No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

JEVON DION JACKSON,

Petitioner,

-v-

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

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QUESTIONS PRESENTED

1. Whether a sentencing court adequately considers the mitigating aspects of youth where it considers at least some of those aspects to be aggravating. *See Miller v. Alabama*, 567 U.S. 460, 476 (2012); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982).
2. Whether a juvenile sentenced to die in prison before *Miller*, is entitled, after *Miller*, to present evidence that the punishment is unconstitutional as applied.
3. Whether Mr. Jackson's sentence to die in prison is unconstitutionally disproportionate as applied in his case. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1322 (2021).

PARTIES TO THE PROCEEDING

The petitioner (defendant-appellant below) is Jevon Dion Jackson.

The respondent (petitioner-appellee below) is the State of Wisconsin.

STATEMENT OF RELATED PROCEEDINGS

A direct appeal, *State v. Jackson*, Circuit Court Case No. 1995CF951873, Wisconsin Appellate Case No. 1996AP382, in which judgment was entered on March 12, 1997.

A state postconviction proceeding, *State v. Jackson*, Circuit Court Case No. 1995CF951873, Wisconsin Appellate Case No. 2017AP712, in which judgment was entered on August 11, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jevon Dion Jackson, seeks this Court's review of his sentence of "life imprisonment with eligibility of parole when he is 101 years old." App. 4a. The questions in his case were explicitly held open by this Court in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), and he respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the State of Wisconsin.

OPINIONS BELOW

The Supreme Court of Wisconsin's August 11, 2021 order denying Mr. Jackson's petition for review is provided in the Appendix, (App. 1a–2a.) as is the Court of Appeals for the State of Wisconsin's August 28, 2018 opinion on the merits. App. 3a–26a. Also appended are the trial court's original sentencing comments, (App. 40a–53a), and the post-conviction court's denial of Mr. Jackson's motion for resentencing. App. 27a–39a. None of these are reported.

STATEMENT OF JURISDICTION

The Supreme Court of Wisconsin denied review on August 11, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution of the United States provides in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

The sentencing court, and then the Wisconsin appellate courts, unconstitutionally construed Mr. Jackson's youth as aggravating evidence. This error led the state courts to erroneously conclude that his sentence to die in prison for a juvenile conviction is lawful.

Mr. Jackson was convicted of a 1993 murder and sentenced to a term that means Mr. Jackson will "not be eligible for parole until he was 101 years old." App. 11a. After this Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), Mr. Jackson filed a state post-conviction motion seeking resentencing. App. 11a.

As the courts below observed, *Miller* requires discretion to consider a sentence that affords a juvenile a meaningful opportunity to obtain release. App. 25a; *see also Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021). However, the courts below failed to recognize that this discretion must account for the "mitigating" aspects of youth. Put another way, the sentencer's refusal here to consider youth as mitigating evidence defeated the purpose of the discretion that *Miller* requires.

In Mr. Jackson's case, the Wisconsin courts implicitly and explicitly placed Mr. Jackson's youth on the aggravated side of the sentencing scale, a mistake other courts have struggled to correct in the wake of *Miller*. This is the case despite this Court's long-standing requirement that sentencers consider youth as mitigating evidence before imposing on juveniles the harshest penalties under law.

That error implicates a second, independent basis for this Court's review. The Court below erroneously determined that Mr. Jackson's sentence was proportionate under the Eighth Amendment. They did so despite not ever having provided Mr. Jackson with a post-*Miller* hearing on whether his sentence is proportionate and despite the compelling extant evidence that Mr. Jackson is not among the rare juveniles who are irreparably corrupt. Because this second error is also recurrent in the lower courts, certiorari should be granted on this basis as well.

STATEMENT

A. Mr. Jackson's Chaotic Childhood Led to the 1993 Homicide

Jevon Dion Jackson grew up in Milwaukee, Wisconsin, the son of Donald Jackson, whom he does not recall ever meeting, and Rosetta Taylor. Mr. Jackson regarded his mother's boyfriend as a father, until the age of thirteen, when he and his mother separated. By the time Mr. Jackson was sixteen years old, when he was arrested for the offense here, he had lived in at least eight different residences. He and his mother suffered from eviction, and in the years preceding the offense, Mr. Jackson lived with his mother's cousin and her children and a grandchild.

In the year before the crime, Mr. Jackson's mother was convicted of welfare fraud. Although she initially only received a sentence of probation, she was eventually jailed for probation violations, including shoplifting and threatening a boyfriend with a knife.

Mr. Jackson reported that he had not been "abused" as a child, but disclosed to the author of his pre-sentencing report that his mother had "whipped" him for discipline. In

the juvenile court proceedings that preceded his conviction in this case, the evaluating psychologist reported that Mr. Jackson was protective of his mother and, therefore, minimized the violence he had experienced at home. Indeed, in 1992, when Mr. Jackson described his living situation to a teacher, there was a referral to the Wisconsin Department of Social Services.

These stressors apparently weighed on Mr. Jackson, who had expressed suicidal ideation to his mother. He described feeling disillusioned and lacking any purpose in life. While living with his cousin's family, Mr. Jackson was responsible for setting his own curfew, making his own meals, and transporting himself to and from school.

Despite these challenges, there was a strong basis for believing that in a stable environment Mr. Jackson would thrive. In each of the three summers prior to the homicide, Mr. Jackson obtained employment through a youth jobs project called "Step Up Program." In 1991, he worked for Milwaukee's Sanitation Department, picking up trash and cleaning vacant lots. In 1992, he worked at a local library, shelving and repairing books and reading to younger children. In the summer of 1993, he worked full time for the Forestry Bureau. His favorite job, however, was in caretaking, babysitting his cousins' children.

He demonstrated ambition in other ways as well, expressing his desire to one day be either a computer programmer or an electrical engineer. Even while in jail, he pursued a GED. He has an average IQ and no conduct disorders or other psychopathologies.

Nonetheless, he faced substantial challenges. And on December 2, 1992, Mr. Jackson was severely beaten, with injuries requiring medical treatment at a local hospital. Mr. Jackson's mother observed that this incident marked a change in Mr. Jackson.

In August of 1993, shortly before this incident, Mr. Jackson's mother repeatedly hit him when she found he possessed condoms. Mr. Jackson fled his mother's home and was gone for three days. In another instance, he ran away from his aunt's residence, believing that she had turned against him. Despite these challenging circumstances, Mr. Jackson resisted pressures to join a gang.

Two months before the crimes in this case, Mr. Jackson was referred to Milwaukee Children's Court following an arrest for battery at his high school. That case was pending at the time of the crimes in this case. Mr. Jackson, then aged sixteen, said that the incident involved the victim bumping into him in an intimidating way, followed by Mr. Jackson hitting him repeatedly. App. 7a. According to Mr. Jackson, it was the victim's friend who had severely beat him the year earlier. He also told the police that he was upset because he was having trouble at home.

Despite the brief intervention by the state juvenile system, Mr. Jackson soon found his way back into it, this time with tragic results. About a week prior to the November 16, 1993 murder, Mr. Jackson and his friend, L.C., also a youth, had started talking about robbing someone. L.C. apparently knew of someone who had committed an armed robbery and had not been caught. On at least one occasion, the boys took L.C.'s father's sawed-off shotgun and walked around looking for a victim. Mr. Jackson, said that, at this time, the boys did not have shells for the gun.

On November 16, L.C. again took his father's gun and met Mr. Jackson. This time, they did have two shotgun shells. The two loaded the gun in an alley, then walked from

Wendy's to McDonald's and, eventually, to Popeye's Chicken, looking for potential robbery victims.

At Popeye's, the two encountered C.S. and her young daughter as they were heading into the fast-food restaurant. When C.S. and her daughter emerged, the two boys approached them in the parking lot. C.S. protested that she did not have any money, and Jackson instructed her to get on her knees. Mr. Jackson shot C.S. in the head at point-blank range, killing her instantly. App. 5a–6a. In his confession, Mr. Jackson would later tell the police that he forgot the gun was loaded, and that he was trying to scare the victim by cocking the gun when it discharged. App. 6a. The boys ran, throwing away the gun and the food that C.S. had been carrying. App. 6a.

B. In the 1995 Sentencing Proceeding, the Court Considered Many of the Mitigating Aspects of Youth as Aggravating Evidence

Mr. Jackson, having been convicted of first-degree murder, faced the Milwaukee Circuit Court's sentencing decision on August 28, 1995. App. 40a. In that proceeding, the court made a single explicit reference to Mr. Jackson's "youthfulness." The court considered his "youthfulness" when setting "the parole eligibility date" beyond his life span. App. 47a.

But many other "mitigating aspects of youth," as described above, were before the court. And the manner in which the court discussed them demonstrates that it was placing them on the aggravated side of the sentencing scale. In one instance, after discussing Mr. Jackson's family life, in which there had been a serious deterioration over the last year, the

sentencing court offered its understanding of how Mr. Jackson would come to commit murder: "[F]or reasons that we don't know he deteriorated to the point where he became an animal. An animal who was stalking his prey on November 16, 1993." App. 45a. Later in the hearing, the court returned to the theme after acknowledging that there had been "claims" that Mr. Jackson's mother's having been incarcerated for welfare fraud "affected" Mr. Jackson. App. 50a. The court appeared to require that any such mitigation arise to the level of a justification or an excuse, stating that "it should not affect you to the extent where you go out beating people up, being disruptive in school, and eventually commit a murder." App. 50a.

In discussing Mr. Jackson's expressions of remorse and efforts to grapple with what he had done—subjects now well known to be difficult for juveniles to discuss—the court turned a letter Mr. Jackson had written to the juvenile court expressing his belief that God had forgiven him in light of his prayer of confession and repentance. App. 49a. The court expressed its disdain: "I don't think God has forgiven you. You may think so, I do not. I don't know how God could forgive you for something such as this." App. 49a–50a. The court explained what its prayers were for Mr. Jackson, "I only pray that after you die . . . that somehow you have to endure some personal hell for eternity for what you did." App. 51a. In light of these comments, it is perhaps unsurprising that, despite the evidence of Mr. Jackson's traumatic upbringing, the court found that he had "very little rehabilitative needs." App. 47a. Less explicable is the court's speculation that Mr. Jackson, who is black, was not "an urban psychosis type of child." App. 44a.

Later in the hearing, in the very same breath that the sentencing court acknowledged that Mr. Jackson was "a child, 16 years of age," when he committed the crime, the court referred to his having been among those who killed "other adults," further belying its ability to consider the mitigating aspects of Mr. Jackson's youth. App. 46a. Returning to Mr. Jackson's age at the time, the court expressed its view that his age aggravated the offense: "I have to consider your age, and you were 16 at the time, which is also shocking. Years ago kids at 16, if they were involved in a fight, that was shocking. But now it's moved up to guns and sawed off shotguns." App. 47a. It was at this point that the court made it clear that the only purpose for which the court considered Mr. Jackson's youth was for imposing a parole date beyond his life span, stating, "I will take in[to] consideration for sentencing purposes your youthfulness, at least of sentencing the parole eligibility date." App. 47a. The court would later explain that it thought "the death penalty would be insufficient penalty." App. 50a.

The State sought a parole eligibility date of 2060, when Mr. Jackson would be 91 years old. App. 51a. The sentencing court instead imposed a sentence that would leave Mr. Jackson parole-ineligible until 2070, when he was 101 years old. App. 51a. Counsel for Mr. Jackson then asked for credit for the 650 days Mr. Jackson had served in pre-trial detention. That request led the final exchange before the sentencing court:

> THE COURT: So ordered. Mr. Jackson, is there anything you want to say now?
>
> DEFENDANT: (Shakes head.)
>
> THE COURT: Okay, take him away.

App. 52a–53a.

C. In State Post-Conviction Proceedings, the Wisconsin Courts Failed to Correct Mr. Jackson's Unconstitutional Sentence

After this Court's decisions in *Miller* and *Montgomery*, Mr. Jackson petitioned the Wisconsin state courts for post-conviction relief. He claimed that his sentence "violates the Eighth Amendment." App. 4a. Mr. Jackson claimed both that that the sentencing court had unconstitutionally used his youth and the attendant circumstances as aggravating evidence and sentenced him to a disproportionate sentence. Without holding an evidentiary hearing, the post-conviction court rejected these claims. App. 27a–39a.

Mr. Jackson appealed, and on August 28, 2018, the Court of Appeals for the State of Wisconsin rejected these claims. It noted the sentencing court's use of the word "youthfulness," but did not describe the context—the court ensuring that the sentence exceeded Mr. Jackson's lifespan. App. 10a. It also did not address whether the sentencing court's treatment of Mr. Jackson's youth and its attendant characteristics complied with the Eighth Amendment's requirement to consider them as mitigating evidence. Finally, the court rejected Mr. Jackson's proportionality argument, reasoning that because all that *Miller* required was that "'a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty,'" his sentence was ipso facto proportionate. App. 25a–26a (quoting *Miller*, 567 U.S. at 483).

Mr. Jackson petitioned for review to the Supreme Court of Wisconsin. That court held the case pending *Mathena v. Malvo*, No. 18-217 (U.S) and then *Jones v. Mississippi*,

141 S. Ct. 1307 (2021) before, ultimately, summarily denying review on August 11, 2021. App. 2a. One member of the Supreme Court of Wisconsin dissented from that denial. App. 2a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE WISCONSIN COURTS FAILED TO APPLY THE EIGHTH AMENDMENT'S REQUIREMENT TO CONSIDER THE MITIGATING ASPECTS OF MR. JACKSON'S YOUTH

Over and over again, the sentencing court implicitly and, in at least one instance, explicitly used Mr. Jackson's youth and attendant characteristics to increase, rather than mitigate the sentence imposed. Similar refusals have been consistently condemned by this Court as violating the Eighth Amendment. *See, e.g.*, *Tennard v. Dretke*, 542 U.S. 274, 285–86 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 113–15 (1982). Yet, state courts continue to struggle to apply this Court's mandate to consider the "'mitigating qualities of youth.'" *Miller*, 467 U.S. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

It is true that the Court has recently spoken in broad terms about the constitutional sufficiency of discretion to consider youth before imposing a sentence to die in prison upon a juvenile. *See Jones*, 141 S. Ct. at 1313 ("a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."). However, the Court went out of its way to explain that if a sentencer refused to consider the mitigating aspects of youth, both *Miller* and other long-standing precedent establish that would be a serious error. *Id.* at 1320 n.7 (citing *Eddings*, 455 U.S. at 114–15).

Thus, courts still must consider what courts have come to call the "*Miller* factors" as mitigating evidence before sentencing a juvenile to die in prison. *Miller*. These factors are as follows:

> Chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences . . . the family home and environment that surrounds [the youth]—and from which [the youth] cannot usually extricate himself . . . the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him . . . that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys . . . [and] the possibility of rehabilitation.

Miller, 567 U.S. at 477–78.

Unfortunately, an even more problematic violation occurred in Mr. Jackson's case. The sentencer considered Mr. Jackson's youth not as mitigation, but to *increase* the sentence against him and hold him *more* responsible for his actions. The sentencer treated it as aggravation, not mitigation.

For example, when the sentencing court said that it was considering Mr. Jackson's "youthfulness," it did so only for the purposes of setting "the parole eligibility date," which the court set beyond Mr. Jackson's life span. App. 47a. Thus, the Wisconsin appellate court's reference to the sentencer's consideration of "youthfulness" is correct. App. 10a. But it calls out for reversal, not affirming Mr. Jackson's sentence, as the court here did.

Other examples abound. The sentencer apparently found Mr. Jackson's age at the crime aggravated the crime, as it was part of the Court's perceived trend of youth seizing

power from adults. App. 46a–47a. Instead of recognizing that Mr. Jackson's chaotic homelife mitigated his responsibility, he concluded those circumstances rendered Mr. Jackson an "animal." App. And the Court spoke with particular opprobrium in assessing Mr. Jackson's efforts to express remorse, announcing the court's view that God could never offer forgiveness to him and the court's desire that Mr. Jackson suffer eternal damnation. App. 51a. Whatever else may be said of the sentencing proceeding, it did not comply with the constitution's requirement to consider the mitigating aspects of youth.

The 1993 sentencing court is not alone in having made such an error. The Montana Supreme Court recently reversed where the sentencing court admitted evidence of, but refused to consider, a juvenile's evidence of advancement towards rehabilitation, before sentencing that juvenile to life without the possibility of parole. *See State v. Keefe*, 478 P.3d 830, 839–40 (Mont. 2021). Instead that sentencing court only considered the state's evidence that the juvenile had not made progress towards rehabilitation. And the Supreme Court of Iowa reversed a juvenile's life sentence because his "family and home environment vulnerabilities together with his lack of maturity, underdeveloped sense of responsibility, and vulnerability to peer pressure [were used] as aggravating, not mitigating, factors." *State v. Seats*, 865 865 N.W.2d 545, 557 (Iowa 2015).

Other state courts have had to issue similar reversals. *See State v. Delbosque*, 456 P.3d 806, 813 (Wash. 2020) (reversing for sentencer disregarding juvenile's evidence based on *Miller* factors); *Davis v. State*, 415 P.3d 666, 695–96 (Wyo. 2018) (reversing in part based on the sentencer "weighing Mr. Davis's youth as an aggravating factor instead of a mitigating factor"); *State v. Ames*, 836 S.E.2d 296, 304 (N.C. App. 2021) (reversing

for comparing juvenile defendant to population of adult offenders when considering prospects for rehabilitation); *State v. Sandifer*, 249 So. 3d 142, 167–69 (La. App. Ct. 2018) (reversing for failure to consider rehabilitation); *People v. Bennett*, 2021 WL 220035 at *8 (Mich. App. Jan. 21, 2021) (reversing for considering mental illness reason in favor of longer sentence, violating *Miller*'s mandate). However, other states have declined to reverse in similar circumstances, concluding that consideration of youth is sufficient, even if that consideration puts youth on the wrong side of the moral scale. *See, e.g.*, *Davis v. State*, 234 So. 3d 440, 442 (Miss. Ct. App. 2017) (affirming sentence of juvenile life without the possibility of parole because court considered *Miller* factor evidence without addressing whether it did so appropriately); *Commonwealth v. Seagraves*, 103 A.3d 839, 851 (Pa. Super. Ct. 2014) (affirming despite sentencing court's belief that juvenile may be rehabilitated). To provide states with guidance and to resolve this split of authority, this Court should grant the petition.

II. MR. JACKSON'S SENTENCE TO DIE IN PRISON IS UNCONSTITUTIONALLY DISPROPORTIONATE

Without receiving any additional evidence, the Wisconsin courts concluded, based on Mr. Jackson's 1995 sentencing hearing, that Mr. Jackson's sentence to die in prison for a juvenile offense was not disproportionate as applied. Even on this pre-*Miller* record, the Court should grant review and hold that his sentence is unconstitutional as applied. Doing so would definitely establish the constitutional necessity of conducting such an assessment and provide clarity on the nature of the inquiry courts must undertake.

The Court has recently indicated its openness to establishing such a protection, but noted that the issue was not before the Court in the case in question. *Jones*, 141 S. Ct. at 1322 ("this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence."). Mr. Jackson's case clearly presents the issue.

The Wisconsin courts rejected Mr. Jackson's claim, which they described as not presenting "categorical challenges" to life without parole for juvenile offenses and instead "arguing only that that his particular sentence is unconstitutional." App. 25a–26a. The court concluded that his sentence as applied did not violate the Eighth Amendment.

But given the context of his case, this Court should conclude otherwise, even without need for post-*Miller* record development. The sentencer here concluded that it was the context of Mr. Jackson's youth that marked a sharp change in his behavior, culminating in the tragic homicide. According to the sentencing court, the arrest and incarceration of Mr. Jackson's mother together with an assault that led to his hospitalization fundamentally changed Mr. Jackson. And when he initially acted out, resulting in a referral to juvenile services for an assault, those services failed him, leaving him at large and at risk of committing the present offense. That offense was undertaken with a peer who took his father's gun. And, according to the argument of the state at Mr. Jackson's trial, the evidence showed "the plan that night was to commit an armed robbery. There was not ever a plan to kill the victim of that armed robbery." These circumstances certainly do not render Mr. Jackson blameless for his actions. But they do render unconstitutional a sentence that gives Mr. Jackson no hope for redemption. *See Graham v. Florida*, 560 U.S. 48, 69–70 (2010).

Granting the petition would provide the Court with an opportunity to affirm the practices of states who have proven willing to review the proportionality of such sentences. For example, states have either reviewed for proportionality under their state rules of appellate procedure or as part of reviewing constitutional claims for relief. *See, e.g.*, *Taylor v. State*, 86 N.E.3d 157, 167 (Ind. 2017) (reducing sentence of life without parole under state appellate rule); *State v. Hauser*, 317 So. 3d 598, 622 (La. Ct. App. 3d 2019) (reviewing Eighth Amendment claim of disproportionality); *State v. Whitaker*, 266 So. 3d 526, 527 (La. Ct. App. 2d 2019) (same). This Court should grant review to clarify the wisdom of such an approach and the constitution's requirements for adjudicating such claims.

In the alternative, Mr. Jackson requests that this Court hold that he is entitled to an evidentiary hearing in which he can make the case that his sentence is disproportionate. *Miller*, together with *Roper v. Simmons*, 543 U.S. 551 (2002) and *Graham v. Florida*, 560 U.S. 48 (2010), fundamentally altered the proper judicial assessment of youth and the stakes attendant to it. *Roper* categorically excludes children from capital punishment because "juveniles cannot with reliability be classified among the worst offenders" on account of traits inherent to childhood: impulsivity, vulnerability to peer influence, and a unique capacity for change. 543 U.S. at 569–70. *Graham v. Florida* excludes them from life without the possibility of parole for nonhomicide offenses because those characteristics render that punishment disproportionate for all such offenses. 560 U.S. at 69. And, of course, *Miller* banned mandatory imposition of that punishment because it is a

disproportionate punishment for all but the rare juvenile homicide offender who is irreparably corrupt. *See Miller*, 567 U.S. at 479–80.

The Court has faced a similar sea change in the significance of a mitigating factor in the context of categorical exemptions from the death penalty. In *Bobby v. Bies*, 556 U.S. 825 (2009), the Court held that Double Jeopardy was no bar to re-litigating whether a capitally charged defendant was intellectually disabled. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court barred executing the intellectually disabled. Mr. Bies, in his pre-*Atkins* trial, was found by a jury to be intellectually disabled and was nonetheless sentenced to death. *See Bies*, 556 U.S. at 827–28.

In *Bies*, the Court concluded that the jury's finding of intellectual disability was no bar to execution. The jury's prior contrary finding was not dispositive because the conclusion that Mr. Bies was intellectually disabled was not an "ultimate fact" necessary to the disposition of the case prior to *Atkins*. *Id.* at 835–36 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). *Atkins* "substantially altered" the legal landscape upon which the parties litigated, converting intellectual disability from a double-edged sword—evidence that could help or hurt either party—into an exclusively defensive shield from extreme sanction. *Id.* at 837.

Just as *Atkins* did with intellectual disability, beyond creating categorical exemptions from punishment based on youth, *Roper*, *Graham*, and *Miller* fundamentally altered the manner in which youth must be considered by sentencers. Before these decisions, youth was regularly used as an *aggravating* factor. For example, in *Roper*, the prosecutor argued that the defendant's age was a reason to impose a death sentence: "Age,

he says. Think about age. Seventeen years old. Isn't that scary. Doesn't that scare you? Mitigating? Quite the contrary, I submit." 543 U.S. at 558.

As discussed *supra*, youth and its attendant circumstances was deployed similarly as an aggravating factor in Mr. Jackson's case. However, here, it was not the prosecutor who used youth as an aggravating circumstance at sentencing. It was the sentencing judge. Providing Mr. Jackson with an opportunity to present evidence of his rehabilitation would provide the courts with assurance that the harshest penalty under law is being constitutionally applied.

Even if the sentencing court here had not used Petitioner's age against him in such a way, the fundamental change in doctrine after *Miller* would warrant reopening the record to allow the parties to present evidence relevant to whether Mr. Jackson is serving a disproportionate sentence. Put another way, "There is nothing novel about the fact that our youth commit murders and mayhem. But the legal lens through which we view their sentencing has changed." *State v. Long*, 8 N.E.3d 890, 899 (Ohio 2014) (O'Connor, C.J., concurring). Like *Atkins* and intellectual disability, *Miller* changed the analysis for the mitigating value of youth.

This Court should grant review and ensure every juvenile sentenced to LWOP prior to *Miller* receives an opportunity to demonstrate that they are not among the very narrow class to whom such sentences may constitutionally be applied.[1]

[1] As the Court has noted, such relief will likely only reach a few persons because "most offenders who could seek collateral review as a result of *Montgomery* have done so

CONCLUSION

Mr. Jackson respectfully requests that the petition is granted.

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and, if eligible, have received new discretionary sentences under *Miller*." *Jones*, 141 S. Ct. at 1317 n.4