No. 20-6775

IN THE SUPREME COURT OF THE UNITED STATES

DANTAZIAS RAINES,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

REPLY TO GEORGIA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK LOUDON-BROWN
ATTEEYAH HOLLIE
SOUTHERN CENTER
FOR HUMAN RIGHTS
60 Walton Street NW
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
mloudonbrown@schr.org
ahollie@schr.org

April 30, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Secondary Sources

REPLY TO GEORGIA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Despite the "abrupt break from precedent" in *Jones v. Mississippi*, No. 18-1259, 2021 WL 1566605, at *17 (Apr. 22, 2021) (Sotomayor, J., dissenting), this case remains worthy of certiorari.[1]

First, the Supreme Court of Georgia has held, repeatedly, that in Georgia, a "specific determination" that a child is "permanently incorrigible" is required in order for a child to be eligible for a sentence of life without parole (LWOP). *Raines v. State*, 845 S.E.2d 613, 615 (Ga. 2020) (citing *White v. State*, 837 S.E.2d 838, 845 n.7 (Ga. 2020), and *Veal v. State*, 784 S.E.2d 403, 411 (Ga. 2016)). Thus, in Georgia there is a Sixth Amendment right to have the question of permanent incorrigibility submitted to a jury, regardless of what *Jones* held. This Court should grant certiorari to ensure that those states that require a specific determination of permanent incorrigibility before a child is eligible for LWOP allow the child to have a jury make that finding.

Second, without the intervention of a justice of this Court, Dantazias Raines might be sentenced to die in prison even though "there is a strong likelihood that [he] is constitutionally ineligible for LWOP." *See Jones* at *26 (Sotomayor, J., dissenting).

[1] *Jones*, which bears directly on the question presented for certiorari in this case, was decided after the State filed its Brief in Opposition, but before Dantazias Raines's Reply Brief was to be submitted. Accordingly, he addresses *Jones* in this Reply.

INTRODUCTION

Dantazias Raines is a Black child who was convicted of committing a botched robbery that ended in the death of a white person. The question presented in this case directly implicates a claim made by the dissenting justices in *Jones*: Does this Court think that what Dantazias Raines does in life matters? *See Jones* at *27 (Sotomayor, J., dissenting).

In a decision that revealed a "fear of too much justice,"[2] this Court, on April 22, 2021, wrote that "[i]f permanent incorrigibility were a factual prerequisite to a life-without-parole sentence, this Court's Sixth Amendment precedents might require that a jury, not a judge, make such a finding. If we were to rule for Jones here, the next wave of litigation would likely concern the scope of the jury right." *Jones* at *6 n.3 (internal citations omitted).

It is concerning that this Court should fear that a child might be so fortunate as to enjoy the right to a jury determination of whether he is eligible to be sentenced to die in prison, a suffrage the Framers characterized as a "modest inconvenience." *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343, 343 (1769)). In addition, even if "a sentencing explanation" were "not necessary to ensure that the sentencer in juvenile life-without-parole cases considers the defendant's youth," *Jones* at *9, it *is* necessary to ensure that the sentencer does so *meaningfully*. *E.g. Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007). That this truth escapes a majority of this

[2] *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

Court is, at a minimum, disheartening to those who practice in the criminal courts of this country.

Yet this Court, in one breath, "los[t] sight of what is at stake in this case." *Jones* at *27 (Sotomayor, J., dissenting). The majority's belief that "the sentencer necessarily *will* consider the defendant's youth," *Jones* at *9 (emphasis in original), reflects a profound misunderstanding of and disconnect from the workings of the criminal courts in this country.[3] Courts not only routinely fail to consider age as a mitigating circumstance, but often they cite it as an *aggravating* factor, especially if the child is almost eighteen. *See, e.g.*, *State of Georgia v. Marcus Battle*, No. 13-SC-117828 (Fulton Co. Super. Ct.) (collateral challenge to LWOP sentence imposed on Black child and affirmed on direct appeal at 804 S.E.2d 46 (Ga. 2017), where defense counsel did not know Marcus Battle was under eighteen at the time of the crime); *State of Georgia v. Million Bedford*, No. 17-CR-44 (Emanuel Co. Super. Ct.) (LWOP sentence imposed, and recently affirmed at 2021 WL 1521563 (Ga. Apr. 19, 2021), where sentencing court found that Black child should be treated as an adult in part because he had proven to be a responsible father); *see also Moss v. State*, No. S20A1520, 2021 WL 954757 (Ga. Mar. 15, 2021) (affirming LWOP sentence for Black child even though trial court admitted it could not reach a finding of irretrievable corruption or permanent incorrigibility).

[3] Prior experience in the criminal courts can ensure that a future justice will understand that "at the heart of the criminal justice system are encounters between human beings, usually of vastly different power and sophistication." Bruce A. Green and Daniel C. Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 Ariz. St. L. J. 369, 402 (1994).

One of the starkest examples of a trial court disregarding *Miller v. Alabama*, 567 U.S. 460 (2012), comes from the *Miller* case itself. Just days after this Court's decision in *Jones*, the Alabama trial court tasked with imposing sentence on remand from this Court's opinion in *Miller* paid mere lip service to the opinion, following a virtual hearing where Evan Miller appeared remotely from prison:

> In resentencing him to life without parole, the judge said he did consider Miller's past exposure to violence; a history that he and two siblings were abused, beaten, and whipped; his use of drugs; and his mental health history, that included multiple suicide attempts - one attempt early as age of 5 or 6 years old.
>
> *But, the judge said: 'The crime is why we are here. We're not here because Mr. Miller suffered abuse at the hands of his father."*

Kent Faulk, *Evan Miller, youngest person ever sentenced to life without parole in Alabama, must remain in prison* (Apr. 27. 2021), *available at* https://www.al.com/news/2021/04/evan-miller-youngest-child-ever-sentenced-to-life-without-parole-in-alabama-must-remain-in-prison.html (emphasis added). The judge also observed that Evan, who was fourteen at the time of the crime, had "thrived in highly structured settings," and did not go to the crime "with the intent to kill." *Id.* Nevertheless, the judge resentenced Evan to LWOP, not because he was permanently incorrigible, but because, in the judge's opinion, LWOP was the only "just sentence." *Id.*

Perhaps most alarming was this Court's apparent ignorance of how its decision in *Jones* will disproportionately affect Black and Brown youth in this country, the only country in the entire world that still thinks it proper to sentence a

child to die in prison. *See Jones* at *21 n.2 (Sotomayor, J., dissenting) ("70 percent of all youths sentenced to LWOP are children of color."); *see also generally* The Sentencing Project, https://www.sentencingproject.org/publications/juvenile-life-without-parole/ (last visited Apr. 29, 2021) (documenting the racial disparities that plague the imposition of LWOP sentences for children).

To be clear, the dissent was correct that "[t]he Court is fooling no one," *Jones* at *17 (Sotomayor, J., dissenting), least of all the Black and Brown children it helped to ensure will be sentenced to die in prison thanks to its decision in *Jones*.[4] "Cast aside . . . are those condemned to face [a child's] ultimate penalty," and squandered is "the authority and the legitimacy of this Court as a protector of the powerless." *Payne v. Tennessee*, 501 U.S. 808, 856 (1991) (Marshall, J., dissenting). The majority's decision in *Jones* will only exacerbate existing racial disparities in who is considered irreparably corrupt, and who is not.

I. GEORGIA LAW REQUIRES A "SPECIFIC DETERMINATION" OF "PERMANENT INCORRIGIBILITY," WHICH CARRIES WITH IT A SIXTH AMENDMENT RIGHT TO A JURY DETERMINATION.

Jones "does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. . . . States may

[4] "It is not often in the law that so few have so quickly changed so much." Tr. of Opinion Announcement, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007) (Breyer, J., dissenting), *available at* https://www.oyez.org/cases/2006/05-908. Here too, chronology suggests that "[p]ower, not reason, is the new currency of this Court's decisionmaking." *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting). *Montgomery v. Louisiana*, 577 U.S. 190 (2016), held that *Miller* was a substantive decision; *Montgomery* held that "permanent incorrigibility" was required for a child's LWOP sentence to be constitutional; Justice Kennedy retired and Justice Ginsburg passed away; the outcome changed. Thus, "[n]either the law nor the facts . . . underwent any change . . . Only the personnel of this Court did." *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole." *Jones* at *12; *see also Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that although a state is not required by the Federal Constitution to grant appellate review, if it does, it may not do so in a way that violates the Constitution). That is precisely what Georgia has done, and it has done so repeatedly. *See, e.g.*, *Raines*, 845 S.E.2d at 615; *White*, 837 S.E.2d at 845 n.7; *Veal*, 784 S.E.2d at 411.

In *Veal v. State*, the Supreme Court of Georgia held that "determining whether a juvenile falls into that exclusive realm [of eligibility for LWOP] *turns not on the sentencing court's consideration* of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a *specific determination* that he is *irreparably corrupt*." (first two emphases added; third emphasis in original). 784 S.E.2d at 411. Accordingly, in Georgia, a specific determination of irreparable corruption is required before a child is eligible for LWOP.

The court below acknowledged that there is a "'specific determination' of irreparable corruption that *Veal* (following *Miller* and *Montgomery*) requires for a juvenile offender to be sentenced to LWOP." *Raines*, 845 S.E.2d at 621. The court then decided that the "specific determination" need not be made by a jury prior to sentencing. *Id.* at 624. That conclusion is contrary to this Court's statement in *Jones* that if "permanent incorrigibility were a factual prerequisite to a life-without-

parole sentence," as it is in Georgia, "this Court's Sixth Amendment precedents might require that a jury, not a judge, make such a finding." *Jones* at *6 n.3.

The court below attempted to avoid the conclusion that a jury was required by opining that *Veal* did not require a "factfinding." *Raines*, 845 S.E.2d at 621-24. But that "overlooks *Apprendi's* instruction that 'the relevant inquiry is one not of form, but of effect.'" *Ring v. Arizona*, 536 U.S. 584, 604 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)); *see also Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[A]ll facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). In Georgia, the "effect" of a "specific determination" of "irreparable corruption" is to make a child who otherwise would be constitutionally ineligible for LWOP, eligible for LWOP. Georgia's requirement of a "specific determination" of "irreparable corruption" prior to a child's eligibility for LWOP thus compels the conclusion that a jury must make that determination. Accordingly, this Court should grant certiorari to clarify that, notwithstanding *Jones*, if a state requires a particular finding before a child can be eligible to receive LWOP, that finding must be made by a jury.

Moreover, as evidenced by the Supreme Court of Georgia's opinion in this case, there is a split among the states on the question of whether a Sixth Amendment jury right attaches when "permanent incorrigibility" is a prerequisite to LWOP eligibility for a child. *See Raines*, 845 S.E.2d at 624 n.12 (2020)

(recognizing *Stevens v. State*, 422 P.3d 741 (Okla. Crim. App. 2018) as contrary authority). The State unsuccessfully attempts to deny the existence of this split. *See* Brief in Opposition at 6-8. Citing *Bever v. State*, 467 P.3d 693, 700 (Okla. Crim. App. 2020), the State notes that Oklahoma rejects "a Sixth Amendment right to jury sentencing." Brief in Opposition at 8. The State's observation is a red herring. Dantazias Raines does not argue for a Sixth Amendment right to jury *sentencing*; rather, he argues for a Sixth Amendment right to a jury *finding of permanent incorrigibility prior to sentencing*. And the Oklahoma Court of Criminal Appeals so found in *Stevens*, holding that the "trial court shall submit a special issue to the jury as to whether the defendant is irreparably corrupt and permanently incorrigible." *Stevens*, 422 P.3d at 750. The question of sentencing (for the judge) is distinct from the question of irreparable corruption or permanent incorrigibility (for the jury), but the State glosses over this difference.[5]

Nothing in *Bever*, which was concerned with the question of sentencing, undid the conclusion in *Stevens*, which was concerned with the question of permanent incorrigibility. Nothing in *Jones* undid the split among the states about whether to empanel a jury when a state requires a determination of permanent incorrigibility before a child is eligible for LWOP. And nothing at all has undone the confusion among trial judges who continue to sentence children to death in prison for crimes that reflect transient immaturity as it was defined in *Miller*. This

[5] Indeed, the court in *Bever* explicitly recognized that "[i]t is not necessary for us to determine whether the finding of 'irreparably corrupt and permanently incorrigible' is akin to the finding of an aggravating circumstance. The claim on appeal is whether running the sentences consecutively violated federal and state law." *Bever*, 467 P. 3d at 700.

Court should therefore grant certiorari to clarify that if a state court makes a child's eligibility for LWOP contingent on a specific determination that the child is "irreparably corrupt" or "permanently incorrigible," that determination must be made by a jury.

This clarification is the least the Court could do. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that a consensus of thirty states against the death penalty for children required the Court to ban the practice. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court banned the death penalty for those with an intellectual disability because thirty states rejected the practice. *Roper*, 543 U.S. at 564. Today, exactly like the count in *Roper* and *Atkins*, thirty states ban life without parole for children in law or in practice. *See* Campaign for Fair Sentencing of Youth, *National trends in sentencing children to life without parole*, at 3 (Feb. 2021), *available at* https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf. Not to mention that no other country—not one—accepts this practice. *See Roper*, 543 U.S. at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.")

In sum, ensuring that a Black child convicted of murder in a botched robbery of a white decedent receives the procedural protections to which he is constitutionally entitled in Georgia is the least this Court could do while it

continues to countenance a practice that a majority of states (and every single other country) have already found offends contemporary sensibilities.

II. THIS COURT'S INTERVENTION IS WARRANTED.

The facts of this case—a botched robbery that turned into a killing—are precisely the facts that this Court cautioned against justifying LWOP for in *Miller*. *See Miller v. Alabama*, 567 U.S. 460, 473 (2012) ("distinctive (and transitory) mental traits and environmental vulnerabilities" are manifest when "a botched robbery turns into a killing"). The refusal of Georgia's courts to recognize that such a fact pattern does not merit a sentence of death in prison underscores the importance of the issues raised in Dantazias Raines's Petition.

Dantazias Raines is Black. The decedent is white. In its Brief in Opposition, the State succinctly summarized the crime: "She had tried to grab the gun and he got nervous and shot her." Brief in Opposition at 2. In other words, even according to the State's own summary of the crime, Dantazias Raines, a Black child, committed "a botched robbery" that "turn[ed] into a killing" when the white decedent tried to grab his gun. *See Miller*, 567 U.S. at 473. Under this Court's express observation in *Miller*, a lifetime in prison is a disproportionate sentence in Dantazias Raines's case, because his *crime*, as evidenced by the example invoked in *Miller*, does not reflect irreparable corruption.

Based on the evidence in this case, "it is hard to see how [Raines] is one of the rare juvenile offenders 'whose crime reflects irreparable corruption.'" *Jones* at *24 (Sotomayor, J., dissenting). Nevertheless, a judge in Upson County, Georgia,

originally ordered Dantazias Raines to die in prison for this childhood crime that had the hallmarks of transient immaturity. And there is no reason to believe, absent a statement from a justice of this Court, that Dantazias Raines will be resentenced to LWOP. This is because "discretion alone will not make LWOP a rare sentence" for children. *Jones* at *21 (Sotomayor, J., dissenting). Indeed, despite Dantazias Raines's myriad foster care placements from ages two through seventeen, his routine exposure to violence, and much more in mitigation, the trial court summarily sentenced him to die in prison once already. *See* Pet. for Certiorari at 2-3 (relating extensive mitigation and the trial court's dismissal of that information). Accordingly, this Court's intervention is warranted and necessary to avoid a manifest injustice from occurring in this case.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

/s/ *Mark Loudon-Brown*
MARK LOUDON-BROWN
ATTEEYAH HOLLIE
SOUTHERN CENTER
FOR HUMAN RIGHTS
60 Walton Street NW
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
mloudonbrown@schr.org
ahollie@schr.org

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I served a copy of the foregoing via email, per prior agreement, upon counsel for the Respondent:

Andrew A. Pinson, Solicitor General
APinson@law.ga.gov
Ross W. Bergethon, Deputy Solicitor General
RBergethon@law.ga.gov
Office of the Georgia Attorney General
40 Capitol Square SW
Atlanta, Georgia 30334

/s/ *Mark Loudon-Brown*
Mark Loudon-Brown