangerous felony, committed on June 8th, 2010.

That you are guilty on Count 5 for the crime of first degree murder, a class 1 felony committed on June 8th, 20120.

And you are guilty on Count 6 for the crime of trafficking in stolen property in the second degree, a class 3 felony, committed on June 8th, 2010.

Based on the entry of judgment in that cause number, it is the determination of this Court that you are in violation of your probation in CR 2009-006958-001 on Count one for the crime of attempted aggravated assault, a class 6 felony, committed on March 24, 2009, having been placed on probation on August 20, 2009. And that you are in violation of your probation in CR 2009-005043-001 for Count 1 for the crime of aggravated assault, a class 6 felony, committed on March 13, 2009, and Count 2, aggravated assault, a class 6 undesignated felony, committed on March 13, 2009, having also been put on probation on August 20, 2009.

I have read and considered the presentence and disposition report that was prepared in this matter, including all of the attachments, which also included the presentence reports in the other cause number. I have read and considered the materials submitted to me by the State

regarding the disciplinary action reports that relate to you. I have read and considered three separate notices of filings and correspondence -- actually, there were two -- of letters that were submitted by your lawyer. I have read and considered all of the letters that have been submitted.

MS. WORKMAN: Judge, I assume the Court has received the mitigation report as well?

THE COURT: Yes. I'm sorry. I should have said that as well.

I'm assuming, Ms. Valenzuela, you have additional information you'd like to present?

MS. VALENZUELA: I do, Judge. I guess my anticipation -- you can let me know if this would be all right if next of kin -- there will be at least one, maybe a couple that would like to speak. And I know the defendant may have someone who would like to speak. If I can present and then Ms. Workman and the defendant.

THE COURT: That's fine. We can proceed in that manner.

Ms. Workman, go ahead and have a seat, you and your client. We'll proceed in that fashion.

MS. WORKMAN: Okay.

MS. VALENZUELA: The first person who would like to speak is Katrina Bustamante.

THE COURT: All right. Good morning, ma'am.

MS. BUSTAMANTE: Good morning.

THE COURT: And your name, please?

MS. BUSTAMANTE: Katrina Bustamante.

THE COURT: All right. What would you like to tell me?

MS. BUSTAMANTE: Before this incident had occurred, David was a really good friend of mine. I had known him for eight years. That's how I met my boyfriend and whom I had a daughter with. And David was going to be the godfather of our daughter. Without him now, it's just like a part of him is missing from us.

When our friends get together, it's like we know he's there, but then he's not there. We spent a lot of time with him. We would see him every week. And when this incident occurred, we went looking for him because we knew something was wrong. We hadn't spoken with him in several days. And it has just taken a big toll on me and my boyfriend and our daughter who's now not going to know her godfather or even him for that matter.

Honestly, I think they need to get, you know, what they deserve for what they did to him and how it happened. I loved him like a brother. I really did. Without him I really wouldn't have, you know, met my boyfriend who I have been with now ten years. And he was just there for me and my family whenever we needed him. We

could, you know, run to him and -- you know, I just felt like I was his sister as well. And I really think things will never be the same.

And let's see. Also, last Easter or two years ago, he came over and we had this big old family party. And that was like one of our last pictures with him. And then this all happened. And now ever since like Easter is not the same when we get together. And nothing is the same. Even birthdays when all our friends get together. Like he's -- you know, he's not there, even though we all wish he was there.

So with that being said, I just really think you should consider giving them life in prison since they took someone else's life that didn't deserve to be taken.

THE COURT: Thank you, ma'am. Ms. Valenzuela.

MS. VALENZUELA: Judge, David's father is going to speak. Just so you know, all the people on this side of the courtroom are here for David. Most of them submitted letters.

THE COURT: Yes. And I read them.

MR. ESTRADA: Good morning.

THE COURT: Good morning, sir.

MR. ESTRADA: I guess I should start out with my name, right?

THE COURT: Please.

MR. ESTRADA: My name is Jesus Estrada. First I want to talk about my son whose life was cut short at the age 22. We, his parents, try to do the best thing we can for our kids. They don't come with instructions, so we do the best we can. He was a loving son. He had dreams. They were not accomplished. One of the main things he wanted to do in the world was get married and have kids. As you know, that dream would never come true.

And, you know, people tell me that it gets easier. No. I recall one of the last meetings we had, you said you feel no pain. I went home and thinking like, wow, I wish that everyone in this courtroom, how would they feel if their son or daughter was in the trunk of the car that day. Anyway, David, only wanted to enjoy life.

One of the things that he would do is he would come into my house and sneak groceries out. And I would ask him, why? He said to give to his friends. I would say, let them work. He'd say, dad, you don't understand. When all this happened, his friends had a car wash. I was invited to come along. And just about everybody that was there were his friends. Mind you, it was June, hot weather. They didn't care. When we had the wake, it was a closed coffin, I looked around and it was full. All his friends were there. When we went to church, it was packed with all his friends. When we laid him to rest, it

was packed. 98 percent of the people that were there were his friends. Then I knew what he meant. I understood when he told me that those are my friends, and you would never understand.

My son had a dream which would never be accomplished now. It was cut short. And some of his friends are here with us. They feel the same pain I feel. We'll never forget he's gone, but not forgotten. One of the things I would like to add to that is like, again, my son had dreams that would never be accomplished.

But Joey also had dreams or has got dreams. The first time we saw him, his forehead, everything was clear. Then one of the few times that I seen him, he had something tattooed or marked or penciled in or whatever it was. And what I could see was something gang related. I'm thinking like my son's dreams didn't get accomplished, but his will. He didn't put that tattoo where nobody could see it. He put that where everybody could see it. To me, is that an introduction of where he is going? To let them know that this is what I did and I'm here because I belong to this rival gang?

And I read some of the letters that his family sent, and everybody said that Joey was a good person. That if you let him up easy, he will go straight. This was not his first offense. He had priors. To me, if he was

going to change, he would have done it already. Everybody labeled Joey -- good person, good person, good person. But the crime he did to my son, what name do they place on it? What label do they put on it? I lost my son at 22 years old. He is still around here. And the pain that we feel, the family, he'll never know. You'll never know. He can get life. He'll never know the pain.

If you were to ask me right now, what would I want? I would say I want him to get the eletric chair. But it's not up to me. It's up to you. I want you to think, like I said before, everybody got families. If that person in the car would have been your son or daughter, what would you want to do? Would you want him to walk out of here 25 years from now? Thirty years from now? And do it all over again? Thank you.

THE COURT: Thank you, Mr. Estrada. As I told you before, sir, I'm really sorry for your loss.

MR. ESTRADA: Every time David -- my kids would say that to me, they would say, dad, I love you. I feel you. I would always say don't tell me, show me. Thank you.

MS. VALENZUELA: Let me check one more time to make sure no one else wishes to speak.

Judge, no one else wishes to speak. David's sister would like -- and his mother -- would like to point out their letters to you. They're too overcome to speak.

THE COURT: Ms. Workman.

MS. WORKMAN: Thank you, Judge. We do have one family member who wanted to speak, Shauntese Williams.

THE COURT: Good morning, ma'am.

MS. WILLIAMS: Good morning, Judge.

THE COURT: Your name?

MS. WILLIAMS: Shauntese Williams.

THE COURT: All right. What would you like to tell me?

MS. WILLIAMS: I'm one of Joey's closest cousins. I know the family right now don't believe that he's a good person, but he is. What he did was wrong, and he knows that. I'm not asking you to be easy on him. I'm just asking you to be lenient, because he does have a life that he wants to pursue.

He did have dreams. He wants to go to college. I know he does, because we were supposed to go together. What Joey did reflects on how his childhood was. He did not have a good childhood growing up. I know this because I witnessed it myself. Every single summer I came to Arizona. I wanted to take Joey with me, back to my house, because I knew he would be loved. And he would have got done with everything he wanted to do. And none of this would never have happened. But the people that raised Joey just wanted him for the money. And I don't think it was

fair, because they didn't ask Joey what he wanted.

My cousin is not part of any gangs or anything. My cousin takes medication because he has depression. And he wasn't on his medication when he was out because his family, the people that were taking care of him, didn't care if he was on his medication or not. And without his medication, my cousin could be easily influenced.

I'm not saying that he didn't have the chance to say no. I know he could have said no. But when he told me about what they told him, I don't think it was right. I just wish that he would have said no. Because now he's going to be locked up. And he can't have kids. He can't see me have my first kid. He didn't get to see me graduate or anything like we were supposed to.

I know when my cousin gets out, he will be changing his life. Whether the victim's family believes it or not, he looked me in the eye and he told me everything he wanted to do with his life. And I told him when he got locked up -- I went over to visit him -- that he could still do everything. I told him when he gets out, he will have a place to live with me.

All I'm asking is that I would love for my kids to be able to know who their cousin is. I don't want to have to take them to visit him just to get to know him. I want them to be able to say that they knew who he was and

how much of a good person he really is. The family might not think he's a good person, but they don't know all the things that Joey's done for us.

All I ask is please be lenient with him. Thank you.

THE COURT: Thank you, ma'am.

MS. WORKMAN: Judge, I think that's the only family member we have who wishes to speak.

THE COURT: All right. Ms. Valenzuela.

MS. VALENZUELA: Judge, for my comments, I will be using the Elmo. So if I may approach there.

I want to start off with who was taken away by this offense. I know defense counsel and the Court has received those pictures. But I want to highlight a couple of those pictures. As we look -- the victim's family, next of kin, pointed out what I'm sure you saw when you looked at these pictures. It's starting at a very young age. Every picture you see him in, he's got his big old Koolaid smile. That's who David was. David wasn't out there causing people harm, getting in criminal problems. He was out helping his friends, helping his family, being a brother, an uncle, a cousin and a son. That was who David Estrada was.

Now the way David Estrada's life ended is senseless. It's absolutely, completely one hundred percent senseless. For some speakers, a woofer and a cell phone,

Mr. Bosquez along with others ended his life in a horrific, horrific manner.

I'm going to warn the victim's family. I told you I'm going to use a couple of pictures from the crime scene. So if they don't want to look, they can avert their head at this time. This photo here shows you three dots on the side of the trunk of the car. Those three dots symbolize -- they don't just symbolize, they are David's last attempts to save his life. There was a screwdriver in the trunk of that car that Mr. Bosquez forced him into together with Robertson Brown and Cecilia Vega, not just once, but after he drove around and showed him off to his friends and his girlfriend, forced him back down into that trunk, and then abandoned him in that alley.

He tried desperately there when he wasn't able to get that truck open to just get a hole to get some air in the side of the trunk of that good old, you know, solid metal-made old fashioned car, not today's fiberglass stuff. He couldn't get that screwdriver to go through. Three different holes there show his desperate attempts to get some air.

Now I know it's been hot lately here in Arizona, and it's only May. This was -- just a couple of weeks from now will be the second anniversary of David's death. So you can imagine as you walked to lunch recently,

as you've gone to dinner, how it feels outside, what he must have been feeling as he sat in the trunk of that car with no water.

And I remind the Court, Mr. Bosquez was asked by two different people if they could give David water. Mr. Bosquez is the person that told them no. When he stopped to visit his girlfriend in his G-ride, as he called her and told her I'm going to bring over a G-ride, I can't talk about it on the phone. He stopped over there. He popped the trunk and showed them David Estrada as he lay in the trunk of that car. And one of the girls, it was a girlfriend and her friend, one of the girls asked him, can I get him water? And he said no. David tried to sit up, and he said, do you want to get your ass beat again? You better lay your ass back down. And you recall the girls -- the girls saw him. His eyes were taped shut. His hands were bound. His feet were bound.

As each step of this night goes on, Judge, each decision that Mr. Bosquez is making only makes his actions in this offense more cruel. The first time as Cecilia sat in the park after luring him there with her text messages, luring him there as Joey lied in wait -- aggravating factor -- lied in wait with Robertson Brown in bushes behind a tree until Cecilia gave them the sign, and then they jumped out and started beating him. He gave a

fight until a gun was put to his head by Mr. Bosquez.

This all came from Efrain Romero, who I'm sure there will be comments made about his truthfulness. But if I remind the Court, he did two free talks and also took a lie detector test, which he passed. He helped get that poor victim into the trunk of the car after he helped in the assault. That was his first choice. I guess the first choice was to start helping lure him to the park on the computer. But once he got to the park, that's what he did. Then they drove over and showed him off. They put gas -- and just imagine what is going through David's head as he's hearing -- okay. Now we're stopped. I hear people outside. I hear this girl talking with him at the house. Every time that car stopped and that trunk is opened or it stopped and he can hear people nearby, he's thinking maybe these people will help me. Maybe this is my chance to escape. Maybe this is where it will end.

And he had choice after choice after choice that night, all through the morning, and he made the wrong one every single time. Nobody forced him to do it. Nobody coerced him or threatened him or put a gun to his head. If that were the case, he would have told you that when he pled guilty straight to the Court or would have told the judge he pled guilty to. That wasn't the case.

Everybody in this case has submitted to you,

Judge, that they are the follower. Joey got in with the wrong crowd. He's the follower. You sentenced Robertson Brown to natural life. And may I remind the Court, Robertson's criminal history was one misdemeanor marijuana. His attorneys told you he sits in the house playing video games, and alcohol is a problem for him and his family. That he has a family history of alcohol abuse. And that person who was 19 when he helped kill 22 year old David is serving natural life in the Department of Corrections. He was a follower his attorneys told you.

Mr. Bosquez's attorney and family is telling you he was a follower. He got in with the wrong crowd. I know you've seen Cecilia Vega's mitigation reports. You'll hear from her attorney and family in just a moment. She's a follower. I'd like to ask, who are they following? If everyone is following, who is the leader?

As the evidence shows you, Cecilia and Joey and Robertson were in this together. Out of the three, Cecilia and Joey were the two giving more commands, but Robertson was there as a bodyguard. You heard he was referred to as the bodyguard, to be the muscle. And even that wasn't enough to get the victim into the trunk of the car. Joey had to pull out his gun, which, mind you, he's on probation, adult probation, when he has that gun.

David is in the trunk of that car making

those holes, trying to get out in that alley where they chose to abandon him. I want to show you not just his hours of suffering, as he succumbed to either a lack of oxygen or to the heat exhaustion, because he was so decomposed by the time the medical examiner got to him that other than seeing a laceration on his arm, he couldn't tell you what the cause of death was other than due to the bindings and being locked in the trunk of a car, he determined that it probably wasn't of natural causes.

Judge, this is where David ended up in the trunk of that car. This is how he was found after they abandoned the car in the alley. This big boy in that trunk -- and mind you that's a big trunk. That's a big trunk. He's filling up that trunk trying to get out of there, Judge.

I'm not going to belabor the point, but one of the things that the victims pointed out to me when we first met, right when this case started, when it was assigned to me, one of their biggest -- apart from losing David, one of the biggest things for them that was so hard to overcome is they had to see him. They had to see their son to know it was him, their brother. They couldn't have an open casket funeral because -- and I'm going to show another graphic picture for those that don't want to look. This is how the defendant left him in the trunk of that car.

That's what they did to him, Judge. As that's going on, that's suffering that David is going through. And it caused more suffering. This was not a quick bullet to the head; the victim was able to pass away within 15 seconds. This is a long, laborious torturous death.

Now as Mr. Bosquez took part that night, it didn't just stop that night. He calls his girlfriend and tells her, make sure you watch the news. He's watching the news, Efrain Romero tells us. The girlfriend says he called her and tells her to watch the news. He's bragging and laughing in the bedroom after he abandoned the car in that alley, leaving David to die. Laughing, giggling, looking for people to purchase the cell phone and the stereo equipment.

One of CC's friends from Wal-Mart came over. She said she felt very uncomfortable, because CC and Joey were just pushing her to buy this cell phone. They're calling people trying to get this stereo equipment sold.

He had the keys to David's car. CC forgot her cell phone in the car and had to ask Joey for the keys to the car. Joey could have popped the trunk of the car. CC could have popped the trunk of the car. She went back to get her cell phone that she forgot in the car. His DNA is on the glove next to the car. I know he's already admitted involvement, but again and again as this poor 22 year old,

whose life is now gone forever, is being tortured to death in the heat, Joey is calling people asking for screwdrivers to get their stereo equipment out, calling people asking for more tape. They ran out of tape, trying to help get rid of the evidence on the computer afterwards.

As he goes through these days, you're talking about someone who as you heard did not have the best childhood. The State is not going to sit here and say he had a Beaver Cleaver childhood. He didn't. He did not have a good childhood. However, he was given chances. The State stepped in and they provided him substance abuse treatment. They provided him mental health counseling. He refused to conform his behavior even when he spent 640 days in the Juvenile Department of Corrections, Judge. And that was all before he was 17 years old.

He came out of the Juvenile Department of Corrections on adult probation, because he had committed three assaults against three different officers, causing them injuries, albeit minor. You read the report. But gang threatening one of them. As he said, that's on my hood.

His cousin -- to be fair -- she's coming from out of town, and she may not know his whole life. But I would like to show you another picture here. This is Joey's booking photo for this case, Judge. He's been in custody since this photograph was taken. You can look at his face,

and you see no tattoos. Now you can see his nice gang tattoo. You can't see it all there under the shirt. He did have gang tattoos before he came in. But the one he got on his face the last time he was here said LCM, which is the gang that Efrain Romero said that his cousin Joey belongs to. And Joey -- and I don't know if this is true or not -- but in his bragging said after they went to the girlfriend's house, he went to his hood and showed off the victim to his homies and let his homies beat him up. Now I don't know that that's true, because we have no other witnesses to testify to that. But that's what Joey was bragging about. It could have just been him bragging, trying to make it bigger than what he had actually done. But that shows you with his mind-set is. Now since the last court hearing where he had LCM on his forehead, now he's got another tattoo there.

Now I submitted to you and to defense counsel defendant's disciplinary action reports. And the reason for doing that, Judge, is to show you that not even -- not even since he's arrested on an offense that he's facing the rest of his life in prison, knowing that you're going to take into consideration his behavior in custody, can he bring himself to behave in custody, where he's provided a stable environment, he's provided any kind of treatment that he needs. People are not forcing him to go out and commit bad

acts. He's in there all on his own. And he is still misbehaving. He's telling people things like -- I get written up for saying, I hope you die, bitch. I'll have someone get you on the outs. This is to a detention officer that told him to get into his room because he had already been in trouble and wasn't allowed to have visitation.

Judge, I know he has family support here. One of his family members told the detention officer that he'd be waiting for him out there when he asked --

MS. WORKMAN: Judge, I'm going to object. I don't see how this is relevant to Joey's sentencing.

THE COURT: If it doesn't relate to him specifically --

MS. VALENZUELA: The only way it relates, Judge, is I know family support is something you're going to take into consideration as mitigation. I want you to take that type of support into consideration when you determine how much weight to give that mitigating factor. That's the only relation whatsoever.

But he continued -- and I know you read that -- to use drugs while in custody and to maintain his gang affiliation and to promote his gang, because that's the only reason you would put it on your face when you're in custody, knowing you're going to prison.

He, Judge, came to the crime here not just

with his two felony convictions, but he's had a total of 11 complaints as a juvenile and was given multiple opportunities when he violated probation, and he violated probation and he violated probation. He was given opportunity after opportunity. They gave him a group home option if the home life was not working out. He ran away from that. He just wouldn't take advantage of what he was offered here, Judge. And it ended where we are today with a 22 year old that his life is gone forever.

This defendant chose to sentence his own family to a natural life of suffering for not being with him, not being around him. Although, they can go visit him in jail. They can take their kids to go visit him in jail. He sentenced David's family to the rest of their lives of suffering. The rest of their lives they will not have David with them. They will not be able to take their nieces and nephews and grandchildren to go visit their uncle, their brother, their son. Those types of things should be taken into consideration when you're determining what the appropriate sentence is here, Judge.

He is not a follower. He's one of the leaders here, together with Cecilia Vega. He did not care about the victim suffering. He did not care about the result or the causation of suffering on his own family or on the victim's family. He had chances for treatment

previously both on adult and juvenile probation. I know as you read the adult PSR, he was ordered to get mental health treatment and drug -- substance abuse treatment, neither which he did. He chose to get a firearm while he was on probation for three adult felonies.

The aggravating factors by the book, Judge, are accomplices, pecuniary gain, physical suffering of the victim, emotional and financial impact on the victim next of kin. They are requesting, and we have provided documentation, $13,971.61.

THE COURT: Could you give me that figure again? 13,000 --

MS. VALENZUELA: -- $971.61.

THE COURT: All right.

MS. VALENZUELA: His history, his choices, time after time after time, Judge, outweigh any mitigation that he's been able to present. And we ask that you sentence him to natural life in the Department of Corrections. And if you won't do that, we ask at a minimum that you give him 25 to life and stack two or three of the other counts on there, because unfortunately where he started, he had no control over, but where he ended he did. And he is the person who he is, and he has demonstrated to you that he's not going to change.

The harm he caused here warrants those years.

And the harm that he will cause in the future if he's ever released warrants those sentences. So that's what we would ask for, Judge, in the alternative.

If I may have one moment.

THE COURT: You can.

MS. VALENZUELA: Nothing else, Judge.

THE COURT: All right. Thank you. Ms. Workman.

MS. WORKMAN: Judge, I know a few moments ago during the State's presentation, the prosecutor made a comment indicating that she anticipated the defense planned on commenting on the veracity of some of the witnesses in this case. Judge, that's not the case. We are not here to try this case to the Court. Joey has already accepted responsibility by pleading to the Court in this case rather than putting the victim's next of kin through a lengthy trial. I think that in and of itself is mitigating.

With that said, we are asking -- with respect to Count 5, specifically, we are asking that the Court take into consideration -- this was a felony murder charge, not a premeditated act. Joey didn't know what the result was going to come to the victim while he was carrying on these actions. Certainly, did he disregard various -- obvious possibilities that death could result? Yes. But he abandoned the car in the middle of a city, not out in the middle of the desert. He didn't take this thing miles

outside of the city knowing that nobody would find him. In fact, Phoenix police came into contact with the car just shortly after Joey left it. They towed it to a tow yard where it was abandoned until the -- until it became obvious there was a body in the trunk. So we're asking the Court to take that into consideration as well. He certainly did not premeditate Count 5 in any way.

With respect to the disciplinary reports that have been submitted to the Court from the jail, I ask that the Court take a good look at those and see that some of them are very clearly unsubstantiated. The forms themselves indicate that the charges were unsubstantiated. Joey did file a grievance relative to several of them with that taken in mind.

With respect to the tattoo that Joey has on his face, it's his best friend's name, Naomi. And she's here in the courtroom in the front row.

Judge, this is probably a good time for me to point out that pretty much this entire side of the courtroom is here to show their support for Joey. I know the Court has received a number of letters from family members that really talk about the other side of Joey that you don't see standing before you here today.

I know the Court also had an opportunity to review the mitigation report that was prepared by our

specialist in this case. As egregious as the charges in this case are, I think also very egregious is the way that Joey was brought up. He had a very disfunctional childhood to say the least. It began before his birth even. He was exposed to drugs in utero as well as severe trauma in utero while his mother was pregnant. She was using a number of illegal substances and being beat pretty badly by his father at the time.

He was placed into CPS custody at the time of his birth. He did not even have a chance with his mom. He became homeless at the age of nine years old after his grandmother died.

Based upon with what happened to him as a child, he developed a mental health diagnosis at the age of five years old. He was diagnosed Bipolar with ADHD, depression and auditory hallucinations. In an attempt to self-medicate his mental health issues, he began using marijuana at the age of six years old. He began using crack cocaine at the age of 10 and methamphetamine at the age of 11.

At the time this offense occurred, he was only 17 years, but clearly functioning at a much lower level as set forth in the mitigation report provided to the Court. He is only 19 years old now, Judge. We are asking that the Court take that into consideration as well by way of

mitigation.

We are asking that with respect to Count 5, the Court impose no more than a term of 25 years and impose presumptive sentences on all the other charges to run concurrent to one another. I know that's what the presentence report recommended was concurrency with respect to all of the counts in the new case.

I realize that the presentence report writer is asking for consecutive terms with respect to the two probation violation cases. And, you know, I don't think that that's an unreasonable request.

So that's what we are asking for. And I think Joey does wish to address the Court.

THE COURT: All right. You may do so, sir. What would you like to tell me?

THE DEFENDANT: I just want to apologize to all the family members, even though it might not mean much to them. My actions don't make me who I am. I believe there is a chance to change. I just -- if given a chance to enter society, I hope to use my mistakes to help others, you know. Again, I'm sorry.

THE COURT: All right. Ms. Workman, any legal cause you're aware of?

MS. WORKMAN: No, Judge.

THE COURT: Mr. Bosquez, I have to disagree with you

a little bit. Actions do indicate who we are. Every day life is full of choices, and we make choices every single day. There are consequences with those choices. So out actions do tell us who we are.

I am mindful when I impose a sentence, I'm instructed by law to consider a couple of things. I'm to look at the nature and circumstances of the offense, the character and background of the accused. When I look at the nature and circumstances of this offense, I'm morally offended. I can imagine no greater horror in life than to be locked in a trunk for a long period of time, to die from the elements.

When I look at your character and background, you shouldn't have had the experiences growing up that you've had. It was clearly mitigated. But now I look at you today and I look at what you've done since you've become an adult. I think, is this man damaged goods? Is this man somebody who's going to continue to terrorize society like you did in this case? Those are the questions I have to answer imposing this sentence.

In CR 2009-006958-001, it is the determination of this Court that a probation sentence is no longer appropriate. Therefore it is the judgment and sentence of this Court that you be incarcerated in the Arizona Department of Corrections for an aggravated term of

one and a half years. It is an aggravated sentence based on the new prior convictions you have and the new charges. Credit for 448 days which would equal that sentence. Community Supervision equal to one day for every seven days of this offense. It is ordered affirming any other orders previously imposed regarding that cause number.

In CR 2009-005043-001 on Count 1, again the Court finds that a term of probation is no longer appropriate. Therefore it is the judgment and sentence of this Court that you be incarcerated in the Arizona Department of Corrections for an aggravated term of one and a half years. This is an aggravated sentence based on the new convictions. Credit for 448 days that would equal that sentence. Community Supervision equal to one day for every seven days of this sentence. Again, it's ordered affirming any monetary orders previously imposed.

Regarding Count 2, again the Court finds that a term of probation is no longer appropriate. It's ordered designating this matter a felony. It is the judgment and sentence of this Court that you be incarcerated in the Arizona Department of Corrections for an aggravated term of one and a half years. This is an aggravated sentence based on the new convictions. Credit for the remaining 94 days you've already spent in custody. Community Supervision equal to one day for every seven days of this sentence.

Again, it's ordered affirming the monetary orders previously imposed.

It's ordered Counts 1 and 2 be served consecutive to each other and consecutive to the other prison term I just imposed.

Regarding the new charges, CR 2010-013094-001. Any objection to the requested restitution?

MS. WORKMAN: No, Judge. We will stipulate to that amount.

THE COURT: It's ordered imposing restitution in the amount of $13,971.61. This is joint and several liability with any other defendant that has been convicted in this cause number where restitution has been ordered.

Regarding Counts 1 and 4. Probation is not an option. Therefore it is the judgment and sentence of this Court that you be incarcerated in the Arizona Department of Corrections for seven and a half years. That's the presumptive term on both charges. No credit for time served. Community Supervision equal to one day for every seven days of this sentence.

Regarding Counts 2 and 3. It is the judgment and sentence of this Court that you be incarcerated in the Arizona Department of Corrections for ten and a half years. That's the presumptive term. No credit for time served.

Community Supervision equal to one day for every seven days of this sentence.

Regarding Count 6. It is the judgment and sentence of this Court that a term of probation is not appropriate. Presumptive term is appropriate. Therefore it is the judgment and sentence of this Court that you be incarcerated in the Arizona Department of Corrections for three and a half years. No credit for time served. Community Supervision equal to one day for every seven days of this sentence.

It's ordered that Counts 1, 4, 2, 3 and 6 be served concurrently.

Regarding Count 5. After reviewing all of the materials, everything in aggravation and mitigation, it is the determination of this Court you should never be released. Thereby, I impose a term of natural life. No credit for time served. There is a $20 one-time payment fee and a $20 probation surcharge. It is ordered that this count be served concurrently with the other counts in this indictment.

Sir, because you pled guilty, you do not have the right to appeal, but you do have the right to ask me to reconsider any decision made here today or throughout these proceedings. If you wish to do that, you must file a notice of post-conviction relief. A notice of post-conviction

relief has to be filed within 90 days of today's date. If you fail to file that notice within 90 days of today's date, you forever lose your right to file such notice. If you need a lawyer to help you, one will be appointed at no cost to you. Records and transcripts will also be provided at no cost.

Counsel, have I omitted or overlooked anything?

MS. WORKMAN: No, Judge.

MS. VALENZUELA: No, Judge.

THE COURT: The Court is in recess.

* * * * *

C E R T I F I C A T E

I, HELENE PAUSTIAN, do hereby certify that the foregoing pages constitute a true and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

Dated this 10th day of September 2012.

_____
HELENE PAUSTIAN
Certified Court Reporter
No. 50072

Appendix T

Clerk of the Superior Court
*** Electronically Filed ***
04/14/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-013094-001 DT 04/13/2022

HONORABLE ROY C. WHITEHEAD

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

KIRSTEN VALENZUELA
JULIE ANN DONE

v.

JOSE LEWIS BOSQUEZ (001)

JOSE LEWIS BOSQUEZ
#272320 ASPC WINSLOW KAIBAB
2100 S HIGHWAY 87
WINSLOW AZ 86047
KERRIE M DROBAN-ZHIVAGO

COURT ADMIN-CRIMINAL-PCR

UNDER ADVISEMENT RULING
PETITION FOR POST-CONVICTION RELIEF DISMISSED

Pending before the Court is the State's Motion to Vacate Evidentiary Hearing and Dismiss Jose Bosquez's Petition for Post-Conviction Relief, Defendant's Response, and the State's Reply. The Court has also received the State's Notice of Supplemental Authority and the Defendant's Supplemental Briefing in response.

I. Background and Procedural History

As relevant to this proceeding, Defendant pled guilty to one count of first-degree murder. Defendant was 17 years old at the time he committed the crime in question. Prior to his sentencing, Defendant submitted numerous issues in support of mitigation of his sentence including his age at the time of the crime, his addiction and mental health issues that began at a young age, and his turbulent upbringing. At sentencing, Court stated the following:

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MARICOPA COUNTY

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> I am mindful when I impose a sentence, I'm instructed by law to consider a couple of things. I'm to look at the nature and circumstances of the offense, the character and background of the accused. When I look at the nature and circumstances of this offense, I'm morally offended. I can imagine no greater horror in life than to be locked in a trunk for a long period of time, to die from the elements.
> When I look at your character and background, you shouldn't have had the experiences growing up that you've had. It was clearly mitigated. But now I look at you today and I look at what you've done since you've become an adult. I think, is this man damaged goods? Is this man somebody who's going to continue to terrorize society like you did in this case? Those are the questions I have to answer imposing this sentence.

Sentencing Tr. 28-29 (May 25, 2012). The Court found Defendant "should never be released" and sentenced him to a natural life sentence. *Id.* at 32.

Subsequently, Defendant filed a Petition for Post-Conviction Relief arguing his sentence was a mandatory life sentence of a juvenile in violation of the Eighth Amendment ban on cruel and unusual punishment as held in *Miller v. Alabama*, 567 U.S. 460 (2012). The Court denied his Petition, holding the Court had complied with the requirements of *Miller* in Defendant's sentencing. Defendant did not file a Petition for Review of this decision in the Court of Appeals.

Following the U.S. Supreme Court decision in *Montgomery v. Louisiana*, 577 U.S. 190 (2016) and the Arizona Supreme Court decision in *State v. Valencia*, 241 Ariz. 206 (2016), Defendant filed another Notice and Petition for Post-Conviction Relief. The State responded by conceding Defendant was entitled to an evidentiary hearing.

After the United States Supreme Court issued its opinion in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), the State filed its Motion to Vacate Evidentiary Hearing and Dismiss Jose Bosquez's Petition for Post-Conviction Relief.

II. Analysis

Defendant argues *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 577 U.S. 190 (2016) and *State v. Valencia*, 241 Ariz. 206 (2016) constitute a significant change in law that would overturn Defendant's sentence. Rule 33.1(g) permits post-conviction relief if "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." "Rule 32 does not define a significant change in the law. But plainly a change in the law requires some transformative event, a clear break from the past." *State v. Shrum*, 220 Ariz. 115, ¶ 15 (2009) (internal quotations omitted).

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MARICOPA COUNTY

CR2010-013094-001 DT 04/13/2022

Notably, in his first Post-Conviction Relief proceeding, Defendant raised the U.S. Supreme Court's ruling in *Miller*, arguing his sentence violated the Eighth Amendment because it imposed a mandatory life sentence on a juvenile. The Court dismissed his petition, finding "that [the Court] did consider Defendant's age, lack of maturity, and all of the other mitigation proffered by the Defendant when it imposed the natural life sentence." Minute Entry, 2/14/2013. Defendant did not seek review of the Court's decision. As a result, Defendant is precluded from raising a successive Rule 33.1(g) claim under *Miller* alone. Rule 33.2(a)(2) and (b). He must rely on a change in law subsequent to the *Miller* holding.

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

In *State v. Valencia*, 241 Ariz. 206 (2016), the Arizona Supreme Court noted that *Montgomery* clarified that *Miller* set forth a new substantive rule of constitutional law that must be given retroactive effect.

> Miller, as clarified by Montgomery, represents a "clear break from the past" for purposes of Rule 32.1(g). Arizona law, when Healer and Valencia were sentenced, allowed a trial court to impose a natural life sentence on a juvenile convicted of first-degree murder without distinguishing crimes that reflected "irreparable corruption" rather than the "transient immaturity of youth."

Valencia, 241 Ariz. at 209, ¶ 15.

In *Jones*, the Supreme Court disavowed *Valencia's* interpretation of Montgomery. According to the Supreme Court, "in making the rule retroactive, the Montgomery Court unsurprisingly declined to impose new requirements not already imposed by Miller." *Jones*, 141 S. Ct. at 1317. A sentencer need not make a separate factual finding of permanent incorrigibility or an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility before sentencing an offender under 18 to life without parole. Id. at 1318-19. Critically, the *Jones* Court succinctly summarized its interpretation of *Miller* and *Montgomery* thus: "Miller held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding. Montgomery later held that Miller applies retroactively on collateral review. Today's decision likewise does not disturb that holding." *Id.* at 1321.

Defendant argues *Montgomery* and *Valencia* constitute a significant change in law because the Court must determine whether his crimes reflected irreparable corruption rather than

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MARICOPA COUNTY

CR2010-013094-001 DT 04/13/2022

transient immaturity. However, *Montgomery*, as clarified by *Jones*, does not require such a determination, and is not a significant change in law as applied to Defendant's case. As noted above, *Montgomery* only made the holding in *Miller* retroactive. The retroactivity of *Miller* was not at issue in Defendant's case. As a result, Defendant is not entitled to relief under Rule 33.1(g).

IT IS THEREFORE ORDERED granting the State's Motion to Vacate Evidentiary Hearing and Dismiss Jose Bosquez's Petition for Post-Conviction Relief.

IT IS FURTHER ORDERED dismissing Defendant's Petition for Post-Conviction Relief pursuant to Ariz. R. Crim. P. 33.2(a)(2) and (b), and Rule 33.11(a).

Appendix U

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOSE LEWIS BOSQUEZ, *Petitioner*.

No. 1 CA-CR 22-0360 PRPC
FILED 2-6-2024

Petition for Review from the Superior Court in Maricopa County
No. CR2010-013094-001
The Honorable Roy C. Whitehead, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Zhivago Law, Phoenix
By Kerri M. Droban Zhivago
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Andrew M. Jacobs, Judge Jennifer M. Perkins, and Judge David D. Weinzweig delivered the following decision.

PER CURIAM:

¶1 Petitioner Jose Bosquez seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is Bosquez's third petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). It is the petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, the petition for review, and response. We find the petitioner has not established an abuse of discretion.

¶4 We grant review but deny relief.

COURT OF APPEALS
STATE OF ARIZONA

AMY M. WOOD • Clerk of the Court
FILED: AA

Appendix V

Supreme Court

STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

November 8, 2024

RE: STATE OF ARIZONA v JOSE LEWIS BOSQUEZ
Arizona Supreme Court No. CR-24-0084-PR
Court of Appeals, Division One No. 1 CA-CR 22-0360 PRPC
Maricopa County Superior Court No. CR2010-013094-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 6, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

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

Tracie K. Lindeman, Clerk

TO:
Alice Jones
Julie A Done
Kirsten Valenzuela
Kerrie M Droban Zhivago
Amy M Wood
ga

Appendix W

FILED
GARY L. HARRISON
CLERK, SUPERIOR COURT
6/20/2023 2:45:15 PM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. JAMES E MARNER

CASE NO. CR20002693-001

DATE: June 20, 2023

STATE OF ARIZONA
Plaintiff,

vs.

RALPH DAVID CRUZ
Defendant.

R U L I N G

IN CHAMBERS RULING ON DEFENDANT'S PETITION FOR POSTCONVICTION RELIEF

Defendant, through counsel, filed a petition for postconviction relief following the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 1255, 183 L.Ed.2d 407 (2012). At the time, the case was assigned to the Hon. K. C. Stanford. In a ruling dated March 14, 2014, Judge Stanford denied the petition, finding that defendant's natural life sentences were not prohibited because the sentencing judge had discretion to impose something less than mandatory natural life sentences for the murders. Judge Stanford also found "the trial judge sufficiently considered the defendant's youth and attending characteristics for sentencing."

Following Judge Stanford's denial of defendant's Rule 32 petition, the United States Supreme Court ruling in *Montgomery v. Louisiana,* 577 U.S. 190, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016) led the defendant to file a successive Rule 32 petition citing a substantive change in the law. Judge Stanford retired and the case was subject to several reassignments and recusals. This Court ultimately was randomly assigned the case in January 2018. By that time, the Arizona Supreme Court issued its ruling in *State v. Valencia/Healer*, 241 Ariz. 206, 386 P.3d 392 (2016) which held that juveniles, like defendant here, who are serving natural life sentences are entitled to an evidentiary hearing where the juvenile is given an opportunity to establish, by a preponderance of the evidence, that his crime did not reflect irreparable corruption but instead transient immaturity. *Id.* at 210.

An evidentiary hearing started in June 2019. Testimony from both lay and expert witnesses was received by the Court. Thereafter, upon a joint request from counsel, this Court stayed the matter pending the outcome of the DC sniper case (*Mathena v. Malvo)* which at the time counsel believed might shed some light on whether evidence of post-conviction behavior should be properly incorporated into the Court's analysis. The *Malvo*

M. Knauer
Judicial Administrative Assistant

matter was subsequently dismissed in February 2020. *Mathena v. Malvo,* 140 S.Ct. 919 (mem.), 206 L.Ed. 250, (2020). This matter was delayed thereafter as a result of Covid 19 restrictions and logistical problems resulting from same. Additionally, in January 2021 the parties stipulated to stay the matter. The Court granted the request.

In April 2021, the United States Supreme Court issued its ruling in *Jones v. Mississippi*, -- U.S --, 209 L.Ed.2d 390, 41 S.Ct. 1307 (2021). In *Jones*, the court revisited its earlier rulings and held:

> "[i]n sum, the Court has unequivocally stated a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18. To borrow the words of the Michigan Supreme Court: "Given that *Montgomery* expressly held that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility,' we likewise hold that *Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility.""

Jones, 141 S.Ct. at 1318 – 19.

In May 2021, the Court scheduled a status conference to discuss with counsel the effect of *Jones v. Mississippi* on these proceedings. The matter was subject to further stay, again at the joint request of counsel. Ultimately the Court ordered counsel to provide supplemental briefing regarding the *Jones* decision. After considering counsels' briefings and tracking developing case law in Arizona and elsewhere, this Court concluded in a ruling dated December 1, 2021 that "the Arizona Supreme Court's decision in *State v. Valencia*, 241 Ariz. 206, 386 P.3d 392 (2016) does, to date, provide the best guidance for Arizona trial courts considering claims by juveniles who received discretionary life sentences without the possibility of parole."[1] Consequently, this Court ordered that the parties set a schedule to complete the evidentiary hearing which began in 2019.

In March 2023 the evidentiary hearing was completed after 5 additional days of testimony. Counsel have submitted written closing arguments and presented oral argument. Upon due consideration, the Court finds and rules as follows:

I. FINDINGS

Miller v. Alabama holds that **mandatory** life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. *Miller v. Alabama*, 567 US at 479. (Emphasis added). The *Miller* court went on to observe "[a]lthough we do not

M. Knauer
Judicial Administrative Assistant

foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id* at 480. And as noted above, a subsequent finding by the trial court that the sentencing judge did take into account the defendant's youth by reviewing the sentencing transcript was not enough to pass constitutional muster. *See State v. Valencia, supra (*mandating an evidentiary hearing in juvenile natural life cases).
In what this Court interprets as an effort to provide some guidance as to what factors trial judges should consider when revisiting juvenile life without parole sentences imposed decades ago by their predecessors, the Arizona Court of Appeals in *Cabanas v. Pineda,* 246 Ariz. 12,18, 433 P.3d 560, 566 (App. 2018) provided an interpretive summary of the *Miller* decision. Defendant has crafted his closing argument using the summary and this Court agrees it is an apt approach in its consideration of the evidence before it.

A. <u>Evidence of Juvenile's Hallmark Characteristics</u>

Defendant was 16 years old when he committed the murders. Defense counsel presented expert testimony, as well as peer-reviewed literature that describes how impulsiveness, inability to emotionally regulate, immaturity and difficulty in perceiving consequences are factors that typically present in the developing juvenile brain. This Court acknowledges that the science supporting these claims is well-established. This Court also acknowledges that given defendant's age at the time of the murders, these characteristics were likely present to some degree in his developing brain.

In an effort to further explore how these characteristics played a role in the murders, the defense retained Dr. Emily Bashah, a licensed psychologist. Dr. Bashah was provided a copy of the presentencing report, a copy of the Pima County Sheriff's Department file in the case, autopsy reports for Lucila Bojorquez and her seven-year-old daughter Jennifer and six-year-old son Jose, defendant's records from the Arizona Department of Corrections, school records, a copy of the mitigation report provided to the sentencing judge, and other pertinent documents. Dr. Bashah also conducted a 16-hour interview of the defendant

Dr. Bashah prepared a lengthy evaluation documenting her findings. She also testified at the evidentiary hearing. The Court has considered her testimony and reviewed her findings and observations, as well as the test results she documented. The Court has compared these findings and observations with its own observations of the testimony of various witnesses and the defendant during the evidentiary hearing. Contrary to Dr. Bashah's

[1] The subsequent Division One Court of Appeals ruling in *State v. Wagner*, 253 Ariz. 201, 510 P.3d 1083 (App. 2022) appears to confirm this conclusion.

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conclusion that defendant was accurate when describing childhood strife and the offense itself, the Court concludes defendant's description of his life experiences and the murders provided to Dr. Bashah is markedly different than the information that was presented at the evidentiary hearing.

Regarding the murders themselves, defendant's description to Dr. Bashah of what he did significantly downplays his actual actions. Defendant claimed "he shot at the vehicle, specifying that eight rounds were fired". Evidence from the scene disproves this claim.. The autopsy of the three victims made it clear that each victim was shot in the head from close range. Despite acknowledging the latter in the introduction of her report, Dr. Bashah thereafter seemed to accept as factual defendant's description of the murders as almost unintentional. The Court noted this to be a recurring practice throughout the evaluation, i.e., Dr. Bashah relying on the subjective claims made by defendant during the lengthy interview about subjects she cited as significant (bad influences, family dysfunction, poverty, neglect, abuse, drug use etc.) which were contradicted by testimony and evidence presented to the Court during the nine days of hearings in 2019 and 2023. Consequently, the Court did not find Dr. Bashah's opinions probative on the ultimate question before it.

Defendant also called Dr. James Garbarino. Dr. Garbarino is developmental psychologist with an impressive background of academic honors, publications, and teaching experience. Dr. Garbarino has done extensive work on the topic before this Court, including offering testimony in over 100 cases where a life without parole sentences were imposed on juveniles. Dr. Garbarino published a book in 2018 titled *"Miller's Children"* which he described as an analysis of the successful rehabilitation and transformation in *Miller* resentencing cases. He prepared a lengthy report, ultimately opining that defendant was not and is not permanently incorrigible and should be resentenced pursuant to *Miller.*

While the Court acknowledges Dr. Garbarino's experience, expertise, and passion on the subject of developmental psychology, it declines to accept his opinion on the *Miller* factors as persuasive. First, Dr. Garbarino made it clear that he relied extensively on many of Dr. Bashah's factual findings and conclusions which, as the Court notes above, were contradicted by evidence received during the nine days of testimony. Consequently, his opinion is based on incomplete and in some cases inaccurate information. [2]

[2] Dr. Garbarino specifically indicated that he did not read transcripts from the evidentiary hearing which began in 2019 which included testimony from defendant's parents, family members, and teachers. He also acknowledged only a cursory review of the police reports. RT Day 9, page 96.

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Second, despite Dr. Garbarino's suggestion that the nature of the crime is immaterial and should not be considered[3], the *Miller* court specifically directs the sentencing court to look at the circumstances of the offense, including the extent of the juvenile's participation in the conduct. *Miller*, 567 US at 477. That Dr. Garbarino would ignore this factor despite having participated in over 100 juvenile life sentence cases and having published a book specifically on *Miller* sentencing proceedings seems incongruent and, in this Court's assessment, detracts from the probative value of his opinion. The facts before this Court are very different than those considered in *Miller* which involves a 14-year-old accomplice to a botched robbery or a 14-year-old who, with his friend, bludgeoned a drug dealer to death. Here, defendant, on his own volition and with no accomplice or peer pressure, decided to execute a young mother and two small children for pecuniary gain. The investigation and autopsy results indicated the children were shot in the head at close range while they were seated in the car. Dr. Garbarino's suggestion that these facts be disregarded in the Court's assessment of whether the crimes were the result of transient immaturity as opposed to permanent incorrigibility/irreparable corruption is illogical.[4]

Another factor that makes Dr. Garbarino's opinion less persuasive to this Court was his testimony about the Adverse Childhood Experience Scale (ACES). Dr. Garabino explained that the ACES assessment is comprised of 10 questions regarding childhood trauma. Defendant answered in the affirmative on nine of 10 of the questions. However, the evidence presented cast doubt on some of the claims. Defendant's subjective report of not feeling loved is not consistent with the testimony of his family members. While the Court recognizes this is a subjective response, had Dr. Garbarino reviewed the transcripts and photograph exhibits[5] from defendant's childhood, he would have been able to explore this claim and perhaps question its veracity. Regarding the claim that defendant often felt he didn't have enough to eat, had to wear dirty clothes, had no one to protect him, etc., the testimony of defendant's mother, sister, grandparents, etc. contradicts these claims. Again, by failing to review the transcripts, Dr. Garbarino deprived himself of contrary information that would have allowed him to make a more complete and accurate assessment.

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[3] Dr. Garbarino made this claim several times during his testimony. However, he did acknowledge that the detail of the crimes "may be very legally relevant and morally relevant". RT Day 9, page 31.
[4] When explaining his position on this point, Dr. Garbarino testified that "I'm not aware of any scientific evidence that demonstrates that link." RT, Day 9, page 26. The Court does not find this premise convincing, i.e., the absence of a study confirming the connection is conclusive evidence that the connection does not exist.
[5] Exhibits F, H, I, J, K, M

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The Court did find a comment made by Dr. Garbarino particularly compelling on the question before it. When Dr. Garbarino was describing the administration of the ACES test, he remarked that defendant's affirmative responses on nine of 10 of the questions was "extraordinary". However, he further testified:

> "And when [defendant] says he thinks pretty much every other kid in his neighborhood would have the same ACE score like this, **that could well be an accurate representation."**

RT, Day 9, page 47.

Yet unlike "every other kid in his neighborhood", defendant murdered a young mother and her seven-year-old daughter and six-year-old son by shooting them in the head a close range and then ran the mother and daughter over while in the process of dumping their bodies. The Court finds this discrepancy significant, and further finds that it lessens the probative value of the ACES assessment results and, by extension, Dr. Garbarino's opinion regarding whether the murders were the result of transient immaturity as opposed to permanent incorrigibility/irreparable corruption.

B. The Juvenile's Family and Home Environment

Counsel's pleadings paint a bleak picture of defendant's childhood, punctuated by an abusive convict for father, the psychologically damaged mother, abject poverty, neglect, a peer group of drug dealers and criminals, a history of drug abuse, and a neighborhood that offered no hope and no way out. In an effort to substantiate these claims, defendant presented testimony from many family members and people from the community in which he was raised. And while some of the testimony did reflect hardship, on balance the testimony of these witnesses revealed a loving and supportive network of family, teachers, and friends. The testimony also undermined the credibility of many of the claims defendant made during his interviews with Dr. Bashah and Dr. Garbarino.

1. Yvette Romero – defendant's sister

Defendant's sister Yvette Romero described their mother as "very loving" and "the most caring person you could meet" and "very affectionate" and was "just always there" and was "a great mother". RT, Day, 1, page 24. Ms. Romero testified that her maternal grandparents would help the family financially and that they cared for her, defendant, and their younger brother when their mother was hospitalized for mental health problems. RT, Day 1, page 17, 24 - 26.

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2. Lydia Romero – defendant's mother

Defendant's mother Lydia Romero testified about defendant's extended family. She observed:

> "We have always been very supportive. On Saturdays, we would have gatherings every Saturday, a potluck, the kids and everybody."

RT, Day 1, page 34.

Lydia testified that even when her husband was in prison and she had very little money, the power was never turned off and they always had food because her parents were there to help. RT, Day 1, 47. Lydia acknowledged there was a time when she had to be hospitalized for mental breakdown and during that time the defendant and his siblings were taken care of by her mother and her sisters Martha and Selena. RT, Day 1, page 68, 92. She testified that when defendant was 9 years old, she and the children moved in next door to her parents. RT, Day 1, 70. Lydia recalled:

> "So financial - wise, we couldn't go to, like, camping and do a lot of fun stuff. So once a month when I would get my food stamps, we would have sleepovers at my house. The kids would bring their sleeping bags and we would make big bonfires outside and tell stories and hear music. My dad would scare the kids and those were fun times."
>
> . . . .
>
> "Every Saturday we would have a potluck at my mother's house, every Saturday without fail. The kids played and we ate and had dessert. My mom and dad would buy a swimming pool sometimes for them and they would go swimming in the backyard, yeah."

RT, Day 1, page 71 – 72.

Lydia also testified that she worked at Maxwell Middle School while defendant was a student there and she saw him every day. RT, Day 1, page 73. She described defendant's participation in a basketball camp sponsored by Lute Olson (the coach of the University of Arizona's basketball team) and explained how her sister/defendant's aunt paid the fee required to allow defendant to play in a school basketball league. RT, Day 1, 57 – 58. Lydia did acknowledge that she was physically violent with defendant when he was 12 but indicated this was a one-time event. She also testified that while defendant's father was violent with her, he was never violent with defendant. RT, Day 1, page 92 – 93.

3. Martha Romero – defendant's aunt

Defendant's aunt Martha Romero testified and confirmed that the defendant had a well-established and loving support system when he was growing up. She confirmed that everybody in the family helped out

defendant's mother Lydia and the children. RT, Day 1, page 107. Martha testified that her husband took on a paternal role for defendant and his siblings and "was always there for them and we were always there for them." RT, Day 1, page 108. Martha testified:

> "Q. You said that when Ralph Cruz's father went to prison that your husband sort of became a surrogate father and took him under his wing.
>
> A. Yes.
>
> Q. And that lasted for a number of years I take it then?
>
> A. Probably until the day we picked him up [when he was arrested].
>
> Q. For a long time, 10 years or so I guess?
>
> A. All his life.
>
> Q. And you and your family, your husband at the time, and your parents all tried to provide for Lydia in the children?
>
> A. Yes.
>
> Q. And your parents especially tried to instill values in Ralph Junior?
>
> A. Yes. He went to church every Sunday..
>
> Q. Family gatherings, that sort of thing? There was a close-knit family that was going on with your entire family, correct?
>
> A. Yes.

RT, Day 1, page 117 – 118

4. Monique Mata – defendant's cousin

Defendant's cousin Monique Mata testified and confirmed many of the observations made by other family members about the significant support defendant had in his formative years. RT, Day 1, page 128 – 129. When asked to describe the neighborhood in which she grew up (Barrio Hollywood) she testified:

> "It was a very close-knit neighborhood. Everybody knew everybody. It's a long-standing neighborhood so it was generations upon generations upon generations of families living there. I mean, my grandmother knew the neighbor across the street for years and then my mom and her sisters knew their kids and so forth and so forth.
>
> . . . .

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> We knew what the neighborhood was because it was Barrio Hollywood. It's a historical. So yeah, there was gangs, there was drugs, but at the same time, there was community, there was family."

RT, Day 1, page 124 – 125

Monique also described defendant's middle school years as relatively idyllic, saying he was the class clown and "everybody loved him". RT, Day 1, page 133.

5. Sally Cruz

Defendant's paternal grandmother Sally Cruz testified that defendant and her husband/defendant's grandfather were very close. RT, Day 2, page 10. She testified that her relationship with Lydia was strained but defendant would often come over to her house and visit her and her husband because they lived close by. During these visits, they would talk and she would feed defendant, just as she did with all of her grandchildren. RT, Day 2, page 12.

6. Don Collier

Mr. Collier was the principal at Maxwell Middle School when defendant was attending as a student. While Mr. Collier acknowledges his recollection of defendant was limited, he was able to recall some specifics. Mr. Collier recalled that a physical education teacher "had an interest in Ralph because Ralph was athletic . . . and wanted to make sure Ralph was academically eligible to participate in athletics." RT, Day 3, page 8 – 9. Mr. Collier also recalled a school counselor who "had a hand in making sure Ralph was involved in [student counsel], to make sure he was actively involved in a positive manner." RT, Day 3, page 9. Mr. Collier testified:

> Q. So these two adults were intimately involved in his life at least at school trying to give him some assistance that he might lack at home?
>
> A. I would surmise that, yes.

RT, Day 3, page 10

7. Defendant

Defendant testified in 2019 and 2023. He confirmed much of the above testimony regarding the network of family and community that provided support for him in his formative years. He testified:

> Q. Did you spend a lot of time with your family growing up?
>
> A. Yeah, we did. We were a real close-knit family.
>
> Q. Did you enjoy spending time with your family?

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A. I loved it. We don't even, me and my cousins, we don't consider ourselves cousins. We consider ourselves brothers and sisters. That's how tight we were.

RT, Day 2, page 64 – 65

Defendant described his maternal grandmother's house as comfortable and safe. RT, Day 2, page 73. He described his mother as a sweetheart and a good woman. RT, Day 2, page 74 – 75. He said that things improved when his father went to prison and agreed that the house became a more peaceful place in which to live. RT, Day 2, page 76. Defendant confirmed that when his mother was hospitalized for a mental breakdown his grandparents and aunt took care him and his siblings RT, Day 2, page 80.

Regarding elementary school, defendant described it as being fun. He testified that he had a lot of friends and was very social. He also recalled that his fourth-grade teacher took a special interest in him and gave him extra attention. RT, Day 2, page 86 – 88. He was on the school's basketball team and also played basketball for the Boys and Girls Club and the Salvation Army teams. RT, Day 2, page 88. His grandmother provided after school care for him. RT, Day 2, page 89. He had friends who invited them over to play at their houses. RT, Day 2, page 93. He confirmed the observations of his sister and cousins about family gatherings and testified:

"Yeah. Every weekend, all of us, meaning my family, my cousins, my tias, would all gather at my grandmother's house. We would have a potluck. Me and my cousins would go play. Those are the best times right there."

RT, Day 2, page 93

8. Ralph Cruz Sr – defendant's father

Defendant went to great lengths to emphasize the bad character of his father and the negative influence his father had on him when he was a child. The evidence revealed that Mr. Cruz, Senior, was indeed a terrible father and husband. He was a lifelong heroin addict who stole indiscriminately, including from his family, to buy drugs. He was physically abusive to defendant's mother. He would use drugs in front of his children. Much of this was acknowledged by Mr. Cruz himself, but given what this Court perceived to be his questionable credibility, the Court relied more heavily on the testimony of his wife and others as proof of these claims.

The evidence also revealed that defendant's exposure to his father was very limited because of Mr. Cruz's repeated incarcerations. Mr. Cruz went to prison for the first time in 1986 when defendant was two years old. He was released in 1989 but returned to prison in 1990 and remained there until 2003. RT, Day 2, page 19.[6]

[6] Lydia Romero indicated that in addition to the time spent in the Department of Corrections, Mr. Cruz spent approximately eight months in the Pima County Jail in 1989. RT, Day 1, page 91.

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During the short time Mr. Cruz was out of prison, it appears the defendant had little contact with his father. Lydia Romero testified:

> Q. I want to talk about Ralph Junior and Ralph Senior's relationship after he came back from prison the first time. What kind of ways would Senior spend time with Junior?
>
> A. He wouldn't spend time with him. [Defendant] was always happy to see his dad, but his dad didn't give him the time of day. The drugs were more important to his dad than his kids.

RT, Day 1, page 46.

Despite this, both defendant and Mr. Cruz testified that for the short time Cruz Sr. was not in prison, he would commit home burglaries and take defendant along with him. Mr. Cruz denied ever having the defendant go into the house[7] but claimed he had defendant act as a lookout. It is unclear how many times this may have occurred, but Lydia Romero did testify that on the one occasion defendant told her about this happening she didn't let defendant go out with his father thereafter. RT, Day 1, page 48. Mr. Cruz also testified that on occasion he would leave defendant at a drug house. The Court did not find this evidence particularly credible. After his return to prison in 1990, Mr. Cruz acknowledged that he lost his visitation privileges at some point and even before that, Lydia Romero stopped bringing the defendant and his siblings for visits. RT, Day 2, page 33.

9. Stefano Bloch

Defendant presented testimony from Stefano Bloch, an associate professor from the University of Arizona school of Geography. His curriculum vitae indicated a research focus in neighborhood change and displacement as well as crime and policing, gangs and graffiti and prison environments.

Professor Bloch's testimony was interesting in an academic sense. However, his testimony regarding gangs and gang activity was not particularly relevant. His suggestion that defendant's crimes needed to be viewed in the context of the Barrio Hollywood environment made no sense given the nature of the crimes. Finally, Professor Bloch's opinions strayed beyond his area of expertise and ventured into matters concerning psychology. Ultimately the Court did not find Professor Bloch's testimony probative.

The Court recognizes that defendant's childhood was not free of hardship. However, the evidence presented made it clear that his childhood was one that included love, guidance, fun, joy, attention, and support.

[7] This contradicts the statement made by defendant to Dr. Bashah which she included in her evaluation. Exhibit E, page 5.

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C. The Circumstances of the Offense

Despite the defendant's argument to the contrary, the murders he committed and the circumstances surrounding them are properly considered when determining whether his actions can be attributed to transient immaturity as opposed to permanent incorrigibility/irreparable corruption. Additionally, consideration of an accurate account of the events, as opposed to the proposed account suggested by defendant, is required. The Court concludes that the presentencing report, which was considered by the sentencing judge, presents the most timely and accurate depiction of what actually occurred, as opposed to the self-serving rendition provided by the defendant two decades later. The presentencing sentencing report provides:

1. The murders and surrounding events

"On August 4, 2000 at 4:24 PM, Tucson Police Department (TPD) officers arrived at an apartment complex in the 400 block of N. Grande Avenue after receiving a 911 call about a shooting in the west parking lot. Tucson Fire Department (TFD) paramedics responded and pronounced victim one dead at 4:42 PM. Witnesses told TPD officers they saw her arguing with a man, later identified as defendant Ralph David Cruz, Junior, who was standing outside the driver's side door of her vehicle, a green Ford Thunderbird. They reported hearing a series of gunshots and saw Cruz pull the victim from the vehicle. He drove over her body as he left the parking lot. A witness indicated victim one usually brought her two children with her but said she did not know if they had accompanied her that day. Other witnesses provided a description of the suspect and the vehicle. TPD detectives located five shell casings in the parking lot and discovered tire marks on victim one's body.

At 5:02 PM, Pima County Sheriff's Department (PCSD) deputies responded to a scenic overlook located at West Gates Pass Road after witnesses reported finding the bodies of victim two, a seven-year-old girl, and victim three, a six-year-old boy, in the parking lot. Victim two appeared to have a tire marks on her arm. Working in conjunction with TPD detectives, they were able to identify them as victim one's children. Northwest Fire Department paramedics responded and both victims were pronounced dead at 5:36 PM. An examination of the physical evidence at the scene led PCSD and TPD homicide detectives to conclude both victims had been seated when they were shot. They found no evidence victims had been killed at the overlook. Autopsies were performed on all three victims and the pathologist reported they died as a result of gunshot wounds. Victim one suffered three close range shot wounds to the head, arms, and

chest. Two bullets were recovered from her body. Victim two sustained two close range gunshot wounds to the head and the right side of the face. The pathologist also found abrasions and other injuries on her head, face, arms, legs, and hands. One bullet was removed from her body. Victim three died as a result of a close range gunshot wound to the head.

Several days later, TPD officers found victim one's vehicle in a desert area between milepost 160 and 162 on the Ajo highway. The wheels and tires had been removed and bloodstains were found on the front and rear seats. A spent bullet was found on the vehicle's floor. There was also a bullet exit hole on the right rear quarter panel. The defendant's palm print was found on the outside passenger window.

TPD detectives released pictures of the wheels and tires to the news media. On August 7, 2000, the defendant's mother contacted TPD detectives after discovering similar wheels and tires in Cruz's bedroom. She told them the defendant had loaded the items into a friend's car and was leaving the house. Uniformed TPD officers were able to stop the vehicle. Cruz fled the scene on foot, but his friend remained there. TPD officers recovered four wheels and tires which were later positively identified as those taken from victim one's vehicle. TPD latent print examiners later found the defendant's fingerprints on the tires and rims. The friend told them the defendant had said he purchased the wheels and tires for $1000 and wished to sell them.

TPD detectives obtained a search warrant for the Cruz home. They found a .40 caliber Glock pistol, a magazine, and .40 caliber cartridges buried in the defendant's rear yard. The search also yielded a pair of shorts which appeared to be stained with human blood. TPD criminalists later confirmed the presence of victim one's blood on the shorts and the pistol.

The defendant contacted TPD detectives later that day and surrendered. He chose not to make a statement to police. However, a PCSD corrections officer contacted TPD detectives to report Cruz made several statements to him while being fingerprinted. He said the defendant admitted being present when the victims were killed, but indicated another individual shot them. He said that person gave him the rims and the wheels."

The investigation also revealed that defendant's gun was used in a home invasion two weeks before the murders. In that matter, a group of heavily armed suspects, including defendant, snuck on to a farm located south of Tucson in the middle of the night, and fired a barrage of rounds at a house occupied by six people, critically injuring one of them.

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Defendant ultimately pled guilty to the murders and the home invasion.

2. Family/peer pressure

Consideration of the defendant's participation in the crime and the way that familial and peer pressures may have affected defendant's actions is also to be considered. Here, the defendant was the sole instigator of the attack and murders. The Court heard no credible testimony or evidence to suggest familial/peer pressure may have played any role in the intentional murder of a Lucila Bojorquez and her children Jennifer and José. [8] And while testimony did indicate that defendant admired and followed his older cousins Anthony and Joe in the drug trade, there is no indication his cousins influenced him in any way when he committed the murders.

3. Drug abuse

Regarding substance abuse, the Court was presented with conflicting evidence and testimony. Defendant claimed to have been smoking "Sherm" at the time of the murders. He described "Sherm" as marijuana joints dipped in embalming fluid. Defendant presented the testimony of Dr. James Stoehr, a professor of physiology who, among other things, conducted studies focused on psychopharmacology and has published in peer-reviewed journals on the subject. Dr. Stoehr also presented testimony on juvenile brain development and the interaction of drugs, including PCP and THC, with the juvenile brain. Dr. Stoehr testified about the effects of PCP/THC on people in general (unpredictable behavior, impulsivity, hallucination, full-blown schizophrenia, etc.) and testified that the adolescent brain can be affected more quickly and intensely than the brain of an adult. Dr. Stoehr acknowledged he had no opinion as to whether defendant was under the influence of any drug on the date of the murder and agreed that he would have to rely on defendant's self-reporting on that subject.

Regarding defendant's claim that he had been smoking "Sherm" for many days leading up to the murders and was under the influence of the substance when he committed the murders, the evidence available does not support this claim. Contrary to any indication that he was "high" or in any sort of dissociative state when he committed the murders, defendant's actions indicate otherwise. Defendant fled the scene in the victim's car and was able to drive several miles away to a remote site to dump the bodies of the two children he

[8] The Court found the testimony of Gabriel Mata, which suggested that criminal behavior was encouraged by the family, to lack any credibility. Mr. Mata's presentation on the stand was combative and the statements he made were largely unresponsive to the questions asked of him. Additionally, his claims were directly contradicted by the testimony of many witnesses this Court found to be credible.

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shot. Defendant then drove the vehicle to an even more remote spot, stripped it of its tires and wheels, and arranged transportation back to Tucson. Defendant attempted to hide the murder weapon by burying it. Defendant made an effort to remove incriminating evidence (the tires and rims) from his house and also managed to evade police officers when they attempted to stop him. He created a cover story that he purchased the tires and rims for $1000. When he surrendered to police officers, he invoked his Miranda rights. Later he made efforts to misdirect the investigation and exculpate himself by claiming a different person shot the victims. In short, defendant engaged in significant executive decision making at the time of and shortly after the murders.

Testimony from witnesses who saw or interacted with defendant around the time of the murders further undermines the credibility of his claim that he was under the influence of "Sherm" when he killed the victims. Lydia Romero testified on the day of the killings she saw the defendant and lent him a car because he said he needed to get a haircut. She said nothing about the defendant appearing to be under the influence of drugs at the time. RT, Day 1, page 82. Additionally, the testimony of multiple witnesses suggests that Lydia Romero was a responsible and caring parent who would not be inclined to lend her 16-year-old son a car if he was incoherent or otherwise heavily affected by drug use.

Sally Cruz testified that defendant visited her a few days prior to his arrest.[9] When asked about the visit, Mrs. Cruz testified "It was okay. I didn't notice anything. He was there, you know. Just talked, how he was doing. That's all." RT, Day 2, pages 17 – 18.

Defendant's cousin Anthony Romero testified that he recalls smoking "Sherm" with defendant the day before the murders. He was not with defendant the day of the murders and does not know if he was smoking "Sherm" that day. RT, Day 1, Page 158. Mr. Romero described the effect of "Sherm" as "living in, like, a la la land, basically" stating it was a "downer" and it made him feel lethargic as opposed to "amped up and wired up." RT, Day 1, Page 161 - 163. He also acknowledged that although it made in feel sort of invincible, it didn't cause him to go out and commit violent crimes, even while armed. RT, Day 1, Page 161. Anthony was approximately 19 at the time.

[9] Defendant committed the murders on August 4, 2000 and he was arrested on August 7, 2000.

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D. Evidence As To Whether The Incompetencies Of Youth Prevented The Juvenile From Being Charged With A Lesser Offense

No meaningful evidence was presented to suggest that defendant's youth resulted in him either intentionally or unintentionally depriving himself of all due process protections afforded a criminal defendant. Upon the advice of his family, when the defendant was arrested, he asserted his Fifth Amendment right to remain silent. He was appointed two very experienced attorneys to represent him through all stages of this matter. Additionally, he was appointed a guardian ad litem to provide further support and protection.

E. Evidence Bearing on the Possibility of Rehabilitation

Defendant presented expert and lay witness testimony on this topic. He also testified for several hours both in 2019 and in 2023 and his testimony included multiple references to this subject. Defendant's voluminous Department of Corrections file was also made part of the record and was examined by the Court.

Defendant called James Aiken to opine regarding the defendant's prison record. Mr. Aiken has spent approximately 50 years as a professional in the corrections field and has extensive experience in the areas of prisoner classification and management of inmate populations. While the Court recognizes Mr. Aiken's lifelong professional commitment to the difficult task of running correctional facilities, his testimony was not probative on the question of defendant's rehabilitation.

As for the defendant's prison record, it the contains multiple findings that defendant, "through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to a lower custody unit, as evidenced by repeated guilty findings by the Disciplinary Hearing Officer." What is particularly notable about these findings is their timing. The first one found by the Court in the records was in January 2012. At that point the defendant had been incarcerated for approximately a decade. These findings continued to appear in defendant's prison record in 2016 and 2017.

Defendant's prison record documents dozens of major violations. This behavior has persisted as the defendant progressed through his 20s and into his mid-30s. Defendant's effort to downplay his involvement in a 2014 prison riot that left a fellow inmate dead was not particularly convincing, especially in light of the investigative report finding dated March 17, 2014 which identified the defendant as a member of a group of inmates vying to control drug distribution in the prison yard and who instigated the original incident. Additionally, defendant has continued to accrue violations during the pendency of the petition that is before the Court.

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Regarding the testimony of Dr. Bashah and Dr. Garbarino, as noted above, their reliance on defendant's subjective claims, as opposed to testimony and evidence to the contrary, detracted from the probative value of their opinions on this subject. In short, both Dr. Bashah and Dr. Garbarino took more of a clinical approach when forming their opinions, emphasizing and relying on the defendant's perspective and ultimately accepting it as true, rather than a forensic approach which would be much more useful to the Court in this matter.

Finally, the Court considered its observations of the defendant and his testimony during the nine days of hearings in 2019 and 2023. Notable to the Court was defendant's efforts to embellish claims of hardship and childhood trauma while minimizing the murders and attempting to deflect accountability for them. And while the Court does acknowledge that defendant expressed remorse, it is the Court's conclusion that the primary source of this remorse is the fact that the murders resulted in him going to prison, as opposed to the murders themselves. This assessment may seem harsh. However, it is based on the Court's consideration of voluminous evidence and the content and manner of defendant's testimony in 2019 and 2023.

CONCLUSION

When defendant was sentenced in this matter, the trial judge was not mandated to impose sentences of life without the possibility of parole. The trial judge was required, and did, consider the defendant's youth before imposing the sentences. Consequently, the constitutional requirements of the *Miller* decision were satisfied.

Nonetheless, given the subsequent rulings on the subject by both the United States Supreme Court and the Arizona Supreme Court, this Court revisits the decision. The Court has weighed the evidence presented. Using the process provided by the *Miller* ruling, and based on the observations and findings detailed above, the Court concludes that the defendant has not shown by a preponderance of the evidence that his actions which resulted in the imposition of the original sentences were the result of transient immaturity. The Court finds the defendant actions which resulted in the imposition of his sentences were the result of permanent incorrigibility/irreparable corruption.

Accordingly,

IT IS ORDERED that defendant's petition for postconviction relief/petition for resentencing on Counts 2 and 3 pursuant to *Miller v. Alabama, et seq.,* is **DENIED.** Defendant's sentences on Counts 2 and 3 are affirmed.

M. Knauer
Judicial Administrative Assistant

IT IS FURTHER ORDERED as to Count 1 only, that per ARS §13 – 716, defendant shall be eligible for parole upon completion of 25 years in the Department of Corrections. The Court acknowledges that, given its above ruling and because the sentences are consecutive to each other, defendant will not be paroled.

IT IS FURTHER ORDERED as to Count 4, the Court has no authority or grounds to modify the sentence and it is affirmed.

IT IS FURTHER ORDERED that the defendant be transported back to the Department of Corrections.

/s/
HON. JAMES MARNER
(ID: e6e5704d-5751-4cee-ac5d-df3b79233769)

cc: Bradley K. Roach, Esq.
David J Euchner, Esq.
Sarah R Kostick, Esq.
Attorney General - Criminal - Tucson
Clerk of Court - Appeals Unit
Clerk of Court - Criminal Unit
Clerk of Court - Under Advisement Clerk
Office of Court-Appointed Counsel

M. Knauer
Judicial Administrative Assistant

Appendix X

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RALPH DAVID CRUZ JR.,
Petitioner.

No. 2 CA-CR 2023-0199-PR
Filed May 14, 2024

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20002693001
The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Megan Page, Pima County Public Defender
By David J. Euchner and Sarah R. Kostick, Assistant Public Defenders, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Gard authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

G A R D, Judge:

¶1 Ralph Cruz Jr. seeks review of the trial court's order denying his petition for post-conviction relief under Rule 33, Ariz. R. Crim. P., after an evidentiary hearing held pursuant to *State v. Valencia* (*Valencia II*), 241 Ariz. 206 (2016). Our supreme court overruled *Valencia II* in *State ex rel. Mitchell v. Cooper*, 256 Ariz. 1 (2023). Thus, although we grant review, we deny relief.

¶2 In August 2000, then-sixteen-year-old Cruz shot and killed a mother and her two children during a robbery. Cruz pled guilty to three counts of first-degree murder and one count of armed robbery. The plea agreement specified that Cruz would be sentenced to natural life or life with the possibility of release after twenty-five years for the first murder count or release after thirty-five years for the second and third murder counts. The plea agreement also required Cruz's prison terms to run consecutively. The court sentenced Cruz to life with the possibility of release after twenty-five years for the first murder, to be followed by consecutive terms of natural life for the children's murders. The court imposed a 10.5-year consecutive prison term for armed robbery.

¶3 Cruz sought post-conviction relief in 2013, asserting inter alia that *Miller v. Alabama*, 567 U.S. 460 (2012), required that he be sentenced to life with the possibility of parole and the court gave insufficient weight to his age as a mitigating factor. The trial court denied relief, and we denied relief on review, observing that "even under *Miller*'s heightened standard, the sentencing court adequately considered Cruz's youth in determining whether to impose a natural life sentence." *State v. Cruz*, No. 2 CA-CR 2014-0102-PR, ¶¶ 3, 11, 13 (Ariz. App. Oct. 8, 2014) (mem. decision).

¶4 In 2016, Cruz again sought post-conviction relief, arguing he was entitled, under *State v. Valencia* (*Valencia I*), 239 Ariz. 255 (App. 2016), *vacated*, 241 Ariz. 206, to resentencing so the trial court could consider whether his crimes reflected permanent incorrigibility such that a natural

life sentence could be imposed. The proceeding was stayed until our supreme court issued *Valencia II*. In *Valencia II*, the supreme court determined that juvenile offenders sentenced to natural life terms, like Cruz, were entitled to an evidentiary hearing to "have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." 241 Ariz. 206, ¶ 18. The court set an evidentiary hearing and heard testimony over several days in 2019. The court continued the hearing in anticipation of rulings by the United States Supreme Court related to juvenile sentencing; the hearing resumed in March 2023.[1]

¶5 The trial court denied relief. It noted, first, that the sentencing court had been "required, and did, consider [Cruz]'s youth before imposing the sentences." Thus, the court concluded, "the constitutional requirements of the *Miller* decision were satisfied." The court nonetheless "revisit[ed]" the sentencing court's decision in light of "subsequent rulings on the subject by both the United States Supreme Court and the Arizona Supreme Court." The court concluded Cruz had failed to show, by a preponderance of the evidence, that "his actions . . . were the result of transient immaturity" and instead "were the result of permanent incorrigibility/irreparable corruption." The court therefore affirmed Cruz's natural life prison terms.[2] This petition for review followed.

¶6 On review, Cruz asserts the trial court erred by denying relief. He argues he "overwhelmingly proved he is not permanently incorrigible," the court erred by rejecting expert testimony "based on preconceived notions and lay assumptions," and the court "cherry-picked certain testimony." As we explain, we need not reach these arguments. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015) ("We will affirm the trial court's decision if it is legally correct for any reason.").

---

[1]Some of the delay was also attributable to the COVID-19 pandemic.

[2] The trial court additionally ordered that, pursuant to A.R.S. § 13-716, Cruz would be eligible for parole for his release-eligible life term after serving the required twenty-five years. Insofar as Cruz's argument is based on the unavailability of parole at the time of his offenses, Cruz is entitled to seek parole for the eligible count under § 13-716, which provides parole eligibility to juvenile offenders "on completion of the minimum sentence."

¶7 After the trial court's ruling, our supreme court decided *Cooper*, overruling *Valencia II* in light of *Jones v. Mississippi*, 593 U.S. 98 (2021). 256 Ariz. 1, ¶ 47. The court thus eliminated *Valencia II*'s rule that juvenile defendants seeking post-conviction relief are entitled to an evidentiary hearing to demonstrate "that their crimes did not reflect irreparable corruption but instead transient immaturity" when a court has imposed a natural life sentence "without distinguishing crimes that reflected 'irreparable corruption' rather than the 'transient immaturity of youth.'" *Id.* (quoting *Valencia II*, 241 Ariz. 206, ¶¶ 15, 18). A natural life sentence is constitutional if the court considered the "juvenile offender's 'youth and attendant characteristics.'" *Id.* ¶ 42 (quoting *Jones*, 593 U.S. at 106). The court noted that the Supreme Court had clarified in *Jones* that sentencing courts need not provide "an 'on-the-record sentencing explanation with an implicit finding of permanent incorrigibility.'" *Id.* (quoting *Jones*, 593 U.S. at 115).

¶8 Although Cruz acknowledges *Cooper*, he argues that we "should reach the merits of [his] claim" because "a *Valencia* hearing occurred." He does not cite any authority, however, nor otherwise explain how this court could conclude the trial court erred by denying Cruz relief after an evidentiary hearing held to address a question our supreme court has since clarified the trial court was not required to address.

¶9 Cruz claims the sentencing court in his case "did not address the attendant characteristics of youth nor did it have discretion to impose a sentence of life with the possibility of parole." But he has not developed any argument that his sentencing procedure was unconstitutional in light of *Jones* and *Cooper*. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review). And no constitutional infirmity is apparent from the record. As we noted above, the court found Cruz's age to be a mitigating factor. The Supreme Court clarified in *Jones* that neither the Constitution nor "historical or contemporary sentencing practice" require "an on-the-record explanation of the mitigating circumstance of youth by the sentencer." 593 U.S. at 116-17. Nor does Arizona law require such findings. *See State v. Cid*, 181 Ariz. 496, 501 (App. 1995). And the court had discretion to impose a sentence other than natural life.

¶10 We grant review but deny relief.

Appendix Y

Supreme Court

STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

December 4, 2024

RE: STATE OF ARIZONA v RALPH DAVID CRUZ JR.
Arizona Supreme Court No. CR-24-0137-PR
Court of Appeals, Division Two No. 2 CA-CR 23-0199 PRPC
Pima County Superior Court No. CR20002693001

GREETINGS:

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

ORDERED: Petition for Review to Arizona Supreme Court = DENIED.

Tracie K. Lindeman, Clerk

TO:
Alice Jones
Bradley K. Roach
David J. Euchner
Sarah Rachel Kostick
Beth C. Beckmann
eg