No. 23A_____

IN THE

Supreme Court of the United States

LONNIE ALLEN BASSETT,

Applicant,

v.

STATE OF ARIZONA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Lonnie Allen Bassett respectfully requests a 45-day extension of time, to and including January 31, 2024, within which to file a petition for a writ of certiorari to review the judgment of the Arizona Supreme Court in this case.

1. The Arizona Supreme Court entered judgment on September 18, 2023. *See State ex rel. Mitchell* v. *Cooper*, 535 P.3d 3 (Ariz. 2023). App. 1a-22a. Unless extended, the time to file a petition for a writ of certiorari will expire on December 18, 2023. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257(a).

2. The Applicant is Lonnie Allen Bassett. Mr. Bassett was 16 years old when he fatally shot two people in 2004. The State's notice of intent to seek the death penalty was struck after this Court held that "the Eighth Amendment prohibit[s] the imposition of the death penalty on juveniles." *Roper* v. *Simmons*, 543 U.S. 551, 570-571 (2005). Mr. Bassett was convicted of two counts of first-degree murder.

3. During the period relevant here, Arizona provided two alternatives to a death sentence for defendants convicted of first-degree murder—"natural life," under which a defendant was categorically ineligible for "commutation, parole, * * * or release from confinement on any basis," and "life," which required a defendant to

serve at least 25 years before he could be eligible for "release[] on any basis." Ariz. Rev. Stat. § 13-703(A) (2004); *see* Ariz. Rev. Stat. §§ 13-703.01(A) (2005), 13-1105(D) (2005). A separate provision of Arizona law, however, abolished parole for felons as of January 1, 1994. *See* App. 8a-9a; Ariz. Rev. Stat. § 41-1604.09(I)(1) (1994); *Lynch* v. *Arizona*, 578 U.S. 613, 614 (2016) ("Under Arizona law, 'parole is available only to individuals who committed a felony before January 1, 1994.'" (citation omitted)). Accordingly, defendants in Arizona who committed their offense during the relevant period were ineligible for parole, meaning that their "only option would have been 'release' after twenty-five years through the executive clemency process." App. 9a; *see also Cruz* v. *Arizona*, 598 U.S. 17, 21 (2023).

4. When Mr. Bassett was sentenced in 2006, the sentencing judge had no option to choose a sentence that would have allowed for parole. *See* App. 8a (acknowledging that "Bassett was actually ineligible for parole"); *see also State* v. *Wagner*, 510 P.3d 1083, 1084 (Ariz. Ct. App. 2022) ("Because parole had been abolished for those who committed felonies as of January 1, 1994, the superior court's sentencing options for the murder conviction were limited to * * * life imprisonment with no release for the rest of [the defendant's] natural life, or life imprisonment with the possibility of release through executive clemency after [the defendant] served 25 years."), *review continued* (Sept. 12, 2023).

5. The trial court sentenced Mr. Bassett to "natural life," rendering him categorically ineligible for "commutation, parole, * * * or release from confinement on any basis." Ariz. Rev. Stat. § 13-703(A) (2004); *see* App. 8a. The trial court also

imposed an additional consecutive life sentence. App. 8a. Both convictions and sentences were affirmed on appeal.

6. In 2012, this Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller* v. *Alabama*, 567 U.S. 460, 479 (2012). This Court identified "29 jurisdictions mandating life without parole for children"—including Arizona. *Id.* at 486 & n.13.

7. In 2016, this Court reiterated *Miller*'s holding that "mandatory life-without-parole sentences for children pose too great a risk of disproportionate punishment" and held that *Miller* applied retroactively in cases on collateral review. *See Montgomery* v. *Louisiana*, 577 U.S. 190, 206, 208 (2016) (citation, quotation marks, and brackets omitted). This Court subsequently vacated several Arizona court dismissals of claims for post-conviction relief under *Miller*, ordering further consideration in light of *Montgomery*. *See Tatum* v. *Arizona*, 137 S. Ct. 11, 11 (2016). As Justice Sotomayor explained, remand was necessary because Arizona courts had not "take[n] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* (Sotomayor, J., concurring in the decision to grant, vacate, and remand) (quoting *Miller*, 567 U.S. at 480).

8. Following *Montgomery* and *Tatum*, the Arizona Supreme Court held that juvenile offenders who were sentenced to natural life were entitled to evidentiary

hearings to determine whether their sentences were unconstitutional under *Miller*. *See State* v. *Valencia*, 386 P.3d 392, 396 (Ariz. 2016).

9. Arizona Rule of Criminal Procedure 32.1(g) allows a defendant to file a successive petition for postconviction review where "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." In 2017, Mr. Bassett filed a petition for postconviction review under Rule 32.1(g), arguing that *Miller* and *Montgomery* constituted a significant change in the law entitling him to relief and resentencing. App. 9a. The State conceded that Mr. Bassett was entitled to an evidentiary hearing. App. 10a.

10. Before Mr. Bassett received a hearing, this Court decided *Jones* v. *Mississippi*, 141 S. Ct. 1307 (2021). Mississippi, like Arizona, provided two alternative sentences to death for capital murder: (1) life without parole, or (2) life with eligibility for release. And like Arizona, a separate provision of Mississippi law eliminated parole for those convicted of homicide. The Mississippi Supreme Court recognized that these "legislative mandates, when read together, are tantamount to life without parole" and thus "contravene[d] the dictates of *Miller*." *Parker* v. *State*, 119 So. 3d 987, 997 (Miss. 2013); *see also Jones*, 141 S. Ct. at 1312 ("Under Mississippi law at the time, murder carried a *mandatory* sentence of life without parole."). As a result, the Mississippi Supreme Court ordered that Jones receive "a new sentencing hearing where the sentencing judge could consider Jones's youth and exercise discretion in selecting an appropriate sentence." *Jones*, 141 S. Ct. at 1312-13. In that

hearing, the sentencing judge acknowledged that he had discretion under *Miller* to impose a sentence less than life without parole, but ultimately determined that life without parole remained the appropriate sentence. *Id.* at 1313.

11. This Court affirmed that such a resentencing satisfied *Miller*. This Court rejected a requirement of a separate factual finding of permanent incorrigibility, but reiterated that "a State may not impose a mandatory life-without-parole sentence on a murderer under 18." *Id.* at 1321. This Court concluded that Jones had received his constitutional due when Mississippi ordered resentencing because the new "sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth." *Id.* at 1322. And this Court made clear that it was "carefully follow[ing] both *Miller* and *Montgomery*" and that its "decision does not overrule *Miller* or *Montgomery*." *Id.* at 1321.

12. After *Jones*, the State of Arizona moved to vacate the evidentiary hearing it had agreed to grant in Mr. Bassett's case, claiming that the scheme under which Mr. Bassett was sentenced was not "mandatory" under *Miller* because the court could have imposed a punishment other than natural life—even though the only form of "release" available was executive clemency. App. 9a-10a. The trial court denied the State's request, concluding that "Bassett was sentenced under a mandatory natural life sentencing scheme that *Miller* and *Jones* found to be unconstitutional, as the law did not allow life with the possibility of parole as an alternative to natural life." App. 14a (citation and quotation marks omitted). Shortly thereafter, the Arizona Court of Appeals came to the same conclusion in another case,

holding that life-without-parole sentences were "mandatory" in Arizona in violation of *Miller* because Arizona's "scheme * * * did not allow for the possibility of parole." *Wagner*, 510 P.3d at 1087. That Arizona law permitted a life sentence with the possibility of release in 25 years did not alter that conclusion: "It matters not whether the superior court had 'discretion' to impose alternative non-parole-eligible penalties or whether the court considered the defendant's youth in exercising that discretion," because there was "no discretion to sentence [the defendant] to a parole-eligible term." *Id*. The State petitioned the Arizona Supreme Court for review, which the court granted.

13. The Arizona Supreme Court agreed with the State's new argument that Mr. Bassett was not entitled to a hearing or any other form of relief. The court acknowledged that "Bassett was actually ineligible for parole" because "the Arizona Legislature eliminated parole for all offenses committed on or after January 1, 1994," meaning that "Bassett's only option would have been 'release' after twenty-five years through the executive clemency process." App. 8a-9a. The court nevertheless held that Arizona's sentencing scheme was *not* "mandatory" under *Miller* because trial courts had "a *choice* between two sentencing options": natural life or life with the possibility of "release" after 25 years—although such "release" did not include parole. App. 14a, 16a. In the court's view, that was sufficient to hold that "Bassett's natural life sentence was not mandatory under *Miller*." App. 17a. Despite this Court's affirmation in *Jones* that it was not overruling *Miller* or *Montgomery*, *see* 141 S. Ct. at 1321, the Arizona Supreme Court held that "*Jones* refuted the premise" for its

precedent interpreting *Miller* and *Montgomery* to require evidentiary hearings and resentencing of defendants who received mandatory life sentences without the possibility of parole, *see* App. 17a.

14. Applicant plans to file a certiorari petition seeking this Court's review of the Arizona Supreme Court's decision. The Arizona Supreme Court's decision contradicts this Court's repeated admonition that "a State may not impose a mandatory life-without-parole sentence on a murderer under 18." *Jones*, 141 S. Ct. at 1321. A "life-without-parole sentence[] for defendants who committed homicide when they were under 18" is allowed "*only* so long as the sentence is not mandatory—that is, only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment." *Id.* at 1314 (emphases altered and citation omitted). Because Arizona had eliminated parole when Mr. Bassett was sentenced, no such "lesser punishment" was available.

15. That straightforward conclusion is unchanged by Arizona's sentencing scheme, which provided a "choice" between a natural life sentence and a life sentence with the possibility of "release" after 25 years. As the Arizona Supreme Court acknowledged, App. 8a-9a, "under state law, the only kind of release for which [Bassett] would have been eligible * * * is executive clemency." *Lynch*, 578 U.S. at 615.

16. This is not the first time that Arizona has conflated parole and executive clemency to deny defendants their constitutional rights. "[I]n a series of cases," the Arizona Supreme Court held that this Court's decision in *Simmons* v. *South*

Carolina—which entitled capital defendants whose future dangerousness was at issue to inform the jury of their parole ineligibility—"did not apply in Arizona" on the ground that defendants could have "been eligible for 'executive clemency' after 25 years." *Cruz*, 598 U.S. at 21-22. This Court summarily reversed, holding that this Court in *Simmons* itself had "expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility." *Lynch*, 578 U.S. at 615.

17. In February of this year, this Court again reversed the Arizona Supreme Court's refusal to provide postconviction relief following *Lynch*. *Cruz*, 598 U.S. at 27-29, 32.

18. In this case, the Arizona Supreme Court committed a variation of the same error this Court has already twice corrected. In *Lynch*, this Court summarily reversed the Arizona Supreme Court's conclusion that *Simmons* does not apply in Arizona because defendants can receive executive clemency even though they cannot be paroled. *Lynch*, 578 U.S. at 615-617. In *Cruz*, this Court again made clear that "the only 'release' available to capital defendants convicted after 1993" in Arizona is "executive clemency." *Cruz*, 598 U.S. at 21. But in the decision below, the Arizona Supreme Court yet again conflated executive clemency with parole to hold that *Miller* and *Montgomery* do not apply in Arizona. App. 8a-9a, 16a-17a.

19. The Arizona Supreme Court's decision splits with how other State high courts have applied *Miller* and *Montgomery* to their own mandatory sentencing schemes. For example, the Mississippi Supreme Court held that a sentencing scheme

similar to Arizona's "contravene[d] the dictates of *Miller*" and required resentencing. *Parker*, 119 So. 3d at 997, 999-1000. The Supreme Court of Wyoming came to the same conclusion following this Court's remand post-*Miller*. *See Bear Cloud* v. *State*, 294 P.3d 36, 45 (Wyo. 2013) (holding that "[t]he practical effect" of similar sentencing laws was "identical to 'life imprisonment without parole' because both exclude any real possibility of parole," which "violate[d] *Miller*'s prohibition against mandatory sentences of life without the possibility of parole for juveniles").

20. The Arizona Supreme Court's defiance has real consequences for Mr. Bassett and other juvenile defendants sentenced under Arizona's mandatory life-without-parole scheme. No juvenile sentenced to mandatory life without parole pre-*Miller* has received a new sentencing hearing. Compare that to other States, in which "many homicide offenders under 18 who received life-without-parole sentences that were final before *Miller* have now obtained new sentencing proceedings and have been sentenced to less than life without parole." *Jones*, 141 S. Ct. at 1322.

21. This Court's review is warranted to prevent the Arizona Supreme Court from repeating the same error this Court has repeatedly corrected.

22. Neal Katyal of Hogan Lovells US LLP, Washington, D.C., was retained to file a petition for certiorari in this Court. Over the next several weeks, counsel is occupied with briefing deadlines and argument in a variety of matters, including a petition for certiorari due November 22, 2023, in *Pickens* v. *United States*, No. 23A311 (U.S.); a reply brief due November 24, 2023, in *Wolford* v. *Lopez*, No. 23-16164 (9th Cir.); oral argument on December 7, 2023, in *Lynwood Investments CY Limited* v.

Konovalov, No. 22-16399 (9th Cir.); a motion to dismiss due December 13, 2023, in *Roberts* v. *Progressive Preferred Ins. Co.*, No. 1:23-cv-1597 (N.D. Ohio); an opening brief due December 18, 2023, in *Coinbase, Inc.* v. *Suski*, No. 23-3 (U.S.); and a reply brief in support of certiorari due December 27, 2023, in *Boresky* v. *Graber*, No. 23-384 (U.S.).

23. Most of the files in Mr. Bassett's case are in hard-copy form, and Mr. Katyal and his team require additional time to review voluminous materials in preparing the petition for certiorari.

24. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including January 31, 2024.

Respectfully submitted,

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