

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD MCCAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed reversible plain error in not vacating petitioner's conviction for murdering a witness to prevent communication of information to law enforcement, in violation of 18 U.S.C. 1512(a)(1)(C), on the ground that the penalties for that offense set forth by statute cannot be constitutionally applied to a juvenile offender.

2. Whether the Eighth Amendment required the district court to make a finding that petitioner is "permanently incorrigible" before imposing a discretionary sentence of life imprisonment without parole.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.S.C.):

United States v. McCain, No. 09-cr-296 (Sept. 25, 2018)

McCain v. United States, No. 16-cv-2094 (Sept. 25, 2018)

United States Court of Appeals (4th Cir.):

United States v. McCain, No. 10-4252 (Feb. 28, 2011)

United States v. McCain, No. 18-4723 (Sept. 10, 2020)

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No. 20-7410

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 974 F.3d 506. A prior opinion of the court of appeals (Pet. App. 53a-56a) is not published in the Federal Reporter but is reprinted at 413 Fed. Appx. 628.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2020. A petition for rehearing was denied on October 7, 2020 (Pet. App. 67a). The petition for a writ of certiorari was filed on March 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of South Carolina, petitioner was convicted of murdering a witness to prevent communication of information to law enforcement, in violation of 18 U.S.C. 1512(a)(1)(C); attempting to murder a witness to prevent communication of information to law enforcement, in violation of 18 U.S.C. 1512(a)(1)(C); and using a firearm to commit murder in the course of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. 924(j). Pet. App. 57a, 248a-250a. The district court sentenced petitioner to life imprisonment, to be followed by five years of supervised release. Id. at 58a-59a. The court of appeals affirmed. Id. at 53a-56a. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. Pet. App. 222a-234a. The district court granted that motion and, following a new sentencing hearing, resentenced petitioner to life imprisonment, to be followed by five years of supervised release. Id. at 24a-25a; see id. at 30a-51a. The court of appeals affirmed. Id. at 1a-22a.

1. Petitioner was a drug dealer in Georgetown, South Carolina. Pet. App. 5a. In 2008, when petitioner was 17 years old, he and an accomplice, Pierre Sanders, began to suspect that two of their customers -- Glen Crawford, Jr., and James Fannin -- were cooperating with law enforcement. Ibid. Petitioner decided "to silence them." Ibid. On November 14, 2008, petitioner met up with Crawford and Fannin, ostensibly to sell them heroin. Ibid.

Instead, petitioner pulled out a gun and emptied it into Crawford and Fannin. Ibid.

After running out of ammunition, petitioner noticed that at least one of the victims was still moving. Pet. App. 5a. Petitioner ran to his grandmother's house, which was near the scene of the shooting, to look for more bullets. Ibid. "Finding none, he hid the gun" and retrieved a knife in order "to finish the job." Ibid. By the time he returned to the scene, however, police had arrived. Ibid. Petitioner "was eventually found lying in a ditch and arrested." Ibid. As a result of the shooting, Fannin died, and Crawford suffered "permanent and disabling injuries" from multiple gunshot wounds to his head, chest, arm, hand, and back. Ibid.

2. The government charged petitioner in connection with the murder and initiated proceedings to transfer him from juvenile to adult status and to prosecute him as an adult under 18 U.S.C. 5032. See Pet. App. 5a-6a. Petitioner "voluntarily waive[d]" any "transfer hearings" under Section 5032 and "request[ed] to be proceeded against as an adult for purposes of criminal prosecution." 2 C.A. App. 350.

A federal grand jury in the District of South Carolina then indicted petitioner on one count of murdering a witness to prevent communication of information to law enforcement, in violation of 18 U.S.C. 1512(a)(1)(C); one count of attempting to murder a witness to prevent communication of information to law enforcement,

in violation of 18 U.S.C. 1512(a)(1)(C); one count of attempting to murder a witness in retaliation for providing information to law enforcement, in violation of 18 U.S.C. 1513(a)(1)(B); one count of using a firearm to commit murder in the course of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. 924(j); and one count of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 248a-251a.

Petitioner pleaded guilty to the murder and attempted murder counts under Section 1512(a)(1)(C) and to the murder count under Section 924(j). Pet. App. 237a-239a; see 1 C.A. App. 40-41. With respect to the Section 1512(a)(1)(C) murder count, the pertinent statute set forth a penalty of "death" or "imprisonment for life." 18 U.S.C. 1111(b); see 18 U.S.C. 1512(a)(3)(A) (providing that the punishment for murder in violation of Section 1512(a)(1)(C) shall be the punishment provided in Section 1111). The parties agreed that petitioner was subject to a mandatory minimum of life imprisonment for that count but was "not eligible for the death penalty due to his age at the time of the offense." Pet. App. 237a-238a. The government agreed to file a motion pursuant to 18 U.S.C. 3553(e) and Federal Rule of Criminal Procedure 35(b) authorizing the district court to impose a sentence below life imprisonment if petitioner cooperated with the government. Pet. App. 240a-243a. But petitioner "lost [his] opportunity" for a lower sentence "when, before sentencing, he sent letters

threatening to kill" several individuals, including Crawford, Sanders, and another witness in the case. Id. at 6a.

In 2010, the district court sentenced petitioner to life imprisonment on the Section 1512(a)(1)(C) murder count, life imprisonment on the Section 924(j) murder count, and a 30-year term of imprisonment on the Section 1512(a)(1)(C) attempted-murder count, all to be served concurrently. Pet. App. 58a. The court of appeals affirmed. Id. at 53a-56a.

3. a. In 2012, this Court in Miller v. Alabama, 567 U.S. 460, "h[e]ld that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[]." Id. at 465. This Court subsequently held that Miller applies retroactively to cases on collateral review. Montgomery v. Louisiana, 577 U.S. 190, 206, 212 (2016).

In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging that "the imposition of [his] sentence" violated Miller. Pet. App. 225a. On the understanding that petitioner's motion was "limited to seeking resentencing in light of Miller" and did "not involve any claim that [his] conviction is invalid," the government declined to raise any potential procedural defenses to petitioner's motion and agreed that petitioner was "entitled to a new sentencing proceeding that complies with Miller." Id. at 220a-221a.

b. The district court held a three-day resentencing hearing in which it received evidence about petitioner's childhood, mental

state, and conduct in prison. Pet. App. 8a-11a. The evidence indicated that petitioner's father was absent during his childhood, that his mother suffered from bipolar disorder, and that petitioner had moved back and forth between his mother's and grandmother's homes. Id. at 6a. The evidence also showed that petitioner had committed several violent offenses as a juvenile, including a racially motivated assault, an attempted burglary, and an attempted armed robbery with a gun, ibid.; that he had "amassed a lengthy record of misconduct" in prison after becoming an adult, including stabbing two inmates with shanks and assaulting several others, id. at 7a; that as a result of those incidents in prison, petitioner was transferred to a special management unit for violent inmates, where he repeatedly threatened guards and threw foul-smelling substances at them, ibid.; and that while in another detention center awaiting his resentencing, he had sexually assaulted a female inmate, id. at 8a.

Petitioner presented a report and testimony from a neuropsychologist, Dr. William Howard Buddin, who had examined petitioner and diagnosed him with antisocial personality disorder. Pet. App. 8a, 126a, 129a-144a. Dr. Buddin stated that antisocial personality disorder "typically is marked by impulsivity, 'failure to conform to lawful or social norms,' inability to benefit from repeat arrests, 'failure to plan ahead,' and 'lack of remorse,'" and suggested that treatment programs might help petitioner manage those symptoms. Id. at 8a (brackets and citation omitted); see

id. at 147a-161a, 190a-191a. Dr. Buddin further opined that petitioner committed his offenses at a time "when [his] neurological development was still taking place," id. at 9a (citation omitted), increasing his susceptibility to "impulsivity" and "the influence of peers," id. at 165a-166a. Dr. Buddin acknowledged, however, that he had not considered petitioner's risk of recidivism or future dangerousness, and that he viewed petitioner as more likely than the average inmate to commit "infractions and violent behaviors while incarcerated." Id. at 177a; see id. at 175a-178a.

c. The district court resentenced petitioner to life imprisonment on the Section 1512(a)(1)(C) and Section 924(j) murder counts and to 30 years of imprisonment on the Section 1512(a)(1)(C) attempted-murder count, all to be served concurrently. Pet. App. 24a.

The district court recognized that, in light of Miller, petitioner could no longer be subject to a mandatory life sentence and that it had discretion to impose any sentence "up to life imprisonment" on the murder counts. Pet. App. 102a; see id. at 35a-36a. The court further recognized that, in determining the appropriate sentence, it was required to "take into account how children are different, and how these differences counsel against irrevocably sentencing them to a life in prison." Id. at 36a. The court expressed its understanding that doing so required consideration of petitioner's "chronological age and hallmark

features" at the time of his offense, including his alleged "immaturity, impetuosity[,] and failure to appreciate the risks and consequences" of his actions; his "family and home environment"; the extent to which "familial and peer pressures may have affected" petitioner's conduct; and "the issue of rehabilitation." Id. at 31a. And the court observed that, "based upon Miller's observations and instructions, appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon." Ibid. (emphasis added).

After reviewing the parties' arguments regarding each of the Miller factors and Dr. Buddin's conclusions regarding petitioner's mental state, see Pet. App. 32a-46a, the district court determined that this was "one of those uncommon cases where sentencing a juvenile to the hardest possible penalty is appropriate," id. at 49a. The court rejected petitioner's assertion that his "terrible choices" as a juvenile were rooted in his childhood experiences. Id. at 48a. It observed that petitioner "was not abused in his home" and did not face hardships beyond the "things we too often see with people in dysfunctional families." Ibid. The court also emphasized that petitioner had continued making "terrible choices" as an adult, ibid., and cited the "violent assaults" that he had committed while incarcerated, as well as the "very disturbing" sexual assault that he had committed while awaiting resentencing, id. at 47a. The court found that those actions exhibited a pattern of opportunistic violence that was more attributable to

petitioner's antisocial personality disorder than to the mitigating qualities of youth. Id. at 47a-48a; see ibid. (noting similarities between petitioner's conduct as a juvenile and his actions as an adult). And the court explained that, "follow[ing] all the directives in Miller" and "consider[ing] every one of the sentencing factors," it was "not convinced that [petitioner's] chronological age and the hallmark features associated with young age played any substantive role in his commission of [his] crimes." Id. at 48a (emphasis added).

4. The court of appeals affirmed. Pet. App. 1a-22a.

Petitioner argued for the first time on appeal that the district court should have vacated his conviction on the Section 1512(a)(1)(C) murder count. Pet. C.A. Br. 15-18. Specifically, petitioner contended that because the only available punishments for that offense at the time he was transferred to adult proceedings were death or life imprisonment, his transfer and subsequent conviction were invalid. Id. at 16. The court of appeals reviewed that claim for plain error and determined that plain-error relief was unwarranted. Pet. App. 11a-14a.

The court of appeals acknowledged its previous conclusion in United States v. Under Seal, 819 F.3d 715 (4th Cir. 2016), that a juvenile could not be transferred to adult proceedings pursuant to Section 5032 on a murder-in-aid-of-racketeering charge whose only available punishments would be unconstitutional as applied to a juvenile. Pet. App. 12a (citing Under Seal, 819 F.3d at 717-718,

728). The court noted, however, that, Under Seal had "distinguished cases like this one, where a court must determine 'how to remedy a mandatory life sentence that was validly imposed at the time, but which was subsequently determined to be unconstitutional,' calling it a 'fundamentally different inquiry.'"
Id. at 12a n.1 (quoting Under Seal, 819 F.3d at 727).

The court of appeals found it unnecessary to "decide whether the district court's failure to sua sponte vacate [petitioner's] Section 1512 conviction was plain error," Pet. App. 12a n.1, because "[e]ven assuming the district court plainly erred in not vacating [petitioner's] Section 1512 conviction," petitioner had "not shown that the error affected his substantial rights," as required by the third element of plain-error review, id. at 12a. The court of appeals observed that petitioner had "received two concurrent life sentences": one on the Section 1512(a)(1)(C) murder count, and another on the Section 924(j) count. Ibid.; see id. at 12a-13a. The court further observed that "Section 924(j) provides that anyone who uses a firearm to murder another person [as petitioner did] shall 'be punished by death or by imprisonment for any term of years or for life.'" Id. at 13a (quoting 18 U.S.C. 924(j)(1)). "Thus," the court reasoned, "even without his conviction for violating Section 1512, [petitioner] was legally subject to a nonmandatory life sentence for his [Section 924(j)] murder offense." Ibid. And the court determined that vacatur of petitioner's Section 1512(a)(1)(C) murder conviction would not have

affected the outcome of the proceedings, because petitioner had "not identified any evidence that the district court would have sentenced him differently" on the Section 924(j) count following such a vacatur. Ibid.

The court of appeals also rejected petitioner's contention that "his sentence of life imprisonment was procedurally and substantively unreasonable" under 18 U.S.C. 3553(a). Pet. App. 14a. As a procedural matter, the court of appeals found that the district court "did not abuse its discretion in its consideration of [petitioner's] age at the time of the offense or his postconviction diagnosis and conduct." Id. at 18a. And as a substantive matter, the court of appeals found that the district court did not "abuse[] its discretion in determining that [petitioner's] crimes, committed when he was 7-and-a-half months shy of his 18th birthday, reflected irreparable corruption rather than 'the transient immaturity of youth.'" Id. at 22a (citation omitted).

ARGUMENT

Petitioner contends (Pet. 15-21) that the court of appeals erred in relying on his concurrent life sentence under Section 924(j) as a basis for concluding that any error in failing to vacate his murder conviction under Section 1512(a)(1)(C) would not have affected his substantial rights under the plain-error standard. Petitioner forfeited that contention by not addressing that element of the plain-error standard in his briefing below. And although the court should not have relied on petitioner's concurrent

sentence in assessing whether his substantial rights were affected, the court's bottom-line determination that petitioner is not entitled to plain-error relief is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioner also contends (Pet. 25-26) that the district court erred by not making a finding of permanent incorrigibility before imposing a life sentence. That contention is foreclosed by this Court's intervening decision in Jones v. Mississippi, 141 S. Ct. 1307 (2021). The petition for a writ of certiorari should be denied.

1. To establish reversible plain error, a defendant must demonstrate (1) error; (2) that is clear or obvious; (3) that affected his substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Puckett v. United States, 556 U.S. 129, 135 (2009); see Fed. R. Crim. P. 52(b). Petitioner contends (Pet. 15-21) that the court of appeals misapplied the third element of that standard by relying on his concurrent life sentence under Section 924(j) to conclude that any hypothetical error in failing to vacate his Section 1512(a)(1)(C) murder conviction would not have affected his substantial rights. That contention does not warrant this Court's review.

a. As an initial matter, petitioner forfeited any argument that he could satisfy the third requirement of the plain-error standard by failing to raise such an argument in the court of

appeals. In his briefs on appeal, petitioner argued only that his Section 1512(a)(1)(C) murder conviction should be vacated in light of the court's prior decision in United States v. Under Seal, 819 F.3d 715 (4th Cir. 2016). See Pet. C.A. Br. 15-18. Petitioner did not address the third requirement of the plain-error standard at all. Nor did petitioner challenge the court's application of that requirement in his petition for rehearing en banc. See Pet. C.A. Pet. for Reh'g En Banc 1-10. Given petitioner's failure to properly present and preserve any argument with respect to the third element of the plain-error standard, this Court's review is not warranted. See United States v. Jones, 565 U.S. 400, 413 (2012).

In any event, although the court of appeals' analysis of that element was incorrect, its analytical error does not call into question its bottom-line determination that petitioner is not entitled to plain-error relief. An invalid count of conviction ordinarily is prejudicial on direct review even if the defendant's sentence of imprisonment on that count was imposed concurrently to a sentence of equal or greater length on another count. See Rutledge v. United States, 517 U.S. 292, 302-303 (1996); Ball v. United States, 470 U.S. 856, 864-865 (1985). But "this Court reviews judgments, not opinions," Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), and it is well established that a "prevailing party may defend a judgment on any ground which the law and the record permit that would not expand

the relief it has been granted," United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977). Here, petitioner is not entitled to plain-error relief because he cannot show that the district court erred in not vacating his Section 1512(a)(1)(C) murder conviction, much less that any error was "clear or obvious." Puckett, 556 U.S. at 135.

Petitioner's challenge to his Section 1512(a)(1)(C) murder conviction rests on the court of appeals' prior decision in United States v. Under Seal, supra, which involved a government appeal from the denial of a motion to transfer a juvenile defendant to adult proceedings under Section 5032. The defendant in that case had been charged with murder in aid of racketeering, which is punishable "by death or life imprisonment." 18 U.S.C. 1959(a)(1). The court concluded that transferring the defendant to adult proceedings to face trial for that offense would be impermissible because neither of the two penalties authorized by Section 1959(a)(1) could be imposed on a juvenile consistent with the Eighth Amendment. Under Seal, 819 F.3d at 720; see Miller v. Alabama, 567 U.S. 460, 479 (2012) (holding that Eighth Amendment precludes mandatory sentence of life imprisonment without parole for juvenile homicide offenders); Roper v. Simmons, 543 U.S. 551, 574-575 (2005) (same for death sentence). Petitioner contends (Pet. 16) that because the statute setting forth the penalties for murder in violation of Section 1512(a)(1)(C) likewise specifies only "death" and "imprisonment for life," 18 U.S.C. 1111(b); see

18 U.S.C. 1512(a)(3)(A), Under Seal requires that his conviction for that offense be vacated.

But even assuming that the court of appeals' decision in Under Seal is correct about the constitutionality of "initiating prosecution of a juvenile" based on future concerns about sentencing, 819 F.3d at 728 (emphasis added), no sound reason exists to extend the court's reasoning to the circumstances here, to vacate an already final conviction based on a sentencing issue that can be remedied in a different way. This Court has explained that Miller "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." Montgomery v. Louisiana, 577 U.S. 190, 212 (2016). Instead, as the court of appeals itself recognized in Under Seal, "vacating a conviction may not be necessary in order to remedy a past Miller violation," 819 F.3d at 728, because a Miller violation may be remedied by ordering a new sentencing hearing at which the sentencing judge has discretion to impose a sentence of less than life imprisonment after considering the juvenile offender's youth. See Jones v. Mississippi, 141 S. Ct. at 1312-1321; see Under Seal, 819 F.3d at 727 (citing cases in which "federal courts have authorized the resentencing of juvenile offenders convicted and sentenced prior to Miller" to a term of years or a discretionary life sentence). The district court therefore committed no error in remedying the Miller violation in this case by conducting such a sentencing hearing

rather than vacating petitioner's Section 1512(a)(1)(C) murder conviction.

At a minimum, any error in not vacating petitioner's Section 1512(a)(1)(C) murder conviction was not plain. To satisfy the second element of the plain-error standard, a defendant must show that the error was "so 'plain'" under governing law that a court would be "derelict in countenancing it, even absent the defendant's timely assistance in detecting it." United States v. Frady, 456 U.S. 152, 163 (1982); see Henderson v. United States, 568 U.S. 266, 278 (2013) (explaining that "lower court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the * * * scope" of the plain-error rule). The only support for petitioner's contention that his conviction should have been vacated is the court of appeals' decision in Under Seal. See Pet. C.A. Br. 15-18. And Under Seal itself recognized that "how to remedy a mandatory life sentence that was validly imposed at the time, but which was subsequently determined to be unconstitutional," "presents a fundamentally different" question from "whether initiating prosecution of a juvenile * * * would be unconstitutional because the sentencing court could not constitutionally impose the only two authorized penalties for that offense." 819 F.3d at 727-728; see id. at 728 (explaining that "[w]hatever the appropriate remedies may be for those juvenile offenders who were convicted and sentenced prior to Miller, they stand on entirely different ground than the [d]efendant" in Under

Seal); Pet. App. 12a n.1 (same). Thus, even if petitioner could demonstrate any error in not vacating his Section 1512(a)(1)(C) murder conviction, he cannot demonstrate that the error was clear or obvious.

b. Petitioner asserts for the first time (Pet. 22-24) that if his Section 1512(a)(1)(C) murder conviction is vacated, his Section 924(j) conviction must be vacated as well. Petitioner forfeited that assertion by not raising it below. See United States v. Jones, 565 U.S. at 413. In any event, petitioner cannot demonstrate any error -- let alone reversible plain error -- in the failure to vacate his Section 924(j) conviction.

Section 924(j) makes it a crime, punishable "by death or by imprisonment for any term of years or for life," 18 U.S.C. 924(j)(1), to use a firearm to commit murder in the course of "any crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A) (emphasis added). Petitioner argues (Pet. 23-24) that "courts must assume that [he] could have been convicted by reliance on either predicate offense," and that if he could not "be prosecuted for witness tampering by murder [under Section 1512(a)(1)(C)] in federal court," his "Section 924(j) conviction and life sentence must also be vacated."

That argument is inconsistent with petitioner's guilty plea. The indictment charged petitioner with using a firearm to commit murder during both a crime of violence (namely, murdering a witness in violation of Section 1512(a)(1)(C)) and a drug trafficking crime

(namely, possessing heroin with intent to distribute). Pet. App. 250a. In his plea agreement, petitioner admitted that he had used a firearm to commit murder during "a drug trafficking crime and a crime of violence." Id. at 238a (emphasis added). And during his plea colloquy, the district court specifically asked petitioner whether he had "knowingly use[d] and carr[ied] a firearm during and in relation to[,] and possess[ed] a firearm in furtherance of[,] a drug trafficking crime and a crime of violence" and had "murder[ed] James Fannin in the course of" doing so. 1 C.A. App. 38 (emphasis added); see id. at 27. Petitioner stated that he had committed that offense as the court had described it. Id. at 38. Petitioner therefore pleaded guilty to using a firearm to commit murder during a drug trafficking crime. And so long as a defendant admits to committing all of the elements of a Section 924(j) offense, Section 924(j) does not require that the defendant be convicted of (or even charged with) the predicate drug trafficking crime as a separate offense. See, e.g., Johnson v. United States, 779 F.3d 125, 129 (2d Cir.) (noting circuit consensus), cert. denied, 577 U.S. 916 (2015). Thus, even if petitioner's Section 1512(a)(1)(C) murder conviction were vacated, his Section 924(j) conviction would still be valid.

2. Petitioner also contends (Pet. 25-26) that the district court was required to make "a finding on the record" that he is "permanently incorrigible" before imposing a life sentence. Petitioner forfeited that contention as well by not raising it in

the district court or in his briefs on appeal. See Pet. App. 20a n.3. In any event, petitioner's contention is foreclosed by this Court's intervening decision in Jones v. Mississippi, supra, which held that "a separate factual finding of permanent incorrigibility is not required." 141 S. Ct. at 1313; see Pet. 25-26 (acknowledging that the issue would be resolved by this Court's decision in Jones v. Mississippi).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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