No. 20-___

IN THE

Supreme Court of the United States

RICO SANDERS,

Petitioner,

v.

DYLON RADTKE, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN C. MIZER
ARIEL N. VOLPE
LINDSAY R. FISHER
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001

ELIZABETH G. BENTLEY
Counsel of Record
JONES DAY
90 South Seventh Street,
Suite 4950
Minneapolis, MN 55402
(612) 217-8800
ebentley@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

Whether this Court's Eighth Amendment precedent clearly establishes that a sentencing court must consider a defendant's juvenile status as a mitigating factor before imposing a life sentence with a remote possibility of parole.

PARTIES TO THE PROCEEDING

Petitioner Rico Sanders was the petitioner-appellant below.

Respondent Dylon Radtke, Warden, was the respondent-appellee below.*

* Dylon Radtke replaced Scott Eckstein as Warden of the Green Bay Correctional Institution, where Sanders is confined. Petitioner has notified the Court pursuant to Rule 35.3 that Dylon Radtke has been automatically substituted as Respondent in this case.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *State v. Sanders*, No. 95CF-954600 (Cir. Ct. Milwaukee Co.);
- *State of Wisconsin ex rel. Rico Sanders v. William Pollard*, No. 2006AP647-W (Wis. Ct. App.);
- *State v. Sanders*, No. 2007AP1469-CR (Wis. Ct. App.);
- *State v. Sanders*, No. 2009AP3190 (Wis. Ct. App.);
- *State v. Sanders*, No. 2012AP1517 (Wis.);
- *Sanders v. Baenen*, No. 11-CV-00868 (E.D. Wis.);
- *Sanders v. Eckstein*, No. 19-2596 (7th Cir.).

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INTRODUCTION

A sentencing court faced with the choice of sending a juvenile to prison for most or all of his life must consider one simple principle: "children are different." *Miller v. Alabama*, 567 U.S. 460, 480 (2012). Over and over, from *Roper* to *Graham* to *Miller* to (most recently) *Jones*, this Court has made clear that children are "less deserving of the most severe punishments." *Id.* at 471 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

"Youth matters in sentencing" for a number of reasons. *Jones v. Mississippi*, 141 S. Ct. 1307, 1316 (2021). Children lack maturity and cannot always separate right from wrong. *Miller*, 567 U.S. at 471. Additionally, children are more vulnerable to negative influences and are unable to escape the violent and crime-ridden circumstances they are born into. *Id.* And children are more capable of reform; their traits less fixed and their development more malleable. *Id.* at 472.

As such, the Eighth Amendment requires a sentencing court to consider youth as a mitigating circumstance when sentencing a juvenile to life in prison or its functional equivalent. Inherent in the Court's holdings is the premise that "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"—must be considered at sentencing. *Id.* at 477. This mandatory principle applies equally to life sentences with the slim chance of parole near the end of a juvenile's life expectancy as it does to life sentences without any possibility of parole.

Sanders's case illustrates the importance of this fundamental principle. Sanders grew up in an extremely dysfunctional environment, was sexually abused by a family member at a young age, experienced repeated violence at the hands of gang members, and watched the murder of his brother, the only positive role model in his life. All this took place before the age of 15, when Sanders committed non-homicide offenses. Like most youth who commit crimes, Sanders possessed the capacity and desire for change. Sanders's psychiatrist was confident that his mental health disorders could be treated, and Sanders himself expressed a commitment to make a better life for himself.

Yet, rather than consider Sanders's youth as a mitigating circumstance, the sentencing court did the opposite: It found that Sanders's age made him *more* dangerous and *more* deserving of punishment. Disregarding the state's requested sentence, the court imposed a sentence of 140 years—nearly *three times* as long as the prosecution's recommended minimum sentence and *twice* as long as the recommended maximum sentence. If that was "warehousing," the sentencing court said, "so be it." Pet.App.89a-90a.

On postconviction review, the Wisconsin Court of Appeals denied relief, finding that this Court's decision in *Miller* only "concern[s] juveniles who committed homicides and were given mandatory sentences of life without parole." Pet.App.34a, 38a.

The U.S. District Court for the Eastern District of Wisconsin and the Seventh Circuit agreed. The Seventh Circuit concluded that *Miller* was not "controlling Supreme Court authority" that rendered

the Wisconsin Court of Appeals' decision an unreasonable application of federal law. Pet.App.12a. In doing so, the Seventh Circuit ignored *Miller*'s inherent holding—confirmed by *Montgomery* and *Jones*—that youth must be considered as a mitigating factor when sentencing juveniles to the most severe sentences, which include life imprisonment with only the remote possibility of parole.

The Seventh Circuit's decision leaving Sanders's unconstitutional sentence in place runs contrary to this Court's clear guidance on juvenile sentencing and conflicts with the decisions of other courts. This Court's review is needed to resolve those conflicts and affirm the basic principles underlying *Roper*, *Graham*, *Miller*, and *Jones*, so that individuals like Sanders, sentenced as juveniles, do not spend their lives in prison in contravention of this Court's clear Eighth Amendment jurisprudence.

OPINIONS BELOW

The District Court's opinion denying Sanders's petition for a writ of habeas corpus under 28 U.S.C. § 2254 (Pet.App.17a-32a) is unpublished, but is available at 2019 WL 11505401. The Seventh Circuit's decision affirming the District Court (Pet.App.1a-13a) is published at 981 F.3d 637.

JURISDICTION

The Seventh Circuit issued its decision on November 30, 2020, and denied Sanders's petition for rehearing and rehearing en banc on January 11, 2021. Sanders timely filed this petition in accordance with the Court's general order dated March 19, 2020, which extended the time to file the petition to June 10, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VIII of the U.S. Constitution provides:

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

STATEMENT OF THE CASE

1. Petitioner Rico Sanders was born into "extremely traumatic and dysfunctional family circumstances" in the inner city of Chicago, Illinois. Pet.App.111a. At age 7, Sanders was sexually abused by his stepfather. Pet.App.159a. By age 8, he began having suicidal thoughts. Pet.App.106a, 112a. From then on, he tried to "kill himself every summer." Pet.App.112a.

At age 11, he witnessed the murder of his brother Rodney, who had been one of Sanders's only positive role models. Pet.App.111a. At age 12, he was involved with a street gang. Pet.App.159a. By age 14, he was severely beaten with a baseball bat, kidnapped, and shot multiple times. *Id.* At his grammar school graduation, gang members beat him up "so bad that he was not able to walk across the stage to receive his diploma." Pet.App.113a.

At the age of 15, Sanders's mom and he thought it would be best to leave Chicago for Wisconsin after gang members threatened his life. Pet.App.67a, 112a-113a, 115a. But Sanders had a hard time adjusting to life in Wisconsin. Pet.App.113a. He continued to display "irrational behaviors," such as washing his face with household bleach to make his skin lighter and eating hair grease thinking it was jam. Pet.App.113a. Sanders frequently ran away from

home, and was "basically transient" at the time of his arrest. Pet.App.111a.

During the pendency of his trial, Sanders was evaluated by multiple psychiatrists. One psychiatrist described Sanders as "quite emotionally fragile, impulsive, and seem[ing] to have many unfulfilled affectional needs." Pet.App.119a. At the time of his arrest, Sanders had an IQ of 72. Pet.App.117a.

Sanders's upbringing contributed to his subsequent dependency on alcohol and marijuana in his early teens. Pet.App.112a-15a, 119a. As one of Sanders's psychiatrists explained, "[i]n his futile effort to escape negative aspects of [his] reality," Sanders "resorted to fantasy and other escapist behaviors," such as substance use. Pet.App.119a. When using drugs and alcohol, Sanders felt "out of control." Pet.App.115a.

Consistent with these findings, Sanders has been diagnosed with schizophrenia, post-hallucinogenic perceptive disorder, major depressive disorder, and post-traumatic stress disorder ("PTSD"). Pet.App.102a-04a. Some of his hallucinations include someone shooting at him, reminding him of when he was dodging bullets as a child in Chicago. Pet.App.106a-07a.

2. When Sanders was 15 years old, he was charged as an adult for offenses related to four incidents that occurred between May and September of 1995.

Sanders broke into the homes of four women and sexually assaulted them. Pet.App.2a. During the assaults, he suffocated, raped, and robbed the victims of money, other valuables, and food stamps. *Id.* When confronted with his actions, Sanders appeared

"extremely remorseful" and "willingly accepted full responsibility." Pet.App.114a-15a. Sanders also indicated that he was drunk "every time [he] did it." Pet.App.115a.

Because of his mental health deficiencies, Sanders was initially deemed incompetent to stand trial, and was sent to a mental health institute for evaluation and treatment. Pet.App.94a-95a, 106a-09a. Ultimately, the trial court decided that Sanders was of below average intelligence, but was competent to stand trial. Pet.App.18a.

On March 11, 1997, Sanders entered *Alford* pleas to five counts of sexual assault and one count of armed robbery. Pet.App.2a. Throughout his plea hearing, Sanders generally gave one-word responses. Pet.App.18a. Sanders has since made clear that he did not fully understand the nature of the charges against him, in part because he did not understand the vocabulary used by the court and in part because his lawyer at the time did not adequately explain the charges to him. Pet.App.130a-34a.

In line with Sanders's plea agreement, the prosecution recommended a range of 50 to 70 years' incarceration followed by a lengthy term of probation. Pet.App.19a. The sentencing court instead imposed a sentence of 140 years—nearly three times as long as the prosecution's recommended minimum and twice as long as the recommended maximum sentence. *Id.*

In explaining its severe sentence, the court made clear that it considered Sanders's age to be an aggravating, not a mitigating, factor: "There are hundreds if not thousands of children who have the same problems in the inner city, but hundreds and not

thousands of children grow up to be 17, I don't even know if he's grown up, to commit crimes so violent at the age of 17. If that's true, we would have thousands of 17-year-olds in here." Pet.App.87a-88a. (Sanders was actually 15 at the time of the offenses.)

Rather than consider whether Sanders had the capacity for rehabilitation and change, the court equated his crimes with murder. The court found that Sanders had "rob[bed] people of their souls" and noted that the conduct was "one of the worst if not the worst" the court had ever seen. Pet.App.85a, 87a. Simply, the court viewed the prosecution's recommended sentence as "insufficient to punish" Sanders and insufficient to "protect the community." Pet.App.88a. Instead of acknowledging youth and its attendant characteristics as a mitigating factor, the sentencing court viewed Sanders's age as a reason he needed to be "warehoused." Pet.App.89a-90a.

The sentencing court ignored evidence that showed how Sanders's youth was a mitigating circumstance. One of Sanders's psychiatrists explained that Sanders was a "young man" with difficulties "relate[d] primarily to dysfunctional family circumstances, negative environmental/peer influences, and possible organic learning difficulties." Pet.App.121a. These circumstances, "in symphony," "accounted for severe attitudinal and behavior disorders[] including the illegal transgressions" for which he was charged. *Id.* But, Sanders was not incorrigible. The psychiatrist thought Sanders, like most youth, could change and his disorders could be treated. *Id.*

Sanders expressed both to his psychiatrist and to the court that he was "quite motivated for change."

Pet.App.122a. When asked what he wished for most, Sanders responded that he wanted "forgiveness," and for his "life [to] be better." Pet.App.116a. His psychiatrist concluded that Sanders could achieve that positive change if he had "positive adult and peer role models," as well as in-patient psychiatric care, substance abuse assistance, and educational programs. Pet.App.121a-23a. The sentencing court ignored this evidence and sentenced Sanders to a life in prison with effectively no chance of parole.

3. In Wisconsin, inmates are generally eligible for parole after serving one quarter of their sentence. Wis. Stat. § 304.06(1)(b) (1993-1994). Because Sanders was sentenced to 140 years, his first chance at release will be in 2030, when he is 51 years old and after serving more than two-thirds of his life in prison.

Most inmates serving time under this regime are entitled to "mandatory release" on parole after serving two-thirds of their sentence. Wis. Stat. § 302.11(1) (1995-1996). But for a defendant who, like Sanders, is serving time for a "serious felony" committed between April 21, 1994, and December 31, 1999, this mandatory release is converted to merely "presumptive mandatory release." Wis. Stat. § 302.11(1g)(am) (1995-1996). This "presumptive mandatory release" affords the Parole Commission the discretion to deny Sanders's release again in 2089, when he would be more than 100 years old.

For Sanders, Wisconsin's statutory requirements provide a bleak opportunity for parole. In practice, the reality is even worse. Parole is rarely granted in Wisconsin, and "release is unlikely" for juvenile offenders in the state. Cara Lombardo, *Juvenile*

Offenders in Legal Limbo Despite Supreme Court Rulings, Milwaukee Journal Sentinel (Oct. 22, 2016). For juveniles, like Sanders, who are serving life sentences, the parole grant rate was only "between 1% and 2%" between 2011 and 2013.[1] In effect, Sanders will almost certainly spend the rest of his life in prison.

4. Sanders has diligently pursued his constitutional rights following his conviction. After this Court issued its decisions in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), Sanders sought postconviction relief in the Wisconsin state courts. Pet.App.23a-24a. In the Wisconsin Court of Appeals, Sanders argued that his sentence violated both *Graham* and *Miller*, which were retroactive and applied to his case.

The Wisconsin Court of Appeals held that Sanders was not eligible for relief under *Graham* or *Miller*. The court narrowly interpreted *Miller* as only "concern[ing] juveniles who committed homicides and were given mandatory sentences of life without parole." Pet.App.38a. The Supreme Court of Wisconsin denied review.

After Sanders's claims were exhausted in state court, Sanders pursued relief under 28 U.S.C. § 2254 in the U.S. District Court for the Eastern District of Wisconsin, which denied the petition. Pet.App.17a, 31a. The court held that the Wisconsin Court of Appeals' decision denying relief under *Miller* was not unreasonable. Pet.App.31a. But the District Court

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[1] Nazgol Ghandnoosh, *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences*, The Sentencing Project, at 68 (Jan. 2017), https://www.sentencingproject.org/wp-content/uploads/2018/03/32-lifer-parole-policies.pdf.

granted a certificate of appealability, concluding that reasonable jurists could find its assessment of the constitutional claims at issue "debatable or wrong." Pet.App.14a-16a (internal quotation and citation omitted).

The Seventh Circuit affirmed. Pet.App.13a. The court concluded that *Miller* was not "controlling Supreme Court authority" because Sanders's sentence "does not fall within th[e] category" of sentences "which provide[] no possibility for parole and [are] therefore effectively a life sentence." Pet.App.12a. In denying relief, the court offered "a brief reaction" to the reality of Wisconsin's parole system and Sanders's argument that the "deck is stacked against his receiving parole in 2030." Pet.App.12a-13a. The court concluded that "[n]ow is not the time for Sanders to advance this argument." Pet.App.13a. According to the court, should the Wisconsin Parole Board deny parole, Sanders "will have a future opportunity to challenge that outcome in state court, including by raising claims grounded in *Graham*, *Miller*, or another Supreme Court precedent that may enter the U.S. Reports in the intervening years." *Id.*

Sanders's petition for rehearing and rehearing *en banc* was denied.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CLEARLY ESTABLISHED PRECEDENT, AS CONFIRMED BY OTHER COURTS.

A. A juvenile offender's age must be considered as a mitigating factor when imposing a life sentence with a remote possibility of parole.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller*, 567 U.S. at 469 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). "That right," as this Court has explained, "'flows from the basic "precept of justice that punishment for crime should be graduated and proportioned"' to both the offender and the offense." *Id.* (quoting *Roper*, 543 U.S. at 560). Indeed, the Court has explained that "[t]he concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S. at 59. In the context of juvenile offenders, this means that the Eighth Amendment protects children from receiving disproportionate sentences for crimes they committed while they were children. *Id.* at 68, 71. To achieve that end, this Court's precedents make clear that an offender's youth must be considered as a mitigating factor at sentencing when imposing a life sentence with a remote possibility of parole. *Jones*, 141 S. Ct. at 1315-16; *Miller*, 567 U.S. at 476-79; *Graham*, 560 U.S. at 68, 77-79; *Roper*, 543 U.S. at 569-70.

1. "'[A]n offender's age' … 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" *Miller*, 567 U.S. at 473-74

(quoting *Graham*, 560 U.S. at 76). This is so because "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. "[J]uveniles have diminished culpability and greater prospects for reform" making them "'less deserving of the most severe punishments.'" *Id.* (quoting *Graham*, 560 U.S. at 68).

This Court's Eighth Amendment jurisprudence—in *Roper*, *Graham*, *Miller*, and *Jones*—clearly establishes that "[y]outh matters in sentencing." *Jones*, 141 S. Ct. at 1316. Because children are different, courts must consider youth as a mitigating factor in sentencing for a number of reasons.

"First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). "Second, children 'are more vulnerable … to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (quoting *Roper*, 543 U.S. at 569). "And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.'" *Id.* (quoting *Roper*, 543 U.S. at 570) (brackets omitted).

Science and social science support these "common sense" intuitions. *Id.* In *Roper*, this Court "cited studies showing that '[o]nly a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem

behavior.'" *Id.* (quoting *Roper*, 543 U.S. at 570). In *Graham*, this Court "noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'" *Id.* at 471-72 (quoting *Graham*, 560 U.S. at 68).

Together, "those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 472 (quoting *Graham*, 560 U.S. at 68).

2. Children are less culpable and more capable of reform regardless of whether the sentence being imposed is life without parole or a life sentence with the slim chance that parole may be granted near the end of a juvenile's life expectancy. Just as "none of what [*Graham*] said about children … is crime-specific," none of what *Miller* said about sentencing is limited to sentences of life-without-parole. *Id.* at 473. *Miller*, relying on *Roper* and *Graham*, could not have been more clear: "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472. It necessarily follows that, in order to ensure the sentence is proportional under the Eighth Amendment, the sentencing court must "consider the 'mitigating qualities of youth.'" *Id.* at 476.

One of the problems identified in *Miller* was that "mandatory penalties, by their nature, preclude a

sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* But the Court's guidance stretches farther than the precise circumstances of a homicide offense and life sentence without any possibility of parole.

Inherent in *Miller*'s holding is the premise that "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"—must be considered at sentencing. *Id.* at 477. Otherwise, "a sentencer misses too much if he treats every child as an adult" when "imposing a State's harshest penalties," whether it be life without parole or, like here, 140 years in prison with a remote possibility of parole near the end of Sanders's life expectancy. *Id.*

3. Again and again, this Court has affirmed the principle that youth is important and must be considered as a *mitigating* factor at sentencing. As this Court has recognized, "*Miller* … did more than require a sentencer to consider a juvenile offender's youth …[;] it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016) (quoting *Miller*, 567 U.S. at 472); *see also Miller*, 567 U.S. at 476 (addressing prior rulings where the Court "insisted … that a sentencer have the ability to consider the '*mitigating* qualities of youth'") (emphasis added).

Most recently, in *Jones v. Mississippi*, the Court confirmed that a "series of Eighth Amendment cases applying the Cruel and Unusual Punishments Clause," recognized "that youth matters in

sentencing." *Jones*, 141 S. Ct. at 1314; *see also id.* at 1316 ("*Miller* cited *Roper* and *Graham* for a simple proposition: Youth matters in sentencing.").

Specifically, *Jones* recognized that "*Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance." *Id.* at 1315. "[T]he *Miller* Court mandated" that a "'sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Id.* at 1316. But merely considering a juvenile offender's age is not enough. *Miller* dictates that "[i]n that process, the sentencer will consider the [offender's] 'diminished culpability and heightened capacity for change,'" *i.e.* the reasons why a juvenile may be less culpable and less deserving of harsh punishment. *Id. Miller*'s promise is fulfilled by giving sentencing courts discretion because "it would be all but impossible for a sentencer to avoid considering [youth as a] *mitigating* factor." *Id.* at 1319 (emphasis added).

This Court meant what it said. None of this Court's precedents grant the sentencing court discretion to consider youth as an *aggravating* factor, as the sentencing court did here.

Youth as a mitigating factor means the sentencer must consider whether an offender's youth "reduces the degree of culpability" and "bear[s] on a court's possibly lessening the severity of its judgment." *Circumstance*, Black's Law Dictionary (11th ed. 2019); *see also Miller*, 567 U.S. at 472 (characteristics of youth "render juveniles less culpable than adults" (quoting *Graham*, 560 U.S. at 72)). It is only after youth is considered as a *mitigating* factor that a

sentencing court may "deem[] the defendant's youth to be outweighed by other factors or deem[] the defendant's youth to be an insufficient reason to support a lesser sentence under the facts of the case." *Jones*, 141 S. Ct. at 1320 n.7.

An aggravating circumstance, by contrast, is a "fact or situation that increases the degree of liability or culpability for a criminal act." *Circumstance*, Black's Law Dictionary, *supra*. Youth, this Court has made clear, does the opposite.

B. The decision below conflicts with decisions of other courts that recognize *Miller*'s mandate that youth matters in sentencing a juvenile to a life sentence with the possibility of parole.

The Supreme Courts of Iowa, Ohio, and Washington—along with other state courts—recognize this Court's clear, constitutionally-required rule that youth must be considered as a mitigating factor in cases where a juvenile is sentenced to life, even with the possibility of parole. And the Federal Sentencing Guidelines already recognize that youth must be considered as a mitigating circumstance as part of the § 3553(a) sentencing factors when imposing federal sentences.

1. The Supreme Court of Iowa has concluded that inherent in the Supreme Court's decision in *Miller* is the rule that a sentencing court must consider youth as a mitigating factor when sentencing a juvenile to a life sentence with a possibility of parole. "*Miller*'s principles are fully applicable to a lengthy term-of-years sentence … because an offender sentenced to a

lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*." *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013).

In *Null*, the defendant was required to serve at least 52.5 years of his 75-year sentence before he was eligible for release for crimes he committed when he was 16 years old. *Id.* at 45. Although recognizing that "a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections." *Id.* at 71. Thus, "youth [as] a mitigating factor in sentencing" must be considered. *Id.* at 75; *see also State v. Davis*, 880 N.W.2d 518 (Iowa Ct. App. 2016) (finding that "the portion of the statutory sentencing schema requiring a juvenile to serve seventy percent of the period of incarceration before parole eligibility may not be imposed without a prior determination by the district court that the minimum period of incarceration without parole is warranted under the factors identified in *Miller*").

The same is true in Ohio. That state's highest court concluded that "the severity of a sentence of life in prison on a juvenile offender, even if parole eligibility is part of the life sentence, is analogous to a sentence of life in prison without the possibility of parole for the purposes of the Eighth Amendment." *State v. Patrick*, -- N.E.3d --, 2020 WL 7501940, at *7 (Ohio Dec. 22, 2020).

There, the juvenile was sentenced to life in prison with parole eligibility after 33 years. *Id.* In such

circumstances, "[g]iven the high likelihood of the juvenile offender spending his or her life in prison, the need for an individualized sentencing decision that considers the offender's youth and its attendant characteristics is critical when life without parole is a *potential* sentence." *Id.* (emphasis added). Simply, *Miller* "do[es] not absolve sentencing courts from considering a defendant's youth during sentencing simply because parole eligibility is ultimately included in the sentence." *Id.*

The Washington Supreme Court agrees. "Critically, the Eighth Amendment requires trial courts to exercise this discretion [to consider the mitigating qualities of youth] at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line." *State v. Houston-Sconiers*, 391 P.3d 409, 419 (Wash. 2017). Considering juveniles sentenced to 26 years and 31 years in prison, the Court saw "no way to avoid the Eighth Amendment requirement to treat children differently, with discretion, and with consideration of mitigating factors." *Id.*

Likewise, a New York court found that this Court's precedent is clear: "at the sentencing stage, a defendant who committed a crime as a juvenile is procedurally entitled to a 'hearing where "youth and its attendant characteristics" are considered' in order to separate out those who can be punished by a life in prison from those who cannot." *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 38-39 (N.Y. App. Div. 2016) (quoting *Montgomery*, 577 U.S. at 210). This guarantee extends both to the original sentencing court and the parole board. *Id.* at 39. Otherwise, "persons convicted of crimes committed

as juveniles who, but for a favorable parole determination will be punished by life in prison" "in contravention" of "the 'foundational principle' of the Eighth Amendment jurisprudence … that [the] imposition of a [s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 38-39 (quoting *Miller*, 567 U.S. at 474).

2. The Federal Sentencing Guidelines recognize that, at the very least, "the nature and circumstances of the offense and the history of characteristics of the defendant," "including youth" should be considered as mitigating factors. 18 U.S.C. § 3553(a)(1); U.S.S.G. § 5H1.1. The Fifth Circuit accordingly concluded that the Federal Sentencing Guidelines "satisf[y] *Miller*'s procedural requirement that the court consider the defendant's youth and its attendant characteristics" before imposing a lengthy sentence, even one that is not life imprisonment without parole. *United States v. Sparks*, 941 F.3d 748, 755 (5th Cir. 2019) (considering sentence of 35 years). As a result, juveniles receiving sentences in federal court have the protections *Miller* affords to them. The Constitution entitles their counterparts in state court to the same.

C. Courts that disagree read *Miller* too narrowly or do not engage with *Miller*'s foundational premise.

Other courts have found that *Miller*'s rule that a sentencing court must consider juvenile status as a mitigating factor at sentencing only applies to cases involving actual or de facto life sentences without any possibility of parole. But these decisions fail to recognize that the same foundational principles that

underlie *Miller*'s holding establish that a defendant's youth must be considered as a mitigating factor when imposing *any* severe sentence, such as life with the possibility of parole or a severe term-of-years sentence. *See, e.g.*, *Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 198 (4th Cir. 2019) ("the application of the protections announced in *Miller* … have not yet reached a juvenile offender who has and will continue to receive parole consideration"); *Goins v. Smith*, 556 F. App'x 434, 435, 440 (6th Cir. 2014) (holding that *Miller* "does not clearly require [individualized sentencing] where a juvenile faces an aggregate term-of-years sentence" of 74 years); *State v. Link*, 482 P.3d 28, 47 (Or. 2021) (en banc) ("*Miller*'s individualized-sentencing requirement is limited to life-without-parole sentences or the functional equivalent."). These decisions are flawed.

First, neither the Fourth Circuit decision nor the unpublished Sixth Circuit decision engaged with the reasoning underlying this Court's precedent that youth matters in sentencing. The decisions merely note that, in their view, there is "disagreement about the application of the protections announced in *Miller* and its lineage to sentences that are practically equivalent to life without parole." *Bowling*, 920 F.3d at 198; *Goins*, 556 F. App'x at 440. The decisions do not discuss the key language in *Miller* establishing that "children are different" and are "less deserving of the most severe punishments," even though those observations are necessary to its holding and apply equally to an assessment of proportionality of sentences that span nearly an entire lifetime before the juvenile offender would become eligible for parole. *Miller*, 567 U.S. at 471, 480; *see also supra* at 11-16.

In *Bowling*, such an inquiry was not central to the court's decision. The appellant had served 17 years when he first became eligible for parole. 920 F.3d at 194. The Fourth Circuit read *Graham* and *Miller* in that context to require only that a "parole board[] … consider a juvenile's *eligibility for parole* within the juvenile's lifetime," which the Virginia parole board had done every year since the petitioner became eligible. *Id.* at 194-95, 198 (emphasis in original). Even if the sentencing court did not consider youth as a mitigating factor at sentencing, the appellant did not have to spend most of his life in prison before another body considered the juvenile's maturity and rehabilitation, as the Virginia Parole Board was required to do. Virginia Parole Board Policy Manual (Oct. 1, 2006), https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf (requiring the parole board to consider "the individual's history," "the individual's conduct, employment, education, vocational training, and other developmental activities during incarceration," the "facts and circumstances of the offense" and "changes in attitude toward self and others" (cleaned up)).

And in *Goins*, the Sixth Circuit, without explanation, found that *Miller* "certainly counsels in favor of considering juveniles' diminished culpability in imposing consecutive term-of-years sentences," but "does not clearly require such an approach where a juvenile faces an aggregate term-of-years sentence." 556 F. App'x at 440. The Sixth Circuit did not explain the difference between the two sentences, even though both may subject a juvenile to prison for the entirety of his life or close to it. It is hard to glean much from the court's silence.

Second, the Oregon Supreme Court in *Link* read *Miller* too narrowly and even narrowed its own prior precedent. The Court previously held that "'a sentence in excess of 50 years' was 'sufficiently lengthy' to require a *Miller* individualized-sentencing analysis." 482 P.3d at 42 (quoting *White v. Premo*, 443 P.3d 597, 605 (Or. 2019)). But in *Link*, the court reversed course and held that "when the Court in *Miller* referred to the 'most severe' or 'harshest penalties,' it meant the death penalty and true-life sentences." *Id.* at 653. The Oregon Supreme Court was right the first time and does not offer a sufficient explanation to distinguish *Miller*'s application between those different circumstances.

Nothing in *Miller* expressly limits its foundational premises to the factual context of sentences of life without any possibility of parole. Instead, this Court based its holding on principles espoused in *Graham* and *Roper* establishing that the individualized sentencing requirement applies to a broad range of "a State's most severe penalties," *including* "the harshest possible penalty for juveniles." *Miller*, 567 U.S. at 474, 489. The range of severe penalties also includes the functional equivalent of life sentences with the chance of parole only after the juvenile has spent significant time in prison.

If youth as a mitigating factor was not required in sentences of life with the possibility of parole, the inherent holding of *Miller* would be undermined and juvenile sentencing would lead to inconsistent and absurd results. For example, a juvenile like Sanders who commits a non-homicide offense and faces a life sentence with only a *remote* opportunity for parole is worse off than a juvenile who commits a homicide

offense and faces a sentence of life without *any* possibility of parole. *Null*, 836 N.W.2d at 72. Both face a significant chance of spending their entire life behind bars; yet only the latter receives the benefit of a constitutional sentencing proceeding.

D. The decision below is wrong.

Like the Oregon Supreme Court, the Seventh Circuit read a restriction into *Miller* that is not there. And like the Fourth and Sixth Circuits, the Seventh Circuit incorrectly asserted that *Miller* was not "controlling Supreme Court authority" that rendered the Wisconsin court's decision an unreasonable application of federal law. Pet.App.12a. Because the Seventh Circuit erred, the state court's unconstitutional sentence stands and the sentencing court's decision considering youth as an aggravating factor rather than a mitigating factor remains on the books. This outcome runs afoul of this Court's precedent and the Constitution.

1. The Seventh Circuit improperly held that Sanders was not entitled to habeas relief because *Miller* does not clearly apply to sentences that provide for even a mere possibility of parole. According to the court, "[a]bsent controlling Supreme Court authority that *Miller* requires a sentencing judge to consider a juvenile offender's youth and its attendant circumstances before imposing a sentence other than a *de jure* or *de facto* life-without-parole sentence," no such consideration is required. *Id.* The Seventh Circuit exacted too demanding a standard.

A petitioner is entitled to habeas relief if the state court decision "involved an unreasonable application of, clearly established Federal law, as determined by

the Supreme Court." 28 U.S.C. § 2254(d)(1). "If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment); *see also Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced'" (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003))); *White v. Woodall*, 572 U.S. 415, 427 (2014) (AEDPA does not "requir[e] an identical factual pattern before a legal rule must be applied," and "state courts must reasonably apply the rules 'squarely established' by this Court's holdings to the facts of each case"). That is, "[a] petitioner need not point a habeas court to a factually identical precedent. Oftentimes, Supreme Court holdings are 'general' in the sense that they erect a framework specifically intended for application to variant factual situations." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 886 (3d Cir. 1999).

Consideration of youth as a mitigating factor does not turn on the factual distinction of whether the juvenile nominally has a chance at parole after spending most of his life in prison. There is no meaningful distinction between life sentences with and without the possibility of parole. Both sentences are severe. Both require the juvenile to spend most of his life in prison. And in both, the underlying crimes

may "reflect[] … transient immaturity." *Miller*, 567 U.S. at 479 (quoting *Roper*, 543 U.S. at 573). But under the Seventh Circuit's reasoning, only in one is a court required to follow this Court's guidance that "children are different" and to consider how "the characteristics of youth … weaken rationales for punishment." *Id.* at 473, 480. That makes little sense and is inconsistent with how this Court views juvenile sentencing.

A lifetime sentence, with or without the possibility of parole, "still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, 577 U.S. at 208 (quoting *Miller*, 567 U.S. at 479). In both scenarios, "'[a]n offender's age' … 'is relevant to the Eighth Amendment.'" *Miller*, 567 U.S. at 473-74 (quoting *Graham*, 560 U.S. at 76). By refusing to consider youth as a mitigating circumstance for life sentences with the remote possibility of parole after the juvenile has spent two-thirds of his life in prison, the Seventh Circuit permitted precisely what this Court has cautioned against: a "flawed" procedure that failed to take into account the "central consideration" of the "characteristics of youth, and the way they weaken rationales for punishment." *Id.*

Considering youth as a mitigating factor at the outset can prevent the court from rendering an unconstitutional sentence. Not only does it protect a juvenile's constitutional rights, it is a more efficient process.

2. The Seventh Circuit's decision improperly allows Sanders's unconstitutional sentence to stand. Sanders was sentenced to a *de facto* life sentence of 140 years with the remote possibility of parole after he

has served 35 years in prison. Wis. Stat. § 304.06(1)(b) (1993-1994). This means that Sanders, who was 15 when he committed the crimes and 17 when he was sentenced, is not even *eligible* for release until he is roughly 51 years old. Due to the severity of his sentence, Sanders's youth should have been considered as a *mitigating* factor at sentencing.

Sanders's traumatic childhood made him "'more vulnerable … to negative influences and outside pressures,'" and Sanders had "limited 'contro[l] over [his] own environment' and lack[ed] the ability to extricate [himself] from horrific, crime-producing settings" both in Chicago and in Wisconsin. *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). Given Sanders's background and age, a psychiatrist concluded that he was "quite emotionally fragile, impulsive, and seem[ed] to have many unfulfilled affectional needs." Pet.App.119a. Sanders had "severe intellectual, academic, emotional[,] and substance abuse difficulties which relate[d] primarily to dysfunctional family circumstances, negative environmental/peer influences, and possible organic learning difficulties." Pet.App.121a. At age 15, he was at "a moment" and in a "condition of life when a person may be most susceptible to influence and to psychological damage." *Miller*, 567 U.S. at 476 (internal quotation marks omitted). But, these "signature qualities" of youth were "all transient." *Id.* (internal quotation marks omitted). His psychiatrist still believed that his "affective and dependency disorders [could] be successfully treated within a relatively short period of time." Pet.App.122a. Indeed, before sentencing, Sanders was "quite motivated for change," and wanted to "get up out of here" and to

make his life better. Pet.App.116a, 122a. Sanders's psychiatrist's assurance that he could "be successfully treated" and Sanders's own desire to change demonstrate that his "character [was] not as 'well formed' …; [and] his traits [were] 'less fixed.'" *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 570). He was youthful, not "incorrigible." *Id.* at 473.

Instead of considering whether Sanders's youth made him less blameworthy, the sentencing court found that Sanders's age made him more deserving of a harsh punishment. The court discounted the idea that Sanders's age or background could mitigate his culpability for his crimes. According to the sentencing court: "There are hundreds if not thousands of children who have the same problems in the inner city, but hundreds and not thousands of children grow up to be 17, I don't even know if he's grown up, to commit crimes so violent at the age of 17. If that's true, we would have thousands of 17-year-olds in here." Pet.App.87a-88a. (Sanders was actually 15 years old when the crimes were committed.)

Far from treating Sanders's age as reason to think he might be less culpable or more capable of rehabilitation, the sentencing court saw Sanders's youth as an aggravating circumstance. According to the sentencing court, Sanders's age made him more dangerous, not less, and drove the court to impose a sentence of 140 years—a sentence that was twice as long as the state's proposed upper limit. Pet.App.19a. Disregarding the state's recommendation, the sentencing court concluded that if its extreme sentence was "warehousing, so be it." Pet.App.90a.

By sentencing Sanders to 140 years in prison with the remote possibility of parole, the sentencing court did just what this Court has said it may not do: allow the "brutality or cold-blooded nature of [a] particular crime [to] overpower mitigating arguments based on youth." *Graham*, 560 U.S. at 78. Unlike *Jones*, where the sentencing court at least "consider[ed] the factors 'relevant to the child's culpability,'" even if it did not make an express finding of permanent incorrigibility, 141 S. Ct. at 1313, the sentencing court here broke with this Court's "foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children," *Miller*, 567 US. at 474. Even if the Eighth Amendment does not require a separate factual finding as to incorrigibility, *Jones*, 141 S. Ct. at 1318-19, the sentencing court's express consideration of Sanders's youth as an *aggravating*—not *mitigating*—factor violated this Court's clearly established precedent. *Jones*, 141 S. Ct. at 1315-16; *Miller*, 567 U.S. at 476-79; *Graham*, 560 U.S. at 68, 77-79; *Roper*, 543 U.S. at 569-70. Sanders was 15 years old when he committed his crimes. Because of the sentencing court's error, he will spend most, if not all, of his adult life in prison.

Sanders should not have to wait to rectify the sentencing court's mistake until 2030 when he is first eligible for parole. Pet.App.11a-12a. Had the Seventh Circuit properly invoked *Miller*'s framework, it would have been clear that the sentencing court's *Miller* violation occurred at the moment of sentencing. As a result, Sanders has been subjected to a prison term that is longer than he otherwise might have served had the sentencing court considered whether his

crimes reflected his "unfortunate yet transient immaturity.'" *Miller*, 567 U.S. at 479. Sanders should not have to spend one more day—let alone nine more years—in prison before a reviewing body properly takes his youth into account at sentencing.

II. THE QUESTION PRESENTED IS IMPORTANT

It is imperative that this Court step in and affirm the basic principles underlying its decisions in *Roper*, *Graham*, *Miller*, and *Jones*, so that individuals like Sanders do not languish in prison under sentences imposed in violation of this Court's clear Eighth Amendment precedent. This Court has made clear: "youth matters for purposes of meting out the law's *most serious* punishments." *Miller*, 567 U.S. at 483 (emphasis added). "[C]hildren are different" and are "less deserving of the most severe punishments." *Id.* at 471, 480. When courts refuse to consider youth as a mitigating factor before imposing a sentence of life imprisonment with the remote possibility of parole, this Court's fundamental guarantee is rendered meaningless.

By refusing to recognize youth as a mitigating circumstance when sentencing a juvenile to life imprisonment, a court fails to account for the transient nature of youth and effectively presumes that the juvenile is incorrigible. As this Court has stated, the "characteristics of juveniles make that judgment questionable" because "incorrigibility is inconsistent with youth." *Graham*, 560 U.S. at 72-73. Since *Roper* and *Graham*, the social science supporting these conclusions "ha[s] become even stronger." *Miller*, 568 U.S. at 472 n.5.

According to a United States Department of Justice report, "[t]he vast majority of juvenile offenders, even those who commit serious crimes, grow out of antisocial activity as they transition to adulthood. … [T]he process of maturing out of crime is linked to the process of maturing more generally, including the development of impulse control and future orientation." [2] "New research on brain development … shows that there is continued maturation of brain systems that support self-regulation—well into the midtwenties." [3] When a juvenile is allowed to mature, "the result may well be desistance from crime."[4]

Research also has shown, however, that harshly sanctioning youth and depriving them of the opportunity for release can "slow the process of psychosocial maturation," which may "in the long run … do more harm than good." [5] Rather than maturing out of crime, juvenile offenders who know they will spend most of their lives in prison remain stagnant. Many suffer from untreated mental illnesses that inhibit their ability to mature emotionally and behaviorally. [6] And many "wrestle

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[2] Lawrence Steinberg et al., *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, U.S. Dep't of Justice, at 1 (March 2015), https://www.courts.ca.gov/documents/BTB24-2M-5.pdf.

[3] *Id.* at 8.

[4] *Id.* at 9.

[5] *Id.*

[6] *See* Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005), https://www.hrw.org/report/2005/10/11/rest-their-lives/

with the anger and emotional turmoil of coming to grips with the knowledge they will die in prison," and suffer from depression and intense loneliness.[7] For these offenders, the sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Graham*, 560 U.S. at 70 (internal quotations and citations omitted).

A life sentence with only a remote possibility of parole is fundamentally at odds with the characteristics of youth and the capacity for change and maturity. This Court has made clear that juveniles "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 79.

By failing to consider youth as a mitigating circumstance, Sanders was denied such an opportunity. He exemplifies a juvenile who displayed a capacity for change. Psychiatrists who examined Sanders during a tumultuous and traumatic part of his childhood concluded as much. According to one, Sanders's "intellectual, academic, emotional[,] and substance abuse" problems, "in symphony," "accounted for severe attitudinal and behavior

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life-without-parole-child-offenders-united-states; Human Rights Watch, *Against All Odds: Prison Conditions for Youth Offenders Serving Life Without Parole Sentences in the United States* (2012), https://www.ojp.gov/ncjrs/virtual-library/abstracts/against-all-odds-prison-conditions-youth-offenders-serving-life.

[7] Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives*, *supra*.

disorders[] including the illegal transgressions" he committed. Pet.App.121a. But he was not incorrigible. Sanders accepted responsibility for his actions, showed remorse, and expressed a desire to make his life better. Pet.App.114a-15a, 116a. Even while incarcerated, and against all odds, Sanders has taken advantage of every opportunity to grow, develop, mature, and gain skills. Many similarly situated offenders cannot be expected to have the same perseverance.

Social science does not treat juveniles sentenced to life imprisonment without parole differently from juveniles sentenced to life in prison with the remote possibility of parole. Nor should sentencing courts. This Court must step in to affirm what is inherent in prior holdings—youth must be considered as a mitigating factor when sentencing a juvenile to a severe sentence, including life imprisonment with a remote possibility of parole.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

BENJAMIN C. MIZER
ARIEL N. VOLPE
LINDSAY R. FISHER
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001

ELIZABETH G. BENTLEY
Counsel of Record
JONES DAY
90 South Seventh Street,
Suite 4950
Minneapolis, MN 55402
(612) 217-8800
ebentley@jonesday.com

Counsel for Petitioner