No. _____

IN THE
Supreme Court of the United States

EDWARD MCCAIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an invalid conviction affects a criminal defendant's substantial rights and must be vacated on plain error review, irrespective of whether he is subject to a concurrent sentence of equal or greater length, as this Court and all of the federal courts of appeals have held.

II. Whether the Eighth Amendment requires a sentencing court to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:

United States v. *McCain*, No. 18-4723 (4th Cir. Sept. 10, 2020) (reported at 974 F.3d 506), *reh'g denied* (Oct. 7, 2020)

United States District Court for the District of South Carolina:

United States v. *McCain*, No. 2:09-CR-296-DCN-2 (D.S.C. Sept. 25, 2018)

United States Court of Appeals for the Fourth Circuit:

In re: Edward McCain, No. 16-9015 (4th Cir. Jun. 8, 2016) (order denying motion for authorization to file successive habeas application)

United States Court of Appeals for the Fourth Circuit:

United States v. *McCain*, No. 10-4252 (4th Cir. Feb. 28, 2011) (available at 413 F. App'x 628)

United States District Court for the District of South Carolina:

United States v. *McCain*, No. 2:09-CR-296-DCN-2 (D.S.C. Mar. 3, 2010, and Mar. 9, 2010)

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Petitioner Edward McCain respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion, Pet. App. 1a-22a, is reported at 974 F.3d 506. That court's order denying rehearing en banc is not reported. Pet. App. 43a. The District Court's judgment is available at Pet. App. 23a-28a.

JURISDICTION

The District Court entered final judgment on September 25, 2018. Pet. App. 23a-28a. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on September 10, 2020. Pet. App. 1a-22a. A timely petition for rehearing en banc was denied on October 7, 2020. Pet. App. 67a. This Court entered an order on March 19, 2020, extending the deadline to file any petition for a

writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 924 provides, in relevant part:

> (c)
>
> (1)
>
> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> * * *
>
> (j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
>
> (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

18 U.S.C. § 1111 provides, in relevant part:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

18 U.S.C. § 1512 provides, in relevant part:

(a)

(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

* * *

(3) The punishment for an offense under this subsection is—

> (A) in the case of a killing, the punishment provided in sections 1111 and 1112;
>
> (B) in the case of—
>
> (i) an attempt to murder; or
>
> (ii) the use or attempted use of physical force against any person;
>
> imprisonment for not more than 30 years;

* * *

INTRODUCTION

In 2010, Edward McCain was sentenced to life imprisonment on three counts of conviction for conduct that occurred when he was just seventeen years old. One of those counts carried a mandatory sentence of life imprisonment or death. Years later, after this Court decided *Miller* v. *Alabama* and *Montgomery* v. *Louisiana*, Mr. McCain moved successfully for resentencing under 28 U.S.C. § 2255. The District Court reimposed its original life sentence, acknowledging it had to consider Mr. McCain's youth at the time of the offense, but never making a finding that he was permanently incorrigible.

On appeal, Mr. McCain argued that one of his convictions, for witness tampering by murder, should have been vacated because it authorized only two penalties, both of which could not constitutionally apply to juveniles: mandatory life imprisonment or death. The Fourth Circuit declined to order the District Court to vacate that conviction, assuming that the conviction was unconstitutional but asserting that Mr. McCain could not establish that his substantial rights were affected by the

illegal conviction because he was subject to a concurrent life sentence on another count. That holding conflicts with this Court's decisions in *Ball* v. *United States* and *Rutledge* v. *United States* and the unanimous wall of precedent applying those cases in the federal courts of appeals.

This Court should grant certiorari and vacate the judgment below. But even if it believes plenary review is unwarranted, it should summarily reverse in light of the Fourth Circuit's clear failure to follow *Ball* and *Rutledge.* In the alternative, the Court should hold Mr. McCain's petition pending disposition of *Jones* v. *Mississippi*, No. 18-1259 (argued Nov. 3, 2020), and grant, vacate, and remand Mr. McCain's case so that the Fourth Circuit can reconsider it with the benefit of that decision.

STATEMENT

On April 15, 2009, Edward McCain was named in a six-count superseding indictment for conduct that allegedly occurred when he was seventeen years old. Mr. McCain consented to have his case transferred to adult criminal prosecution[1], CAJA 350, and six months later, pleaded guilty to three of those counts with a written plea agreement: count one—witness tampering by murder, in violation of 18 U.S.C. § 1512(a)(1)(C) and 2; count two—witness tampering by attempted murder, in violation of 18 U.S.C. § 1512 (a)(1)(C) and 2; and count five—using a firearm in furtherance of a drug trafficking crime and a crime of violence, resulting in murder, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i), 924(j), and 2. Pet. App. 236a-247a.

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[1] When asked by the lawyer representing Mr. McCain at resentencing why Mr. McCain waived his right to a transfer hearing, Mr. McCain's trial counsel reportedly asked: " 'I waived it? Why did I do that?' " CAJA 345.

Count one carried mandatory penalties of life imprisonment or death. Pet. App. 237a-238a. Count two carried a maximum penalty of thirty years of imprisonment. Pet. App. 238a. Count five carried mandatory penalties of life imprisonment, any term of years, or death, and had to be run consecutive to any other sentence. Pet. App. 239a; 18 U.S.C. § 924(c)(1)(D)(ii) (2006). Mr. McCain was sentenced to life imprisonment on the first and fifth count and thirty years on the second count, all to run concurrently. Pet. App. 58a. He was also sentenced to a five-year term of supervised release, with mandatory and discretionary conditions of supervision, and ordered to pay a special assessment of $300 ($100 per count) and restitution of $39,926.87. *Id.*

Mr. McCain appealed his sentence and his counsel filed a brief under *Anders* v. *California*, 386 U.S. 738 (1967), questioning whether the District Court erred in accepting Mr. McCain's plea and whether it abused its discretion in sentencing him. The Fourth Circuit affirmed Mr. McCain's convictions and sentence in an unpublished opinion without oral argument. *United States* v. *McCain*, 413 F. App'x 628 (4th Cir. 2011).

After Mr. McCain's direct appeal was final, this Court decided *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016). In *Miller*, the Court explained that the Eighth Amendment prohibits sentencing schemes that mandate life imprisonment without parole for crimes committed by juveniles under the age of eighteen. In *Montgomery*, the Court explained that the

rule articulated in *Miller* is a new, substantive constitutional rule that applies retroactively.

In light of these decisions, Mr. McCain moved pro se under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, arguing that his sentencing ran afoul of the Eighth Amendment's protection against cruel and unusual punishment. Pet. App. 222a-235a. The Government agreed that Mr. McCain was entitled to a new sentencing hearing that would comply with *Miller*. Pet. App. 220a-221a. The District Court appointed counsel for Mr. McCain, and resentencing was held over three days on May 31, September 19, and September 20, 2018. Pet. App. 68a-219a; Pet. App. 29a-52a.

Resentencing began with testimony by W. Howard Buddin, Jr., Ph.D., a neuropsychologist. Pet. App. 126a. Dr. Buddin testified that he administered several tests with Mr. McCain to measure "cognitive capacity, problem solving, [and] reasoning" as well as tests of executive functioning and behavioral personality and psychopathology. Pet. App. 130a-131a. Dr. Buddin noted that Mr. McCain began seeing counselors around age eight or nine and was diagnosed with ADHD. Pet. App. 135a. He also explained that Mr. McCain lived with various relatives during his adolescence and had a "chaotic" upbringing. Pet. App. 137a.

Dr. Buddin explained that adolescence persists until sometime between ages eighteen and twenty-five and that the brain continues to develop throughout one's entire life. Pet. App. 139a. He explained that he diagnosed Mr. McCain with antisocial personality disorder at the time of his evaluation and opined that Mr.

McCain would have the "potential . . . for benefit" from dialectical behavioral treatment programs in the Bureau of Prisons. Pet. App. 143a-144a; *id.* 149a. He pointed to the decrease in Mr. McCain's security levels in the Bureau of Prisons as an encouraging sign of his rehabilitation, despite several infractions, including a fight involving a knife. Pet. App. 203a.

Resentencing recessed for nearly four months. At the next hearing, Mr. McCain's counsel explained that he was one of the last juveniles to be sentenced to mandatory life without parole before *Miller* was decided. Pet. App. 70a. She explained that Mr. McCain had given up his right to challenge the transfer of his case to adult criminal prosecution because he had been cooperating with the Government and could have received a downward departure as a result. Pet. App. 74a-75a. However, he lost that opportunity by writing threatening letters to witnesses. Pet. App. 6a; 75a. Then twenty-seven years old, Mr. McCain had "several significant infractions" after his original sentencing, but some were "mutual" and some were committed in self-defense. Pet. App. 77a. Counsel noted that Mr. McCain's behavior improved "dramatically" after he left Terre Haute five years prior to resentencing, when "the infractions go down and the education courses go up." Pet. App. 78a.

Mr. McCain's counsel cited *United States* v. *Under Seal*, 819 F.3d 715 (4th Cir. 2016), for the proposition that he "could not be prosecuted in this courtroom today" for witness tampering by murder because it carries a mandatory life or death sentence, both of which are prohibited for juveniles. Pet. App. 80a. She

recommended a sentence of twenty-five, thirty, or fifty years and suggested periodic reviews every five years beginning at the "fifteenth or the eighteenth or the twentieth year." Pet. App. 82a. She also addressed recent misconduct, including an infraction in which Mr. McCain touched a female inmate's behind, which she described as "impetuous" and "adolescent." Pet. App. 83a.

Mr. McCain spoke next, apologizing to the court and his victims and explaining that "time has been a beautiful thing for me." Pet. App. 85a. He stated that "had I known then what I know now, I wouldn't be standing before you." Pet. App. 88a. He described struggling with disciplinary infractions at Terre Haute because of the "helplessness of the environment," describing a specific knife fight that was brought about by the sexual advance of another male inmate. Pet. App. 90a. He also described a more recent incident at the Charleston County Detention Center, where he touched "a female inmate's butt"; he described that he "had only known one woman intimately in my entire life" and explained that he acted out of desperation. Pet. App. 91a.

He described his plans for his release, noting that he wanted to "start by working two jobs . . .to pay my restitution." Pet. App. 93a. He described a book he was writing and his intention one day to start a clothing line. *Id.*

Mr. McCain asked the court to suspend his sentence to a term of twenty-five years, conditioned on his good behavior in the Bureau of Prisons so that he would have "an opportunity to gain release based on demonstrated maturity and rehabilitation." Pet. App. 94a. He asked for an "extended amount of supervised

release." *Id.* He asked the court for "one chance" explaining that "[a] man without hope is nothing. And for the last ten years of my life, I've been in the BOP with no hope, Your Honor." Pet. App. 95a.

Counsel for Mr. McCain explained that some correction officers offered to speak on Mr. McCain's behalf but were not permitted to do so by the chief of the detention center. Pet. App. 98a-99a. She explained that under *Miller*, unless the court were prepared to say that Mr. McCain is "irredeemable," "a life sentence is not appropriate." Pet. App. 100a.

The court stated that the penalties were up to life imprisonment on count one (even though the statute provides only for a sentence of life or death), thirty years on count two, and up to life imprisonment on count five. Pet. App. 102a. Each count carried a maximum of five years of supervised release and a special assessment of $100. *Id.* The court calculated Mr. McCain's guideline range as life, based on a total offense level of 48 and a criminal history category of four, and calculated restitution as $39,926.87. *Id.* Neither party objected to those guideline calculations. Pet. App. 103a.

The Assistant United States Attorney spoke next, explaining that one of the victims, and that victim's mother and stepfather, wanted Mr. McCain to stay in prison for the rest of his life. Pet. App. 104a-105a. He described Mr. McCain's infractions in the Bureau of Prisons as "serious." Pet. App. 106a-107a. He described Mr. McCain as "irreparably corrupted" and asserted that assessment was "solidified by his" post-sentencing conduct. Pet. App. 108a. He described the "gap in time"

after violent conduct as evidence that Mr. McCain had become "wiser and more manipulative." Pet. App. 112a.

Counsel for Mr. McCain reiterated her request for a sentence that restores "some measure of hope" for him. Pet. App. 120a.

Sentencing reconvened the following day. The court began by recognizing its obligation under *Roper* v. *Simmons*, *Graham* v. *Florida*, and *Miller* v. *Alabama*, to consider "chronological age and hallmark features," including "immaturity, impetuosity and failure to appreciate the risks and consequences." Pet. App. 31a. It acknowledged that it also needed to consider "the family and home environment," as well as the "circumstances of the . . . offense, including extent of the participation in the conduct" and "the way familial and peer pressures may have affected the defendant in this instance." *Id.* It noted that "appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon." *Id.* It summarized the parties' arguments for and against a life sentence for Mr. McCain. Pet. App. 32a-44a.

The court explained that it "read very carefully" the testimony of Dr. Buddin and agreed that Mr. McCain suffers from antisocial personality disorder. Pet. App. 44a. The court described the "treatment/prognosis" for persons suffering from the disorder as "less favorable" than with many other conditions. Pet. App. 46a. The court described Mr. McCain's allocution as "very credible" and described him as "obviously bright," "engaging," with "well organized" and "well presented" thoughts. Pet. App. 46a. The court observed: "I see that, and I don't see the person standing

before me that I've read about in those reports. And some ask, has rehabilitation already started taking place. Maybe there is something here to look for and look at." Pet. App. 47a.

But the court described Mr. McCain's post-sentencing incidents in prison as "disturbing" in "nature" and "number," including an infraction against a female inmate while Mr. McCain was awaiting resentencing. *Id.* In contrast to the court's prior remarks, it stated: "I see no difference between that juvenile and this adult . . . . " Pet. App. 48a. The court opined that antisocial personality disorder "still controls his action and his thinking." *Id.* The court stated it "followed all the directives in Miller, [and] considered every one of the sentencing factors." *Id.* But the court was "not convinced that his chronological age and the hallmark features associated with young age played any substantive role in his commission of these crimes." *Id.* It opined that Mr. McCain's youth "may have been a contributing factor, but it was not a major one." *Id.* The court "reluctantly conclude[d], reluctantly, and really reluctantly conclude this may be one of those uncommon cases where sentencing a juvenile to the hardest possible penalty is appropriate." Pet. App. 49a. It imposed a sentence of life imprisonment on counts one and five and thirty years' imprisonment on count two, to run concurrently. *Id.* It imposed three, consecutive[2], five-year terms of supervised release and imposed mandatory and special conditions of supervised release. *Id.*

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[2] Although the written judgment reflects concurrent supervised-release terms, it is the oral pronouncement of sentence that controls in the event of a conflict. Fed. R. Crim. P. 35(c) (" 'sentencing' means the oral announcement of sentence").

Mr. McCain appealed his convictions and sentence, arguing first that the District Court plainly erred when it did not vacate Mr. McCain's conviction for witness tampering by murder because under the Fourth Circuit's decision in *Under Seal*, and this Court's decisions in *Roper*, *Graham*, *Miller*, and *Montgomery*, a juvenile may not be transferred for adult prosecution under a statute that prescribes life imprisonment as a mandatory minimum punishment.

He also argued that the District Court's sentence was procedurally unreasonable because it failed to sufficiently address juvenility at the time of the offense and failed to address Mr. McCain's nonfrivolous request that it fashion an opportunity for his future release. He argued that the sentence was substantively unreasonable because the court failed to apply the Eighth Amendment principles set forth in *Miller*.

The Fourth Circuit affirmed in a published opinion. Pet. App. 1a-22a. First, it affirmed Mr. McCain's conviction for witness tampering by murder and explained that, assuming the District Court plainly erred in not vacating his conviction for witness tampering by murder, remand for vacatur of the conviction was not warranted because "he has not shown that the error affected his substantial rights." Pet. App. 12a. It so held because it believed that Mr. McCain "received two concurrent life sentences: on Count One for violating Section 1512 and on Count Five for violating Section 924." Pet. App. 12a-13a. Because "even without his conviction for violating Section 1512, McCain was legally subject to a nonmandatory life sentence for his Count Five murder offense," Pet. App. 13a, it held that Mr.

McCain "failed to demonstrate a reasonable probability that, but for the assumed error, the district court would have imposed a lesser sentence," Pet. App. 14a (citing *United States* v. *Foster*, 507 F.3d 233, 251-252 (4th Cir. 2007)).

The Court of Appeals also affirmed the District Court's sentence, holding that its "multiday sentencing hearing" was thorough, that the court "considered the Sentencing Guidelines and properly calculated the Guidelines range, carefully described the parties' contentions as they pertained to each of the Section 3553(a) factors and *Miller* factors, and adequately explained its chosen sentence." Pet. App. 15a (cleaned up). It held that the District Court adequately considered Mr. McCain's juvenility at the time of the offense, and appropriately considered Mr. McCain's antisocial personality disorder diagnosis and postconviction misconduct in the Bureau of Prisons. Pet. App. 17a. And the Court of Appeals held that Mr. McCain's request for *de facto* parole was potentially frivolous and, in any event, the District Court adequately explained why it rejected that request. Pet. App. 19a.

Finally, the Court of Appeals upheld the sentence as substantively reasonable, explaining that the District Court did not abuse its discretion when it determined that Mr. McCain's crimes, committed when he was seventeen years old, "reflected irreparable corruption rather than 'the transient immaturity of youth.' " Pet. App. 21a-22a. The court noted that the parties did not brief whether the District Court was required to make a finding of permanent incorrigibility before imposing a life sentence on a juvenile, an issue currently pending before this Court in *Jones* v. *Mississippi*, 140 S. Ct. 1293 (2020).

Through counsel, Mr. McCain timely petitioned for rehearing or rehearing en banc, which was denied. Pet. App. 67a. Mr. McCain later moved *pro se* to substitute counsel and for leave to file an amended petition for rehearing and rehearing en banc out of time; the Court of Appeals granted the motion for substitute counsel, but denied the motion for leave to file an amended petition.

This timely petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS WRONG AND CONTRAVENES THIS COURT'S DECISIONS IN *BALL* V. *UNITED STATES* AND *RUTLEDGE* V. *UNITED STATES*, AS WELL AS A UNIFORM WALL OF PRECEDENT FROM ALL OF THE FEDERAL COURTS OF APPEALS

One of the counts to which Edward McCain pleaded guilty alleged that he engaged in witness tampering by murder, and aiding and abetting the same, in violation of 18 U.S.C. § 1512(a)(1)(C) and 2. By statute, that offense requires imposition of one of two mandatory penalties: life imprisonment or death. 18 U.S.C. § 1512(a)(3)(A); *id.* § 1111(b); Pet. App. 237a-238a. The plea agreement correctly notes that Mr. McCain was not eligible for the death penalty due to his youth at the time of the offense. *See Roper* v. *Simmons*, 543 U.S. 551 (2005).

After Mr. McCain's guilty plea and original sentencing, this Court decided *Miller* v. *Alabama*, 567 U.S. 460 (2012), which held that the United States Constitution prohibits sentencing juvenile offenders to mandatory life without parole. Against that backdrop, the Fourth Circuit decided *Under Seal*, 819 F.3d 715 (4th Cir. 2016). In *Under Seal*, the defendant, who was seventeen years old, allegedly participated

in a gang-related murder. *Id.* at 718. The Government filed a delinquency information and certification against the defendant under 18 U.S.C. § 5032 and moved to transfer him to adult criminal prosecution for murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1). *Id.* The district court held that it would be unconstitutional to grant the Government's motion because district courts do not have discretion to sentence a defendant to less than the statutory mandatory minimum penalty, which, in the case of Section 1959(a)(1), is life imprisonment, and that sentence could not constitutionally be imposed on him. *Id.* The Fourth Circuit affirmed that conclusion, concluding that the defendant could not be prosecuted for murder in aid of racketeering because his conviction would require the court to impose an unconstitutional sentence. *Id.* at 728.

The same is true of witness tampering by murder, which mandates only two penalties: life imprisonment or death. As a result, Mr. McCain never should have been criminally prosecuted for that offense and his resulting conviction and life sentence should have been vacated. Although Mr. McCain did not raise this argument in his pro se Section 2255 motion, his counsel mentioned *Under Seal* at resentencing and did raise the argument in his counseled appeal, seeking vacatur of his witness-tampering-by-murder conviction on plain error review.

Under Federal Rule of Criminal Procedure 52(b) and *United States* v. *Olano*, 507 U.S. 725 (1993), appellate courts may correct an error that is plain and "affects substantial rights." *Olano*, 507 U.S. at 732. If these criteria are met, the court may

exercise its discretion to correct the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 732.

The Fourth Circuit assumed that the District Court plainly erred in failing to vacate Mr. McCain's Section 1512 conviction, but denied relief because Mr. McCain "has not shown that the error affected his substantial rights." Pet. App. 12a. It so held because, in its view, Mr. McCain received two concurrent life sentences, one on Count One and one on Count Five. Because the court found that the conviction resulting in a concurrent life sentence "authorized the district court to sentence McCain to a term of years up to life but did not mandate a sentence of life imprisonment," Mr. McCain was "legally subject to a nonmandatory life sentence for his Count Five murder offense." Pet. App. 13a. And because Mr. McCain "failed to demonstrate a reasonable probability that, but for the assumed error, the district court would have imposed a lesser sentence," the Court of Appeals concluded that the error did not affect Mr. McCain's substantial rights. Pet. App. 14a.

That decision flies in the face of this Court's precedents regarding application of the concurrent sentence doctrine on plain error review and the conclusion of all of the federal courts of appeals to have considered the question. Although there is a concurrent sentence doctrine that can bar relief with respect to certain *sentencing* errors, that same doctrine holds that vacatur is *required* where the error invalidates the conviction and not just the resulting sentence. In *Ball* v. *United States*, this Court held that vacatur of a duplicitous conviction was required, even where a second conviction's sentence was ordered to be served concurrently. 470 U.S. 856,

865 (1985). The Court made plain that the concurrent sentence did not reduce the need to redress the illegal conviction and corresponding punishment. It spoke clearly:

> The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Id. at 865 (citing *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969); *Sibron v. New York*, 392 U.S. 40, 54-56 (1968)). In *Rutledge* v. *United States*, this Court reiterated that holding, explaining that 18 U.S.C. § 3013's requirement that a special assessment be applied to each conviction ensures that "a second conviction will amount to a second punishment." 517 U.S. 292, 301 (1996) (citing *Ray* v. *United States*, 481 U.S. 736, 737 (1987) (per curiam) (presence of $50 assessment precludes application of "concurrent sentence doctrine")). This was so despite the fact that "petitioner will never be exposed to collateral consequences like those described in *Ball* because he is subject to multiple life sentences without possibility of release." *Id.* ("the assessment was . . . as much a collateral consequence of the conspiracy conviction as the consequences recognized by *Ball* would be").

The federal courts of appeals have not struggled to apply *Ball* and *Rutledge* correctly in the context of determining whether a defendant's substantial rights have been affected for purposes of plain error review.

The First Circuit vacated a duplicative conviction and sentence on plain error review in *United States* v. *King*, explaining that although "[o]ne might contend that even if the double conviction were plain error and prejudicial, the extent of prejudice—a nominal second conviction with concurrent sentence and a $100 special assessment—does not meet the 'miscarriage of justice' requirement," *Ball* and *Rutledge* require vacatur and remand, citing a number of circuit cases holding that a second conviction and sentence violate a defendant's substantial rights, even if they are completely concurrent. 554 F.3d 177, 180 and n.2 (1st Cir. 2009). The Second Circuit did the same, holding that a defendant's substantial rights were affected and vacatur of a conviction is warranted when he received "multiple punishments—in the form of two convictions and two special assessments—unauthorized by Congress for the same offense." *United States* v. *Gore*, 154 F.3d 34, 48 (2d Cir. 1998). The Third Circuit concurred, explaining that a defendant's substantial rights are affected and vacatur of a conviction is warranted even where the sentence is concurrent with another because "the defendant received two special assessments of $100 instead of one" and the entry of separate convictions "threatens him with 'the potential adverse collateral consequences' of two convictions on child pornography charges." *United States* v. *Miller*, 527 F.3d 54, 74 (3d Cir. 2008); *see also United States* v. *Tann*, 577 F.3d 533, 539 (3d Cir. 2009) (same). The Fifth Circuit agreed, vacating an illegal conviction on plain error review where it resulted in an additional special assessment, explaining that "sentences with special assessments imposed for individual counts are not in fact 'concurrent,' no matter

how small the special assessments. Nor do we take lightly the collateral effects of sentences, whether concurrent or consecutive." *United States* v. *Ogba*, 526 F.3d 214, 237 and n. 58 (5th Cir. 2008). The Sixth Circuit reached the same conclusion, vacating and remanding an illegally duplicative conviction on plain error review and holding that "[t]he only constitutionally sufficient remedy in this case is to remand to the district court for it to vacate one of the two convictions in its discretion." *United States* v. *Ehle*, 640 F.3d 689, 699 (6th Cir. 2011) (explaining that "[u]pholding the convictions and running Ehle's sentences concurrently rather than consecutively would be a legally insufficient remedy," citing *Ball*). The Seventh Circuit too, agreed, holding that *Ball* and *Rutledge* together require vacatur on plain error review of an illegal conviction that results in a concurrent sentence and an extra special assessment. *United States* v. *Parker*, 508 F.3d 434, 440-441 (7th Cir. 2007) (overruling prior cases holding otherwise as in conflict with *Ball* and *Rutledge* "and out of step with our sister circuits"). The Eighth Circuit agreed, vacating an illegal conviction on plain error review because the "sentences are not entirely concurrent because each conviction carries a mandatory special assessment." *United States* v. *Robertson*, 606 F.3d 943, 952 (8th Cir. 2010) (citing *Ball*, *Rutledge*, *Ogba*, *Tann*, and *Parker*). The Ninth Circuit did the same, vacating an illegal conviction on plain error review because "[t]he multiplicitous convictions and sentences affect Zalapa's substantial rights because they have collateral consequences," including "the possibility of an increased sentence under a recidivist statute for a future offense" and "a mandatory $100 special assessment, which

constitutes additional punishment that would not have been imposed absent the multiplicitous conviction and sentence." *United States* v. *Zalapa*, 509 F.3d 1060, 1064 (9th Cir. 2007). The Tenth Circuit agreed, vacating two illegal convictions with concurrent sentences on plain error review and explaining that "it would affect Graham's rights and substantially undermine the integrity of the judicial proceedings if we allowed him to receive three punishments for the same offense." *United States* v. *Graham*, 305 F.3d 1094, 1100-1101 (10th Cir. 2002). And the Eleventh Circuit is in accord, vacating an illegal conviction with a concurrent sentence under plain error review in reliance on *Rutledge*. *United States* v. *Boyd*, 131 F.3d 951, 954-955 (11th Cir. 1997).

Even the Fourth Circuit has agreed, citing *Ball* and *Rutledge* and explaining that the collateral consequences of an unlawful conviction and its attendant special assessment affect a defendant's substantial rights and require vacatur of an illegal conviction that results in a concurrent sentence. *United States* v. *Bennafield*, 287 F.3d 320, 324 (4th Cir. 2002).

The Fourth Circuit's refusal in this case to correct an error it assumed was plain, contravenes this Court's precedents, is out of step with the unanimous precedents of all federal courts of appeals to have considered the question, and requires this Court's intervention.

II. THIS ISSUE IS IMPORTANT

This issue could hardly be more consequential. The pernicious effects of an illegal conviction, separate and apart from that of an illegal sentence, are well-

documented in this Court's precedents and in those of the federal courts of appeals. *Ball*, 470 U.S. at 865 (additional convictions can delay parole eligibility, result in an increased sentence under a recidivist statute for a future offense, be used to impeach a defendant's credibility, carry societal stigma); *Rutledge*, 517 U.S. at 301 (additional convictions also carry additional special assessments); *see above at* 18-21. And those effects are magnified a thousand fold when the conviction at issue results in a life sentence imposed for an offense committed when the defendant was a juvenile. *See Miller*, 567 U.S. at 473 (quoting *Graham* v. *Florida*, 560 U.S. 48, 74 (2010)) ("Life without parole 'forswears altogether the rehabilitative ideal.' It reflects an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change.").

What is more, the illegal conviction in count one corrodes Mr. McCain's conviction on count five, the other conviction that purports to authorize a life sentence. Once Mr. McCain's illegal conviction on count one is vacated, the lower courts must consider whether Mr. McCain's conviction under Section 924(j) must also be vacated, given that his conviction for witness tampering by murder is not "a crime of violence . . . for which [Mr. McCain] may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A). Mr. McCain's guilty plea stated that his Section 924(j) conviction was premised on use of a firearm in furtherance of "a drug trafficking crime *and* a crime of violence, *both* of which are prosecutable in a court of the United States." Pet. App. 238a (emphasis added). But one of those, the alleged crime of violence, is *not* prosecutable against Mr. McCain in federal court.

Omari v. *Gonzales*, 419 F.3d 303, 308 n.10 (5th Cir. 2005) ("Indictments often allege conjunctively elements that are disjunctive in the corresponding statute, and this does not require either that the government prove all of the statutorily disjunctive elements of that a defendant admit to all of them when pleading guilty."); *Malta-Espinoza* v. *Gonzales*, 478 F.3d 1080, 1082 n.3 (9th Cir. 2007) ("[A] plea of guilty admits only the elements of the charge necessary for a conviction."); *Valansi* v. *Ashcroft*, 278 F.3d 203, 214-217 (3d Cir. 2002) (rejecting assertion that defendant's guilty plea to indictment charging embezzlement with 'intent to injure and defraud' admitted both states of mind where intent to do either was sufficient to sustain conviction).

When an offense includes alternative elements for conviction, it is divisible, and courts then use a "modified categorical approach" to determine "which element played a part in the defendant's conviction." *Descamps* v. *United States*, 570 U.S. 254, 260 (2013). Under this approach, the court may look to the terms of the charging document, plea agreement, and plea colloquy. *See Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016); *Shepard* v. *United States*, 544 U.S. 13, 26 (2005). Here, Mr. McCain pleaded guilty to a Section 924(j) offense based on two predicate offenses. Accordingly, courts must assume that Mr. McCain could have been convicted by reliance on either predicate offense, requiring a determination whether each predicate offense is one "for which the person may be prosecuted in a court of the United States." *Under Seal* makes plain that Mr. McCain *may not* be prosecuted for witness tampering by murder in federal court. And, because that is

true, Mr. McCain's Section 924(j) conviction and life sentence must also be vacated. *See United States* v. *Vann*, 660 F.3d 771, 776-777 (4th Cir. 2011) (en banc) (vacating armed career criminal sentence and remanding where Vann pleaded guilty to indecent liberties pursuant to conjunctively drawn indictments that alleged an offense that would be a violent felony as well as an offense that would not be).

The Fourth Circuit's lone holding—in conflict with settled law of this Court and all of the federal courts of appeals to have considered the question—that an unconstitutional conviction and resulting life sentence does not affect a juvenile's substantial rights, creates an island in which plainly illegal mandatory juvenile life sentences cannot be corrected, even though they *would* be corrected anywhere else in the country. This Court should not countenance such disparate treatment on such an important question.

III. THIS IS A CLEAN VEHICLE TO DECIDE THE QUESTION PRESENTED

This case also presents a clean vehicle for deciding the question presented. First, the argument was both pressed and passed upon. Mr. McCain argued to the Court of Appeals, on plain error review, that his conviction on Count One should have been vacated. The panel addressed that argument in a published decision, employing reasoning that contravenes this Court's precedents and breaks from the unanimous precedent of all other federal courts of appeals to have considered the question.

What is more, this issue is outcome-determinative with respect to Mr. McCain's conviction on count one, and potentially count five, and could result in a significantly shorter sentence for Mr. McCain if both of those convictions are vacated.

IV. EVEN IF THIS COURT BELIEVES PLENARY REVIEW IS UNWARRANTED, IT SHOULD SUMMARILY REVERSE

The Fourth Circuit's decision so plainly conflicts with this Court's precedents and the well-reasoned decisions of its sister circuits applying those precedents that the Court should, in the alternative, summarily reverse. *See Maryland* v. *Kulbicki*, 136 S. Ct. 2, 3 (2015) (per curiam) (summarily reversing where the court applied governing Supreme Court case "in name only"); *Grady* v. *North Carolina*, 575 U.S. 306, 311 (2015) (per curiam) (summarily reversing a judgment inconsistent with the Court's Fourth Amendment precedents); *Martinez* v. *Illinois*, 572 U.S. 833, 843 (2014) (per curiam) (summarily reversing a holding that "r[an] directly counter to [this Court's] precedents").

This Court should set the issue to rights.

V. IN THE ALTERNATIVE, THIS COURT SHOULD HOLD MR. MCCAIN'S PETITION PENDING DISPOSITION OF *JONES* V. *MISSISSIPPI* AND GRANT CERTIORARI, VACATE THE FOURTH CIRCUIT'S JUDGMENT, AND REMAND FOR RECONSIDERATION OF THE CASE IN LIGHT OF THAT NEW PRECEDENT

Jones v. *Mississippi*, No. 18-1259, was argued on November 3, 2020, and is currently pending before this Court. That case presents the question "[w]hether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without

parole." *Jones* Br. Of Petitioner at i. Here, at Mr. McCain's resentencing, the District Court never made such a finding on the record before imposing a sentence of life without parole. Although this claim was not raised in the District Court or before the panel, Pet. App. 20a, it was raised in a petition for rehearing and rehearing en banc, and this Court frequently grants petitions for certiorari that were pending at the time a new decision issues from this Court, vacates the judgments below, and remands the cases to the Court of Appeals to enable that court to reconsider the case with the benefit of this Court's new decision. *See, e.g., Atkinson* v. *United States*, 140 S. Ct. 396 (2019); *Parks* v. *United States*, 140 S. Ct. 98 (2019); *Hall* v. *United States*, 139 S. Ct. 2771 (2019). The Court should do so here, especially where this case presents the significant consequence of an unconstitutional conviction and life sentence imposed on a juvenile.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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