No.

IN THE

SUPREME COURT OF THE UNITED STATES

PHILIP JOHNSON, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1994, Philip Johnson, then a minor, faced a mandatory life without parole sentence for killing two people: his father, James Johnson (James), and James' girlfriend, Frances Buck. Philip avoided the mandatory life sentence by agreeing to plead guilty to one count of second degree murder and one count of first degree murder, and to receive consecutive sentences of 20 and 90 years, respectively, for a total sentence of 110 years, of which Illinois law requires him to serve at least 55 years.

Philip later brought a collateral challenge to his sentence after this Court invalidated life without parole sentences for minors convicted of homicide in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and the Illinois Supreme Court in *People v. Buffer*, 2019 IL 122327, held that a sentence longer than 40 years is a *de facto* life sentence that may only be imposed on a minor if the judge first considers his youth and the so-called *Miller* factors.

The Illinois Appellate Court originally found that the ordinary rule of law that a guilty plea waives all issues, including constitutional ones, did not apply in this case because it concerned a novel constitutional right that was not available to the defendant at the time he pled guilty. *People v. Johnson*, 2021 IL App (3d) 180357, ¶ 20, vacated, 184 N.E. 2d 983 (Ill.2022). The Appellate Court thus considered the merits of Philip's *Miller* claim, and found that he was sentenced to a *de facto* life sentence and that the court failed to consider his youth and its attendant characteristics. *Id.* ¶ 22. Pursuant to the Illinois Supreme Court's supervisory order, *Johnson,* 184 N.E. 2d 983 (Ill. 2002), this opinion was vacated, and the Appellate Court was directed to consider the effect of the Illinois Supreme Court's opinion in *People v. Jones*, 2021 IL 126432, which held that the defendant's guilty plea barred his later *Miller* challenge to a *de*

facto life sentence, and that there was no *Miller* violation because the plea judge exercised discretion in accepting the plea agreement and sentencing the defendant to a *de facto* life sentence. *People v. Jones*, 2021 IL 126432, ¶¶ 14-28. Following the Supreme Court's edict, the Appellate Court rejected the defendant's Eighth Amendment argument as well as his argument related to the proportionate penalties clause of the Illinois Constitution, found that Johnson waived any *Miller* claim by pleading guilty, and further found that the circuit court had been able to exercise its discretion in determining whether to sentence Johnson to the sentence recommended by the State. *People v. Johnson*, 2022 IL App (3d) 180357-B.

The questions presented for review are:

(1) Whether a pre-*Miller* guilty plea bars a post-*Miller* sentencing challenge under the Eighth Amendment.

(2) Whether the sentencing process mandated by *Miller* and *Jones* is satisfied where the judge accepts a negotiated plea agreement but fails to consider the attendant circumstances of youth.

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PEOPLE OF THE STATE OF ILLINOIS, Respondent.

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To The Appellate Court Of Illinois

The petitioner, Philip Johnson, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The order of the Illinois Supreme Court denying leave to appeal (Appendix A) is reported at 197 N.E.3d 1081. The decision of the Illinois Appellate Court on remand (Appendix B) is reported at *People v. Johnson*, 2022 IL App (3d) 180357-B, appeal denied, 197 N.E.3d 1081 (Ill. 2022), and is published. The order of the Illinois Supreme Court denying the State's Petition for Leave to Appeal Decision of the Appellate Court of Illinois and remanding for reconsideration original, subsequently vacated (Appendix C) is reported at *People v. Johnson*, 184 N.E.3d 983 (Ill. 2022). The original, subsequently vacated, published decision of the Appellate Court of Illinois (Appendix D) is reported at *People v. Johnson*, 2021 IL App (3d) 180357, 195 N.E.3d 686, vacated, 184 N.E.3d 983 (Ill. 2022).

JURISDICTION

On April 28, 2022, the Appellate Court of Illinois issued a decision, Modified Upon Denial of Rehearing. The Illinois Supreme Court denied a timely filed petition for leave to appeal on September 28, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution

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

Fourteenth Amendment to the United States Constitution

> 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; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Philip Johnson, then 16 years old, and his older sister, Angela Oakes, were charged in July 1994 with the first degree murders of his father, James Johnson (James), and James' girlfriend, Frances Buck (C32, 58-67; R75). At that time, any person, including a minor, convicted of two or more murders in Illinois was subject to mandatory life without parole imprisonment. 730 ILCS 5/5-8-1(a)(1)(c)(ii)(1994). Philip gave a statement to the police, confessing that he had killed his father because James had been mentally and physically abusive to him and his sister (C32-33). Philip shot his father while James slept; Philip had not intended to kill Buck, but shot her when she woke up and saw him (C34-36). Seeking to avoid the mandatory life sentence he otherwise would have received, Philip entered into a negotiated plea agreement on the first day of his jury trial in May 1996, when he was 17 years old, to the first degree murder of Buck and the second degree murder of his father, in exchange for consecutive sentences of 90 years and 20 years, respectively, for a total sentence of 110 years, of which Philip must serve at least 55 years (C184-87). The parties waived a hearing in mitigation and aggravation as well as a pre-sentence investigation (R97). The judge accepted the plea and imposed the agreed sentences after being told Philip's age at the time of the offenses and that he had no criminal history (R80, 98).

The defendant filed his first postconviction petition in 1999 (C241-42). The trial court denied the petition, and the Appellate Court granted defense counsel's motion for leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551(1987) (C352-54). *People v. Johnson*, No. 3-06-0868 (2008) (unpublished order under Illinois Supreme Court Rule 23).

In 2017, the defendant filed an "expedited" motion for leave to file a successive postconviction petition (C366-375). The court granted the defendant leave to file the

petition and appointed counsel (C598). Counsel amended the petition to allege the defendant's constitutional rights were violated under *Miller v. Alabama*, 567 U.S. 460 (2012), where he was sentenced to a *de facto* life sentence without consideration of his youth and attendant circumstances (C628-33). Attached to the petition were several exhibits, including a psychological evaluation and report made in preparation for trial, school records, and statements from Johnson's family (C402-21).

The State filed a motion to dismiss the petition, arguing that *Miller* did not apply because the defendant did not receive a mandatory life sentence or a *de facto* life sentence but a discretionary sentence that the defendant agreed to and the court found appropriate (C833). The State also argued that Philip waived any complaints about the sentence by entering into a fully negotiated guilty plea (C863). The court granted the motion and dismissed the petition, finding that the constitutional issues the defendant raised could not be established since he entered into a fully negotiated guilty plea (C871). *People v. Johnson*, 2021 IL App (3d) 180357, ¶ 10.

In its original opinion, the majority of the Appellate Court, Third District, found that Johnson's willingness to agree to a 110-year sentence – which the Appellate Court held, based on *People v. Buffer*, 2019 IL 122327, ¶¶ 40-41, constituted a *de facto* life sentence – demonstrated that he was unable to deal with prosecutors and vulnerable to outside pressure and influence, and therefore ruled that his *de facto sentence* was unconstitutional, as established in *Miller* and *Buffer*, which had not been available to him when he was sentenced in 1994. *Johnson*, 2021 IL App (3d) 180357, ¶¶ 15, 24. That opinion was vacated when the Illinois Supreme Court directed the Appellate Court to consider the effect of the Illinois Supreme Court's opinion in *People v. Jones*, 2021 IL 126432. *Johnson*, 184 N.E.3d 983 (Ill. 2022).

In *Jones*, the Illinois Supreme Court, with two Justices dissenting, affirmed the judgement of the appellate court that the circuit judge properly denied Jones leave to file his successive post-conviction petition, finding that the defendant's guilty plea barred his later *Miller* challenge to his 50-year *de facto* life sentence. *People v. Jones*, 2021 IL 126432, ¶¶ 14-26. The majority then decided, "[f]urthermore," that there was no *Miller* violation because the plea judge exercised discretion in accepting the plea agreement and sentencing Robert to 50 years in prison. *Id.*, ¶¶ 27-28. In light of *Jones*, the Appellate Court held that Johnson had waived any *Miller* claim by pleading guilty. *People v. Johnson*, 2022 IL App (3d)180357-B, ¶ 10. Upon denial of defendant's petition for rehearing, the Appellate Court modified its opinion to state that, while the Illinois Supreme Court in *Jones* specifically considered defendant's Eighth Amendment argument, *Jones* is equally applicable to the same arguments raised by Johnson under both the Eighth Amendment and the proportionate penalties clause. *Johnson*, 2022 IL App (3d)180357-B, ¶ 10.

On September 28, 2022, the Supreme Court of Illinois entered an order denying Phillip's petition for leave to appeal. *People v. Johnson*, 197 N.E.3d 1081 (2022).

REASONS FOR GRANTING CERTIORARI

Facing a mandatory life without parole sentence for murdering two people in 1994 when he was 16 years old [730 ILCS 5/5-8-1(a)(1)(c)(ii) (1994)], Philip Johnson entered into a fully-negotiated plea agreement in 1996, whereby he received concurrent sentences totaling 110 years in exchange for pleading guilty to one count of first degree murder and one count of second degree murder ((C184-87). Illinois law requires that Philip serve at least 55 years. 730 ILCS 5/3-6-3 (1994). Sixteen years after his plea, this Court held in *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012), that life without parole sentences cannot be imposed on juveniles in accordance with the Eighth Amendment unless the judge first considers the juvenile's "chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences." Mandatory life sentences preclude judges from considering such factors. 132 S. Ct. at 2467. This is especially problematic because "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469.

In 2017, Philip brought a collateral challenge to his 110-year sentence based on *Miller*, arguing, *inter alia*, that the sentencing scheme in place at the time of his plea was rendered unconstitutional by *Miller* (C628-33). While his collateral post-conviction challenge was still pending in the Illinois courts, the Illinois Supreme Court decided in *People v. Buffer*, 2019 IL 122327, that any sentence imposed on a juvenile greater than 40 years' imprisonment is a *de facto* life sentence that has to comply with the procedures and principles mandated by this Court in *Miller*. As a result, it is apparent that Philip is currently serving a *de facto* life sentence.

The Illinois Appellate Court initially held that Philip's willingness to agree to a 110-year sentence – which the Appellate Court considered no different from a natural life sentence – demonstrated that he was unable to deal with prosecutors and vulnerable to outside pressure and influence, and therefore ruled that his *de facto sentence* was unconstitutional, as established in *Miller* and *Buffer*, which had not been available to him when he was sentenced in 1996. *Johnson*, 2021 IL App (3d) 180357, ¶ 24. However, that opinion was vacated when the Illinois Supreme Court directed the Appellate Court to consider the effect of the Illinois Supreme Court's decison in *People v. Jones*, 2021 IL 126432, which held that defendant's challenge to his sentence was barred by his guilty plea.

In *Jones*, the Illinois Supreme Court held that the question of whether a defendant's pre-*Miller* guilty plea barred his post-*Miller* challenge to his sentence was one of first impression in Illinois. *Id.*, ¶ 14. The same is true here. This Court has not yet decided this issue. The issue, has, however, arisen in a handful of other jurisdictions and has resulted in a split of authority. Both logic and the interests of justice should entitle a person in Philip's position to a new, constitutional sentencing hearing in accordance with the *Miller* principles. Because this important question is likely to arise again, this Court can and should grant review in order to resolve this split of authority.

This Court could also take this opportunity to resolve a split of authority over whether *Miller* and its progeny are limited to mandatory *de jure* life sentences, or whether they apply to discretionary *de facto* life sentences as well. The majority of jurisdictions have found there is no substantive difference, for Eighth Amendment purposes, between the two. The majority position is sound because such harsh penalties should only be imposed after considering youth and its hallmark features.

Finally, this Court should grant review in order to address the discretion exercised by a judge in accepting a juvenile's plea agreement that includes a life sentence. The court below apparently believes that *any* discretion is sufficient under *Miller* and this Court's recent decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). That conclusion risks severe erosion of *Miller* and its progeny in Illinois and, likely, other states, and should therefore be addressed by this Court.

I. This Court should grant review so as to resolve a split of authority regarding whether a minor who pled guilty long before *Miller* was decided can later bring a collateral Eighth Amendment challenge seeking re-sentencing in accordance with the principles announced in the *Miller-Jones* line of cases.

In *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 139 S. Ct. 1317 (2019). *cert. dismissed*, 140 S. Ct. 919 (2020), the 17-year-old defendant pled guilty before *Miller* was decided and negotiated a life without parole sentence in order to avoid the death penalty. He later sought habeas corpus relief in the form of a new sentencing hearing based on *Miller* and on this Court's holding in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that *Miller* applies retroactively. The Fourth Circuit Court of Appeals remanded for re-sentencing, rejecting the argument that Malvo's plea waived his entitlement to sentencing relief. 893 F.3d at 275-77. The court reasoned that his conviction remained valid but his guilty plea neither explicitly nor implicitly waived his ability to challenge the constitutionality of his sentence based on this Court's intervening holdings. *Id.* at 277. Because *Miller* applies retroactively, Malvo was entitled to receive its benefit and the court was "bound to apply" it. *Id.*

Re-sentencing in accordance with *Miller* was also ordered in *Jackson v. Clarke*, 2014 WL 12789351, *8-9 (E.D. Va. 2014), in which the juvenile defendant pled guilty and received a mandatory life without parole sentence before this Court decided *Miller v. Alabama*. Noting the defendant was challenging the constitutionality of his sentence,

not his plea or conviction, the court held his plea did not bar relief. Most decisions by the Illinois Appellate Court reached the same conclusion prior to the Illinois Supreme Court's decision in Philip's case, including the initial decision of the Illinois Appellate Court, ultimately vacated by the Illinois Supreme Court. *People v. Johnson*, 2021 IL App (3d) 180357, 95 N.E.3d 686, vacated, 184 N.E.3d 983 (Ill. 2022). See *People v. Parker*, 2019 IL App (5th) 150192; *People v. Applewhite*, 2020 IL App (1st) 142330-B; *People v. Daniels*, 2020 IL App (1st) 171738; *People v. Robinson*, 2021 IL App (1st) 181653; *People v. Brown*, 2021 IL App (1st) 160060-U (unpublished order).

In *Newton v. State*, 83 N.E.2d 726 (Ind. 2017), the Court of Appeals of Indiana denied *Miller* re-sentencing to a juvenile who had pled guilty prior to *Miller* and had negotiated a life without parole sentence to avoid the death penalty. The court held the plea was knowing and voluntary and resulted in a benefit to Newton and therefore barred his collateral post-*Miller* challenge. Importantly, however, the plea judge in that case ordered a pre-sentence investigation and held a hearing in aggravation and mitigation during which he considered Newton's youth and prospects for rehabilitation before imposing the agreed sentence. *Newton* is therefore factually distinguishable from Philip's case.

The Illinois Supreme Court's decisions in Philip's case and in *People v. Jones*, 2021 IL 126432, are the only other cases Philip has found in which a juvenile's pre-*Miller* guilty plea was held to have barred his post-*Miller* collateral challenge to his sentence. The court's reasoning in both cases was seriously flawed. Because the Illinois Appellate Court decision in the instant case was based solely on the decision reached by the Illinois Supreme Court in *People v. Jones*, review of *Jones* is required.

First, the *Jones* court relied on inapposite case law, including *Brady v. United States*, 397 U.S. 742 (1970), and *Dingle v. Stevenson*, 840 F.3d 171 (4th Cir. 2016). The

most important distinction between those cases and Philip's case is that both Brady and Dingle sought to withdraw their guilty pleas based on later changes in the sentencing laws applicable to them. Accord, *Contreras v. Davis*, 2013 WL 6504654 (D. Va. 2013), *aff'd*, 597 Fed. Appx. 175 (4th Cir. 2015), *vacated and remanded on other grounds*, 136 S. Ct 1363 (2016); *Commonwealth v. Noonan*, 32 Mass. L. Rptr. 244 (Super. Ct. Mass.). See *Malvo*, 893 F.3d at 276 (emphasis in original):

> [I]n both *Brady* and *Dingle*, the defendants sought to use new sentencing case law to attack their convictions–their guilty pleas–without any claim that the sentences they actually received were unlawful. The question in both cases was thus whether to set aside the guilty-plea *convictions* when the *penalties that induced the pleas* were later found to be unconstitutional. In both cases that relief was denied, and the legality *vel non* of the avoided sentences was thus held not to cast doubt on the validity of the guilty plea. In this case, by distinction, Malvo seeks to challenge his *sentences,* not his guilty-plea *convictions*, on the ground that they were retroactively made unconstitutional under the rule announced in *Miller*. Thus, whereas the defendants in *Brady* and *Dingle* sought to use new sentencing law as a sword to attack the validity of their guilty pleas, here the Warden seeks to use Malvo's lawful guilty plea as a shield to insulate his allegedly unlawful life-without-parole sentences from judicial review. We conclude that *Brady* and *Dingle* do not provide [the Warden] with that shield.

As in *Malvo*, and in contrast to *Brady* and *Dingle*, Philip has challenged only his sentence, not his convictions, and seeks a new sentencing hearing in accordance with the Eighth Amendment and the principles announced in the *Miller-Jones* line of cases. Thus, the Illinois Supreme Court erred in relying on *Brady* and *Dingle* instead of *Malvo* when it decided *People v. Jones*, and when it directed the Appellate Court to reconsider its original holding – that the ordinary rule of law that a guilty plea waives all issues, including constitutional ones, did not apply in this case because it concerned a novel constitutional right that was not available to the defendant at the time he pled guilty. *People v. Johnson*, 2022 IL App (3d) 180357-B, ¶ 8. See *Crespin v. Ryan*, 46 F.4th 803, 809 (9th Cir. 2022) (*Brady* and *Dingle* involved challenges to

unconstitutional convictions and therefore did not apply where juvenile offender challenged the life without parole negotiated sentence imposed upon him before *Miller* was decided).

Second, the decision of the court below is inconsistent with a host of other jurisdictions that have held that a guilty plea does not insulate an illegal or unconstitutional sentence against a later challenge. *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005); *United States v. Adkins*, 743 F.3d 176, 192-93 (7th Cir. 2014); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007); *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016); *Lee v. United States*, 2018 WL 4906327 (D. Ariz.); *Bell v. State*, 294 Ga. 5 (2013); *Bryant v. State*, 2022 WL 499796 (Ga.); *State v. Darby*, 2008 WL 2121748 (Super. Ct. N.J., App. Div.); *People v. Kilgore*, 199 A.D. 2d 1008, 608 N.Y.S.3d 12 (S. Ct. N.Y., App. Div. 1993). See also *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003) (knowing and voluntary plea waiver would not be enforced if it would result in miscarriage of justice); *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (same). These courts recognize, as recently noted by the Ninth Circuit: "a defendant cannot voluntarily and intelligently waive a constitutional right of which he is unaware." *Crespin v. Ryan*, 46 F.4th at 809, quoting *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) ("'Waiver ... of constitutional rights in the criminal process generally, must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances.') (cleaned up)."

Third, it is undisputed that when Philip pled guilty in 1996, neither he, his attorney, the prosecutor, nor the judge could have known that (a) the mandatory life sentence he faced but for his plea would he deemed unconstitutional as applied to juveniles such as Philip, or (b) the Illinois Supreme Court would later find that his 110-year sentence was a *de facto* life sentence that could not be imposed absent

consideration of Philip's age and the attendant circumstances of youth. While it may be presumed that a sentencing judge knows and applies the law, it cannot be presumed that judges are clairvoyant; the instant circuit court accepting Philip's negotiated guilty plea could not have "forecast the future holdings of *Miller* and *Montgomery*, and then silently appl[ied] that foresight in a sentencing proceeding." *Malvo v. State*, 481 Md. 72, 97–98, 281 A.3d 758, 772–73 (2022). It was therefore unjust for the court below to conclude that Philip's plea waived his collateral post-*Miller* challenge to his sentence.

Fourth, it is ironic that, but for his plea, Philip would have received at least a life without parole sentence and likely would have received a new sentencing hearing long before today. In *Jones*, upon which the instant decision was predicated, the Illinois Supreme Court stated that "[i]t would be purely speculative . . . to conclude that petitioner was doomed to be convicted of the most serious charges against him at trial and sentenced to mandatory life without parole." *Jones*, 2021 IL 126432, ¶ 26.As in *Jones*, the factual basis for Philip's plea included substantial circumstantial evidence and incriminating statements, including his inculpatory statements to the police, which demonstrated that convictions were certain (C32-34).

Fifth, Illinois and other jurisdictions have stated that pleading guilty reflects positively on a criminal defendant's prospects for rehabilitation. *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973); *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992); *Hooten v. State*, 212 Ga. App. 770, 774 (1994); *People v. King*, 102 Ill. App. 3d 257, 260 (3d Dist. 1981); *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989); *State v. Brouwer*, 346 S.C. 375, 391 (2001) (Anderson, J., dissenting). By pleading guilty, Philip took responsibility for his actions, saved the prosecution and the court time and expense, and embarked on the road towards rehabilitation. It is both illogical

and unfair to penalize him by holding that his guilty plea insulated his unconstitutional sentence. The Illinois Appellate Court's decision also may have the unintended consequence of deterring future guilty pleas, which are vital to our criminal justice system. In *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004), this Court recognized that guilty pleas are "indispensable in the operation of the modern justice system." Accord, *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971). Criminal defendants may be wary of entering into future guilty pleas if the court's decision in this case is allowed to stand.

Finally, the decision of the court below flies in the face of this Court's frequent pronouncements that the Eighth Amendment must be "viewed through the evolving standards of decency that mark the progress of a maturing society." *E.g.*, *Miller v. Alabama*, 132 S. Ct. at 2463; *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)), the Court stated: "The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes more enlightened by humane justice.'" The Illinois Supreme Court below paid lip service to this ideal in *Jones* [2021 IL 126432, ¶ 16] but failed to follow it. In effect, the court below held that the evolving standards of decency as they apply to Philip and other similarly situated juveniles come to a dead halt when a guilty plea is entered. The court's decision hurts Philip and diminishes society as a whole.

Philip acknowledges that, after *certiorari* was dismissed in *Malvo v. Mathena*, this Court in *Jones v. Mississippi* abrogated that part of the *Malvo* decision that required a sentencing judge to find a juvenile permanently incorrigible before sentencing him to a life without parole sentence. 141 S. Ct. at 1313-19. Notably, this

Court in *Jones* acknowledged that most offenders to whom *Miller* and *Montgomery* applied retroactively had already been resentenced. *Jones*, 141 S. Ct. at 1317 n.4. ("By now, most offenders who could seek collateral review as a result of Montgomery have done so and, if eligible, have received new discretionary sentences under Miller."). The present case gives this Court an opportunity to resolve an issue decided by the Fourth Circuit in *Malvo* over which there is now a split of authority - whether a juvenile's pre-*Miller* guilty plea automatically bars him from raising a post-*Miller* collateral challenge to his life without parole sentence. The Illinois Supreme Court answered that question in the affirmative in *People v. Jones*, and the Illinois Appellate Court followed the Illinois Supreme Court's edict, in the case bar, as it was required to do. These decisions are not defensible. This important question will likely arise again in other jurisdictions; guidance is therefore needed from this Court.

Discretionary de facto versus mandatory de jure life sentences

In *Miller v. Alabama*, this Court held that a juvenile cannot receive a mandatory life without parole sentence unless the judge first considers the juvenile's youth and its attendant circumstances. Neither in *Miller* nor in any subsequent decision has this Court stated whether *Miller* and its progeny extend to discretionary *de facto* life without parole sentences - that is, sentences which are the functional equivalent of life without parole sentences. Philip received such a *de facto* life sentence of 110 years' imprisonment (C184-87). See *People v. Buffer*, 2019 IL 122327 (sentence that exceeds 40 years' imprisonment constitutes *de facto* life sentence requiring a *Miller* sentencing hearing). There currently exists a split among jurisdictions as to whether the *Miller-Jones* line of cases apply to discretionary *de facto* or only mandatory *de jure* life sentences. *People v. Lora*, 71 Misc. 3d 221, 226-27, 140 N.Y.S.3d 390, **4-5 (N.Y. S. Ct. 2021) (noting the split); *State v. Kelliher*, 273 N.C. App. 616, (2020), *review allowed*,

854 S.E.2d 586 (N.C. 2021) (same); *State v. Link*, 367 Or. 625, 627 (2021) (same). This Court can choose to resolve that split. (This Court would have decided whether *Miller* is limited to mandatory life sentences had *certiorari* not been dismissed in *Malvo v. Mathena*.)

Cases ruling that the *Miller* principles apply only to mandatory life without parole sentences include the following: *United States v. Grant*, 9 F.4th 186 (3d Cir. 2021); *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012); *Demirdjian v. Gipson,* 832 F.3d 1060 (9th Cir. 2016); *Hobbs v. Turner*, 2014 Ark. 19 (2014); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017); *Veal v. State*, 303 Ga. 18 (2018); *Wilson v. State*, 157 N.E.3d 1163 (Ind. 2020); *State v. Gulley*, 2022 WL 628172 (Kan.); *State v. Brown*, 118 So. 3d 332 (La. 2013); *Mason v. State*, 235 So. 3d 129 (Miss. 2017); *Garcia v. State*, 2017 N.D. 263 (2017); *State v. Miller*, 433 S.C. 613 (2021); *Hampton v. State*, 2021 WL 274561 (Tenn.); *Vasquez v. Commonwealth*, 291 Va. 232 (2016).

Cases ruling that the *Miller* principles apply to both life without parole and *de facto* life sentences include the following: *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016); *People v. Franklin*, 63 Cal. 4th 261 (2016); *Casiano v. Commissioner of Correction*, 317 Conn. 52 (2015); *Henry v. State*, 175 So. 3d 675 (Fla. 2015); *People v. Reyes*, 2016 IL 119271; *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *Commonwealth v. Brown*, 466 Mass. 676 (2013); *State ex rel. Carr. v. Wallace*, 527 S.W.2d 55 (Mo. 2017); *State v. Zuber*, 227 N.J. 422 (2017); *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018); *People v. Lora*, 71 Misc. 3d 221, 140 N.Y.S.3d 390 (N.Y. 2021); *State v. Kelliher*, 273 N.C. App. 616 (2020), *review allowed,* 854 S.E.2d 586 (2021); *State v. Link*, 367 Or. 625 (2021); *Commonwealth v. Clary*, 226 A.3d 571 (Pa. 2020); *In the Matter of Ali*, 196 Wash. 2d 260 (2020); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014).

Jurisdictions finding that *Miller* applies to discretionary *de facto* life sentences tend to differ regarding the number of years that render a sentence the functional

equivalent of a life without parole sentence. Nonetheless, these decisions honor the spirit and intent of the *Miller-Jones* line of cases. As noted by one jurist, if *de facto* life sentences may be imposed without consideration of the *Miller* factors, "a sentencer [can] circumvent the Eighth Amendment prohibition against cruel and unusual punishment simply by expressing the sentence in the form of a lengthy term of numerical years rather than labeling it for what it is: a life sentence without parole." *State v. Gulley*, 2022 WL 628172, *17 (Kan.) (Standridge, J., dissenting). See also *Miller v. Alabama*, 132 S. Ct. at 2469 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010) (while not required to guarantee eventual freedom to juvenile, states must provide "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'"); *People v. Holman*, 2017 IL 120655, ¶ 38 (*Miller* contains language broader than its core holding, and none of what was said in *Miller* is specific to only mandatory life sentences).

The debate over *de jure* and *de facto* life sentences was not at issue in Philip's case because Illinois law equates *de facto* life sentences with mandatory life without parole sentences. But there is no reason that juvenile offenders should be treated differently in this regard depending on the jurisdiction in which they are prosecuted. Philip's case therefore presents this Court with the opportunity to resolve the split among jurisdictions in this country.

II. This Court should grant review so as to decide whether the Eighth Amendment, as construed in the *Miller-Jones* line of cases, is satisfied where, pre-*Miller*, a plea judge agrees to impose a *de facto* life sentence bargained for by the parties where neither the judge nor the parties could have known what constituted a *de facto* life sentence and where the judge was aware of the minor's age but did not consider the attendant circumstances of youth discussed in the *Miller-Jones* line of cases.

This Court in *Miller* stated that "youth matters in determining the appropriateness of a lifetime of incarceration without possibility of parole." 132 S. Ct. at 2465. The Court also stated that "'youth is more than a chronological fact.'" *Id.* at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). The sentencing judge thus must consider the juvenile's age "and its hallmark features" - immaturity, impetuosity, and failure to appreciate risks and consequences. *Id.* at 2468. As a result, mandatory life sentences are prohibited, *Id.* at 2469, and "a sentencer [must] follow a certain process - considering an offender's youth and attendant characteristics - before imposing a particular penalty," *Id.* at 2471. In *Jones v. Mississippi*, this Court repeatedly reaffirmed the principle that a sentencer must consider a juvenile's youth and attendant characteristics before imposing a life without parole sentence. 141 S. Ct. at 1311, 1314, 1316. Your Honors quoted a similar passage from *Montgomery v. Louisiana*, 577 U.S. 190, 210 (2016): "A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Jones*, 141 S. Ct. at 1317-18. Indeed, the Court expressed confidence that this discretionary sentencing procedure mandated by *Miller* has made, and will continue to make, the imposition of life without parole sentences on juveniles relatively rare. 141 S. Ct. at 1322.

The Illinois Supreme Court's secondary ruling in *People v. Jones* - that a plea judge exercises adequate discretion when it accepts a plea agreement and imposes a

sentence agreed upon by the parties - marks a severe departure from the principles announced in *Miller* and reaffirmed in *Jones v. Mississippi*. In response to his question, the plea judge was informed during the plea hearing that Philip was 16 years old at the time of his offenses (R80). He was also advised that Philip had no criminal record (R98). As in most cases in which the judge is presented with a fully-negotiated plea agreement, the parties waived a pre-sentence investigation and a hearing in mitigation and aggravation (R97). As a result, the judge exercised very little discretion, and had absolutely no knowledge about the hallmark features of youth as they related to Philip. Contrast *Newton v. State*, 83 N.E.2d 726 (Ind. 2017), where the plea judge ordered a pre-sentence investigation and held a hearing in aggravation and mitigation during which he considered Newton's youth and prospects for rehabilitation before imposing the agreed sentence.

The judge in Philip's case plainly did not follow the "certain process" adopted by this Court in *Miller* and reaffirmed by this Court in *Jones*. Moreover, the phrase "*de facto* life sentence" was not even part of the legal lexicon when Philip pled guilty and was sentenced in 1996. The plea judge thus could not have known that he was imposing the functional equivalent of a life sentence or that there was any constitutional infirmity in the imposition of such a sentence. Indeed, the judge probably believed Philip was receiving a huge break because, but for the plea, Philip had to receive a life without parole sentence, and the judge likewise could not have known in 1996 that there was anything wrong with such a sentence. Compare *Commonwealth v. Coster*, 472 Mass. 139, 144 (2015) ("We cannot know that the judge would have imposed consecutive [life without parole] sentences [on the juvenile defendant] had he known ... about the constitutional differences that separate juvenile offenders from adults" that were recognized in *Miller* years after Coster was sentenced).

The import of the lower court's decision is that a *de facto* life sentence may be imposed on a juvenile as long as the judge exercises *some* discretion, even if he does not consider the minor's youth or its hallmark features. This is an unreasonable application of *Miller*. While the sentencing judge had discretion under Illinois law to either accept or reject the plea agreement (Ill. S.C.R. 402), the issue in this case is not whether the trial judge complied with state law, but rather whether the procedural and substantive requirements of *Miller* were satisfied. Clearly, they were not. *Miller* requires more than a simple determination that the stipulated, *de facto life* sentence sentence was acceptable. *Crespin*, 46 F.4th at 810-11. "Under *Miller*, a sentencer must also have the discretion to impose a lesser sentence than *de facto* life." *Crespin*, 46 F.4th at 811, citing *Jones*, 141 S. Ct. at 1311. The instant trial judge made it clear that he did not have this discretion, warning Philip that the court was not bound to accept his plea (R72). Although the judge had the discretion to determine whether this was a plea agreement that he could accept, he did not have the discretion to choose which sentence he felt was best for Philip. See *Malvo*, 893 F.3d at 276 (granting *habeas* relief despite state court's power to accept or reject the plea agreement). Indeed, if the judge rejected the agreement, he could not have given Johnson a lesser sentence; the most he could have done without the consent of the parties was reject the guilty plea and proceed to trial (R72-73). Ill. SCR 402. See *Crespin*, 46 F.4th at 811 (9th Cir. 2022). Because the judge quite correctly recognized that his only sentencing option was the State's offer, Philip's sentence violated the Eighth Amendment.

This decision is contrary to the *Miller-Jones* line of cases and would mark a return to pre-*Miller* days when judges were not "require[d] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct. at 2469. The decision in Philip's case thus sets a dangerous precedent and adversely impacts juveniles in Illinois. This Court

should grant review so as to protect juveniles in Illinois and to ensure that the decision of the Appellate Court's decision, predicted up the Illinois Supreme Court misguided decision in *Jones* does not convince other states to deviate from the teachings of *Miller* and its progeny.

CONCLUSION

For the foregoing reasons, petitioner, Philip Johnson, respectfully prays that a writ of *certiorari* issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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