No. 23-830

IN THE

Supreme Court of the United States

LONNIE ALLEN BASSETT,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The State, remarkably, does not attempt to defend the Arizona Supreme Court's holding that "*Miller* and its progeny do not specifically require the availability of parole when sentencing a juvenile offender." Pet. App. 11a, 19a. That holding is indefensible. The Constitution "prohibits mandatory life-without-parole sentences" for juveniles. *Jones* v. *Mississippi*, 593 U.S. 98, 103 (2021). As *amici* urge, this Court should grant certiorari to reverse the Arizona Supreme Court's ruling, which affects dozens of offenders sentenced as juveniles in Arizona. *See* Nat'l Ass'n of Crim. Def. Laws. (NACDL) Br. 3-17; Scholars Br. 4-21; Maricopa Cnty. Pub. Defs. (MCPD) Br. 2-15.

The State does not dispute that a "discretionary sentencing system"—one "where the sentencer can consider the defendant's youth *and has discretion to impose a lesser sentence than life without parole*"—is "constitutionally necessary." *Jones*, 593 U.S. at 105, 112 (emphasis added). Nor does the State dispute that *Miller* correctly identified Arizona as one of "29 jurisdictions mandating life without parole for children." *Miller* v. *Alabama*, 567 U.S. 460, 482, 486-487 & nn.9, 13, 15 (2012). The State does not dispute that from 1994 to 2014, "Arizona law did not provide a parole eligible option" at sentencing. Opp. 1. And the State concedes that the existence of "two sentencing options"—neither permitting parole—cannot "save[] it from a *Miller* violation," Opp. 22, even though that is *the basis for the decision below*.

The State instead adopts the implausible theory that all Arizona judges were laboring under "a widespread mistaken belief" that parole was available—and therefore "fortuitously complied with *Miller*." Opp. 3, 27. The Court should emphatically reject this theory, which the Arizona Supreme Court did not adopt and which contravenes the State's position in other cases. Arizona courts have for decades correctly recognized that parole was abolished in 1994, as has the State. Condoning the State's theory would permit States to violate the federal Constitution based on speculation that state courts were ignorant of their own state law.

Arizona's history does not reflect confusion about state law, but rather a persistent and erroneous belief that constitutional rights involving parole do not apply in Arizona. *See Lynch* v. *Arizona*, 578 U.S. 613 (2016); *Cruz* v. *Arizona*, 598 U.S. 17 (2023). This

Court has repeatedly corrected Arizona's misunderstanding and should do so again here.

Other States with materially identical sentencing systems have reached the opposite conclusion from the court below, making Arizona an extreme outlier and creating a clear split worthy of review. The State does not dispute this case is an excellent vehicle for addressing a recurring issue with enormous consequences for Bassett and numerous other Arizona defendants. This Court should grant the Petition and reverse.

ARGUMENT

I. THE DECISION BELOW IS WRONG.

A. The State Does Not Defend The Arizona Supreme Court's Reasoning.

The Arizona Supreme Court held that Arizona's sentencing scheme complies with *Miller* because state law offered "a choice between two sentencing options"—even though *parole was unavailable under both* and the "only option" for release was "executive clemency." Pet. App. 11a, 23a (emphasis omitted). That Arizona had "eliminated parole" did not matter, the court reasoned, because "*Miller* and its progeny do not specifically require the availability of parole when sentencing a juvenile." Pet. App. 11a, 19a.

That reasoning so plainly defies this Court's precedents that the State does not defend it. The State agrees that "parole-eligibility is constitutionally required." Opp. 24. Reversal is warranted on that basis alone. Because "Arizona law did not provide a parole eligible option at the time of Bassett's sentencing," Opp. 1, Bassett's sentencing judge lacked "discretion to impose a lesser sentence than life

without parole," *Jones*, 593 U.S. at 112, and his sentence is unconstitutional.

B. Claimed Ignorance Of State Law Cannot Save Arizona's Unconstitutional System.

Unwilling to defend the Arizona Supreme Court's reasoning, the State posits an alternative: that Arizona "was so mistaken about its own sentencing statutes that it fortuitously complied with *Miller*" thanks to a "widespread mistaken belief" that parole was available. Opp. 3, 27. This argument is meritless.

First, and most importantly, the decision below did not depend on any mistaken belief. To the contrary, the Arizona Supreme Court held that "*Miller* and its progeny *do not specifically require the availability of parole* when sentencing a juvenile," and that "Arizona's sentencing scheme" satisfied *Miller* "*[r]egardless* of whether parole was available." Pet. App. 19a, 22a (emphases added). Lower courts in Arizona read *Bassett* as foreclosing relief regardless of "the unavailability of parole." *State* v. *Cruz*, No. 2-CA-CR-2023-0199-PR, 2024 WL 2164842, at *1 n.2, *2 (Ariz. Ct. App. May 14, 2024); *see* NACDL Br. 15.

The State took that same position until this Petition, maintaining that Arizona's sentencing scheme was "not mandatory" under *Miller* because state law "provided two sentencing options," even though both "amount[ed] to sentences of life without the possibility of parole." *State* v. *Valencia*, 386 P.3d 392, 394 (Ariz. 2016); *see also* State Br., *State* v. *Valencia*, No. CR-16-0156, 2016 WL 6780720, at *5-6 (Ariz. Oct. 10, 2016) ("*Miller* had no effect on Arizona law" because "there were two options" and "[t]he trial court had the discretion to choose between" them).

The State argued the same below. State Pet. for Review 19, https://perma.cc/QSD3-PL36 ("Because Bassett's sentencer had a choice between two options, neither option may properly be characterized as 'mandatory.'"). The State's flip-flopping and refusal to defend its position below underscores that certiorari is warranted.

Second, the State's argument that Arizona courts were supposedly operating under a "universal" mistake about parole availability—even though Arizona eliminated parole *more than a decade before Bassett's sentencing*—is provably false. Both before and after Bassett's sentencing, Arizona courts correctly recognized that Arizona "eliminat[ed] the possibility of parole for crimes committed after [1993]." *State* v. *Rosario*, 987 P.2d 226, 230 (Ariz. Ct. App. 1999); *see State* v. *Lynch*, 357 P.3d 119, 138 (Ariz. 2015) ("parole is available only to individuals who committed a felony before January 1, 1994, and juveniles [after 2014]"), *rev'd*, 578 U.S. 613 (2016); *State* v. *Vera*, 334 P.3d 754, 758-759 (Ariz. Ct. App. 2014) (similar); *State* v. *Hargrave*, 234 P.3d 569, 582-583 (Ariz. 2010) (similar), *abrogation recognized*, *Cruz*, 598 U.S. at 22 n.1. Even the State's primary authority makes clear that Arizona law "unquestionably made [defendants] ineligible for parole." *State* v. *Anderson*, No. CR-23-0008, –P.3d–, 2024 WL 1922175, at *5 n.1 (Ariz. May 2, 2024).

Before this case, the State argued that "Arizona statutory law at all relevant times *unambiguously forbade parole* to anyone convicted of first-degree murder after 1993." State MTD 3, *Chaparro* v. *Ryan*, No. 2:19-cv-00650 (D. Ariz. Mar. 27, 2019) (emphasis added). For at least 15 years, the State has

represented to this Court and others that Arizona law made "life without parole the minimum sentence." States Amicus Br. i, 1, *Miller* v. *Alabama*, Nos. 10-9646, 10-9647 (U.S. Feb. 21, 2012); *see also*, *e.g.*, State Br., *State* v. *Womble*, No. CR-07-0139-AP, 2009 WL 2510724, at *58 (Ariz. May 29, 2009) (noting that defendant "would not be eligible for pre-1994 parole after 25 years"); State Opp. 11-13, *Lynch* v. *Arizona*, No. 15-8366 (U.S. Mar. 29, 2016) (similar). The State's opportunistic position here that *every Arizona court* mistakenly believed parole was available is demonstrably inaccurate.

Third, the State's argument (at 20, 22) that Bassett's sentencing court "actually considered whether he should be parole-eligible" because it mentioned "parole" does not withstand scrutiny.

Although Arizona abolished parole in a separate provision, Ariz. Rev. Stat. § 41-1604.09(I)(1) (1994), the first-degree murder statute continued to list two alternatives to death: "natural life," which barred release including "parole," and "life" with the possibility of "release" after 25 years. Ariz. Rev. Stat. § 13-703(A) (2003) (renumbered as § 13-751(A)); *accord Cruz*, 598 U.S. at 21. It is therefore unsurprising that the sentencing judge used the word "parole" when describing Bassett's sentencing options. That does not mean the judge in fact believed Bassett could be released on parole, rather than through executive clemency.

In other litigation, the State argued that "sentencing judge[s] likely used 'without possibility of parole for 25 years' as shorthand for when all forms of applicable executive clemency * * * became available." State MTD 12-13, *Chaparro* v. *Ryan*, No. 2:19-cv-

00650 (D. Ariz. Mar. 27, 2019). Although some judges "continued to use pre-1993 formulation of words even after parole was abolished," the State explained that "the superior courts were not engaged in hundreds of acts of outright and lawless defiance of the Arizona Legislature; they were simply continuing to use the same, albeit somewhat-imprecise, language they had long used before." *Id.* at 13.

The State's contrary position before this Court is flatly "inconsistent with the presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002). It would insulate sentences where the judge did not mention parole during sentencing, *e.g.*, State Pet. for Review, *State* v. *Petrone-Cabanas*, No. CR-22-0185-PR, 2022 WL 19567807, at *20-21 (Ariz. July 21, 2022), or where court records are lost to time, *e.g.*, *State* v. *McLeod*, No. 1-CA-SA-22-0196 (Ariz. Ct. App. Oct. 13, 2023), https://perma.cc/JYH2-KMHP, Pet. for Review, No. CR-23-0285-PR, 2023 WL 9776556, at *3-4 (Ariz. Dec. 13, 2023).

Where a judge used the word "parole" at sentencing, the State can only speculate on a cold appellate record whether the judge mistakenly believed parole was available, rather than simply using "parole" as a shorthand for executive clemency. Any such speculation is prohibited by *Jones*, which confirmed that compliance with the Eighth Amendment turns on whether states' "sentencing regimes" objectively impose "mandatory life-without-parole sentences," not on the nature of a particular judge's "on-the-record sentencing explanation." 593 U.S. at 114, 119. Arizona cannot escape the unconstitutionality of its mandatory sentencing

regime by asking this Court to engage in the very record-parsing *Jones* rejected.

C. Discretion To Choose Between Two Parole-Ineligible Sentences Does Not Satisfy The Eighth Amendment.

To the extent the State argues (at 14) that parole-eligibility is not required because Bassett received "an individualized sentencing hearing at which his youth and attendant characteristics were considered," this argument is foreclosed by precedent. *Jones* confirmed that courts must not only have discretion to consider youth—they must also have authority *to implement that discretion* by "impos[ing] a lesser sentence than life without parole." 593 U.S. at 112. A choice between two unconstitutional sentences is not enough; the sentencing schemes in *Miller* were no less unconstitutional because they offered a choice between death and life without parole. 567 U.S. at 466, 469, *see* Ala. Code §§ 13A-5-45(a), 13A-5-51(7); Ark. Code §§ 5-10-101(c) (1995), 5-4-605(4).[1]

Arizona's sentencing scheme illustrates why discretion to implement a lesser sentence is critical. Bassett's sentencing judge chose between a "natural life" sentence providing no prospect of release and a "life" sentence providing no prospect of release except executive clemency. The "likelihood of [clemency] is so remote" that the sentencing options were "indistinct." *State* v. *Dansdill*, 443 P.3d 990, 1000 n.10 (Ariz. Ct. App. 2019). No one convicted of first-degree murder has received clemency in the 30 years since Arizona abolished parole. NACDL Br. 8. When

[1] Although the defendants in *Miller* did not face death, those who did were equally entitled to relief. *E.g.*, *Wynn* v. *State*, 246 So. 3d 163, 187-189 (Ala. Crim. App. 2016).

the possibility of release "is more theoretical than practical," sentencing courts are not choosing between life in prison and life with the possibility of parole. *Dansdill*, 443 P.3d at 1000 n.10. There may be structural pressures to impose the harsher sentence where both yield the same practical result.

That Bassett received a clemency-eligible sentence on one count and natural life on the other says only that the court found one crime more serious—not that it considered whether Bassett was one of the "relatively rare" cases in which life without parole was "appropriate in light of [his] age." *Jones*, 593 U.S. at 111-112. Nor is the constitutionality of Bassett's sentence affected by the 2014 reinstatement of parole for juveniles serving release-eligible sentences. *Contra* Opp. 21-22. "[T]he potential for future 'legislative reform'" cannot rescue an unconstitutional system. *Lynch*, 578 U.S. at 616. Without "discretion to impose a lesser sentence than life without parole," *Miller*'s "key assumption" falls apart. *Jones*, 593 U.S. at 111-112.

Many juveniles currently serving life-without-parole sentences in Arizona were sentenced before *Roper* v. *Simmons*, 543 U.S. 551 (2005), prohibited juvenile death sentences. In multiple cases, the sentencing judge cited the defendant's youth as a reason not to impose death, without addressing any distinction between life sentences. *E.g.*, Special Verdict 18-19, 28-29, *State* v. *Petrone-Cabanas*, No. CR-99-004790 (Ariz. Sup. Ct. Feb. 20, 2002), https://perma.cc/9MR3-3TP2. Courts thus viewed a life-without-parole sentence as an act of leniency, making it impossible to conclude that the court "consider[ed] an offender's youth and attendant

characteristics[] before imposing a life-without-parole sentence." *Jones*, 593 U.S. at 98 (citation and quotation marks omitted); *see* MCPD Br. 8-10. Yet Arizona courts interpret the decision below as foreclosing relief here too. *E.g.*, *State* v. *Petrone-Cabanas*, No. 1-CA-CR-21-0534-PRPC (Ariz. Ct. App. Dec. 6, 2023), https://perma.cc/Z2CY-D58T. As *amici* explain, the decision below means that "all juvenile lifers in Arizona are categorically not entitled to relief, without individualized consideration of each case." NACDL Br. 15.

II. THE ARIZONA SUPREME COURT'S DECISION SPLITS FROM OTHER STATE HIGH COURTS.

This Court should also grant certiorari because there is a clear split. Other high courts have reached the opposite conclusion from the Arizona Supreme Court.

Wyoming: The State cannot distinguish *Bear Cloud* v. *State*, 294 P.3d 36 (Wyo. 2013). As the State concedes (at 26), Wyoming law, like Arizona law, provided two non-capital sentences for juveniles convicted of murder, while separately eliminating parole. The court held this scheme "violates the Eighth Amendment because it has the practical effect of mandating life in prison without the possibility of parole," *id.* at 45—exactly the opposite as the decision below.

The State contends, without citation, that the sentencing court in *Bear Cloud* "did not specifically consider whether parole-eligibility was appropriate at sentencing." Opp. 26-27. That is incorrect. The trial court considered "mitigating factors," including the defendant's "age," when choosing "between life with parole and life without." Sent'g Tr. 45, 51, 53, *State* v.

Bear Cloud, No. CR2009-56 (Wyo. D. Ct. Feb. 9, 2011), https://perma.cc/2VMN-H7ND. The Wyoming Supreme Court nonetheless held that the sentencing court lacked "discretion to determine whether a juvenile homicide offender should be eligible for parole." *Bear Cloud*, 294 P.3d at 45-46. The court reached the same conclusion in a companion case, specifically rejecting the argument that the "sentencing hearing met the requirements of *Miller* because the State and [defendant] presented evidence that spoke directly to the issues of [his] youth." *Sen* v. *State*, 301 P.3d 106, 125-128 (Wyo. 2013).

Mississippi: Mississippi's sentencing statute provided two alternative sentences for capital murder—one with parole, one without—while providing only one sentence—silent as to parole—for non-capital murder. Mississippi, like Arizona, separately abolished parole. The Mississippi Supreme Court explained that these "legislative mandates, when read together, are tantamount to life without parole." *Parker* v. *State*, 119 So. 3d 987, 997 (Miss. 2013).

The State distinguishes *Parker* on the ground that the defendant was convicted of non-capital murder for which only one sentence was available. But the Mississippi Supreme Court has applied *Parker* to juveniles convicted of capital murder where the sentencer had a choice between "life imprisonment without parole, or life imprisonment." *Wharton* v. *State*, 298 So. 3d 921, 923-924 (Miss. 2019) (en banc). In choosing between these options, the sentencer in *Wharton* considered "aggravating and mitigating factors," *id.* at 923, including age, Miss. Code § 99-19-101(6)(g). The court nevertheless concluded that the

sentence violated *Miller*'s prohibition on "mandatory life-without-parole sentencing schemes" because a separate statute "takes away parole eligibility." *Wharton*, 298 So. 3d at 928.

North Carolina: The State attempts to distinguish *State* v. *Young* as involving a "single sentence" where the sentencer "did not engage in a discretionary sentencing process." Opp. 25. But the statute provided two punishments—death or life without parole. The jury in *Young* considered both options, 794 S.E.2d 274, 275, 278 (N.C. 2016), and "[t]he age of the defendant" in making that choice, N.C. Gen. Stat. § 15A-2000(f)(7) (1999). The North Carolina Supreme Court ruled the sentence unconstitutional.

Nebraska and Iowa: The State's observation (at 14) that Nebraska and Iowa provided just one sentencing option misses the point. Both state high courts rejected the argument that the defendant's sentence was not mandatory under *Miller* despite the possibility of executive clemency. *See State* v. *Castaneda*, 842 N.W.2d 740, 758 (Neb. 2014); *State* v. *Ragland*, 836 N.W.2d 107, 120 (Iowa 2013). In contrast, the decision below held that *Miller* does "not specifically require the availability of parole" where executive clemency was available. Pet. App. 11a, 19a.

Other Jurisdictions: Arizona ignores the judicial and legislative fixes 22 States have implemented following *Miller*. Pet. 32-33; Scholars Br. 19-21. Arizona stands "[a]lone on an island" in refusing to do the same. Scholars Br. 6.

III. THE STATE DOES NOT DISPUTE THIS PETITION IS AN IDEAL VEHICLE.

The State does not dispute this is an ideal vehicle for addressing a "recurring" question in Arizona,

Pet. App. 14a, or that the State identified this case as the "better vehicle" for addressing it, NACDL Br. 16 (citation omitted).

Arizona courts have cited the decision below in summarily denying relief in other cases raising the same issue, confirming the decision is conclusive. *See* NACDL Br. 14-15; *State* v. *Odom*, No. 1-CA-CR-21-0537-PRPC (Ariz. Ct. App. Sept. 25, 2023), *review denied*, No. CR-23-0265-PR (Ariz. May 7, 2024), https://perma.cc/Q3NJ-K7HL. The decision below makes "Arizona an extreme outlier" and "the *only* state the *Miller* Court identified as having an unconstitutional scheme that has not provided some mechanism for relief for an entire class of individuals to this day." Scholars Br. 16. A broad coalition of *amici* all urge this Court to grant review.

Review is essential to bring Arizona in line with what this Court and every other State recognizes as constitutionally necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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