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DEPARTMENT OF JUSTICE

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May 11, 2021

Sheila T. Reiff
Clerk, Wisconsin Supreme Court
110 East Main Street
Post Office Box 1688
Madison, Wisconsin 53701-1688

Re: *State of Wisconsin v. Jevon Dion Jackson*
Case No. 2017AP712

Dear Ms. Reiff:

On April 27, 2021, this Court ordered the parties to file simultaneous letters/briefs discussing the impact of the United States Supreme Court's April 22, 2021 opinion in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), on Jackson's petition for review. In his petition, Jackson seeks review of the court of appeals' decision holding that his 1995 discretionary juvenile life sentence for first-degree intentional homicide, making him eligible for parole in 2070, is not unconstitutional. In *Jones,* the Court addressed precisely the issue that Jackson raises in his petition: whether the sentencing court must make a separate explicit or implicit finding beyond its exercise of its sentencing discretion that a juvenile is "permanently incorrigible" before imposing a discretionary life-without-parole sentence. *Id.* at 1311. The Court clarified that there is no requirement of either an explicit or implicit finding of "permanent incorrigibility" and that a discretionary juvenile life-without-parole sentence is constitutional because when the court exercises its discretion to determine parole eligibility, it necessarily considers the offender's youthfulness. *Id.* at 1318–19. Because *Jones* definitively clarified that Jackson's sentence is not unconstitutional, review by this Court of the court of appeals' decision is not necessary.

Background. In 1993, Jackson committed an armed robbery in a fast-food restaurant parking lot, during which he executed a woman in front of her young daughter, shooting her in the head with a sawed-off shotgun. Jackson was 16 at the time of his crimes. The State charged him with first-degree intentional homicide, armed robbery, attempted armed robbery, and possession of a short-barreled shotgun. He was tried in adult criminal court in 1995, and convicted of all four charges.

At sentencing, the court considered the appropriate sentencing factors, including the "unbelievable horror and depravity" of the crime, Jackson's character, and his age at the time of the crimes, specifically stating that it took Jackson's "youthfulness" into consideration. (Pet. App. 105–6.) Under Wisconsin sentencing statutes, the court was required to sentence Jackson to life in prison for first-degree intentional homicide but had the discretion to set a parole eligibility date. Exercising that discretion, the court imposed a life sentence for first-degree intentional homicide and consecutive sentences for the other crimes, making Jackson eligible for parole when he is 101 years old.

Over 20 years later, Jackson sought resentencing on the basis that his sentence violated the Eighth Amendment of the United States Constitution and article I, section 6 of the Wisconsin Constitution. Jackson relied on two United States Supreme Court cases: *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Miller* held that sentencing schemes that mandate juvenile life-without-parole sentences are unconstitutional, and *Montgomery* made the holding of *Miller* retroactive. Jackson argued that *Montgomery* modified and extended *Miller* so that any juvenile sentence that was the functional equivalent of life-without-parole was unconstitutional unless the sentencing court made a factual finding on the record that the juvenile was irreparably corrupt. The court of appeals rejected Jackson's claim that he is entitled to resentencing under *Miller* and *Montgomery*, relying on those cases and the controlling Wisconsin decisions in *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451, and *State v. Barbeau*, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520, *review denied*, 2016 WI 98, 372 Wis. 2d 275, 891 N.W.2d 408, *and cert. denied*, 137 S. Ct. 821 (2017). The court of appeals held that the sentencing court exercised its discretion to specifically considered the sentencing factors, including Jackson's youth as required by *Miller*, which "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." (Pet. App. 115 (citing *Miller*, 567 U.S at 483).) The court of appeals concluded that although Jackson's constitutional challenge to his sentence was not categorical such as in *Ninham* and

Barbeau, his specific sentence "comports with the directives" of the relevant state and federal decisions and accordingly, was not unconstitutional. (Pet. App. 115.)

Jackson filed a petition for review. As grounds, Jackson argued that the court of appeals' reliance on *Ninham* and *Barbeau* was misplaced because these decisions conflicted with *Miller* and *Montgomery* and that review was necessary to clarify the constitutionality of discretionary juvenile life sentences. In Jackson's view, *Miller* and *Montgomery* required the sentencing court to make a factual finding of permanent incorrigibility or irreparable corruption before imposing a discretionary life sentence on a juvenile convicted of homicide. The State filed a court-ordered response, taking the position that although the court of appeals' decision affirming Jackson's sentence was correct, review by this Court was appropriate to clarify the requirements of *Miller* and *Montgomery* because the constitutionality of discretionary life sentences for a juvenile convicted of homicide was a real and significant issue of constitutional law and a decision by this Court would develop and clarify the law on a question that is likely to recur. Wis Stat. § (Rule) 809.62(1r)(a) and (c)3.[1] The State disagreed, and still disagrees, that review is appropriate under Wis. Stat. § (Rule) 809.62(1r)(3) because *Ninham* and *Barbeau* are not in conflict with *Miller* and *Montgomery*.

After the United States Supreme Court granted the petition for writ of certiorari in *Jones*, and in response to both parties' requests, this Court entered an order on April 17, 2020 holding Jackson's petition for review in abeyance pending a decision in *Jones*.

The Jones opinion. In *Jones*, the Supreme Court definitively clarified that the Constitution and the Court's previous decisions in *Miller* and *Montgomery* required neither an explicit nor an implicit factual finding of "permanent incorrigibility" for a sentencing court to exercise its discretion to impose a juvenile life sentence. *Jones,* 141 S.Ct. at 1318–19. For Eighth Amendment purposes, "in a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id.* at 1313. The Court determined that a "key assumption of both *Miller* and *Montgomery* was that discretionary sentencing allows the

[1] In its response, the State noted that at that time, two petitions for writ of certiorari were pending that would address the issues raised in Jackson's petition. The Supreme Court granted the petition in one of those cases, which was subsequently dismissed. *Mathena v. Malvo*, U.S. Case No. 18-217 (cert. granted March 18, 2019; stipulation for dismissal filed February 24, 2020). Two weeks after *Malvo* was dismissed, the Supreme Court granted the petition for writ of certiorari in *Jones*.

sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Id. at* 1318.

Using the logic of *Jones*, Wisconsin's discretionary sentencing scheme does not require the sentencing court to make an explicit "separate factual finding of permanent incorrigibility," nor is such a finding "necessary to make life-without parole sentences for juvenile offenders relatively rare." *Jones,* 141 S.Ct. at 1318–19. An "implicit finding of permanent incorrigibility" is "not necessary to ensure that a sentencer considers a defendant's youth," is "not required by or consistent with *Miller*" or "with this Court's analogous death penalty precedents," and is not "dictated by any consistent historical or contemporary sentencing practice in the States." *Id.* at 1319. The Court in *Jones* made clear that its opinion was consistent with and did not overrule or unduly narrow *Miller* and *Montgomery,* but instead followed "their explicit language addressing the precise question before us and definitively rejecting any requirement of a finding of permanent incorrigibility." *Id.* at 1322.[2]

Jones' impact on Jackson's petition for review. After *Jones*, review by this Court of the court of appeals decision holding that Jackson's sentence was not unconstitutional is no longer necessary. *Jones* clarified the constitutional issue Jackson raises in his petition: whether *Miller* and *Montgomery* mandated that for a discretionary juvenile life sentence to be constitutional, a sentencing court must make specific factual findings that the offender is permanently incorrigible or irreparably corrupt. *Jones* clearly answered that question, "no." As a result, Jackson's petition does not present a real and significant issue of constitutional law that needs clarification or that is likely to recur.

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[2] The *Jones* Court also noted that there have already been "significant changes wrought by *Miller* and *Montgomery*," including a decrease in discretionary juvenile life-without-parole sentences, and that its holding "does not preclude the States from imposing additional sentencing limits" and reforms related to sentencing juveniles convicted of homicide. *Jones,* 141 S. Ct. at 1322–23. In Wisconsin, the Legislative Council is currently preparing an interim research report on criminal juvenile sentencing, focusing on sentences of life imprisonment and possible modifications to the procedures and standards for sentencing juvenile offenders in adult criminal court, including determinations of eligibility for release to supervision. David Moore and Katie Bender Olson, 2020 Legislative Interim Research Report on Criminal Sentencing of Juvenile Offenders (May 10, 2021, 10:05 a.m.) https://docs.legis.wisconsin.gov/misc/lc/study/2020/2086.

Jackson also raises the issue in his petition of whether *Ninham* and *Barbeau* remain good law after *Miller* and *Montgomery*. *Jones* answers this as well, by reinforcing their holdings that juvenile life sentences imposed in the court's discretion are constitutional. In *Ninham,* this Court held that an as-applied challenge (like Jackson's) to the constitutionality of a Ninham's life without parole sentence imposed when he was a juvenile must be analyzed in the context of the sentencing court's exercise of discretion: "If the sentence is within the statutory limit, appellate courts will not interfere" unless it is "so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ninham*, 333 Wis. 2d 335, ¶ 85 (citations omitted). This Court concluded that Ninham's youth did not "automatically remove his punishment out of the realm of proportionate," that while his discretionary life-without-parole sentence was "severe," it was "not disproportionately so," and thus, that his sentence was not cruel and unusual because it was proportionately based on the "horrific and senseless" nature of his crime. *Id.*, ¶¶ 85–86. This Court's analysis in *Ninham* is supported and reinforced by *Jones,* in which the Supreme Court clarified that *Miller* and *Montgomery* do not require a sentencing court exercising its discretion to sentence a juvenile to life without parole to make an on-the-record finding that the juvenile is permanently incorrigible or irreparably corrupt.

Barbeau, decided after both *Miller* and *Montgomery*, and also relied on by the court of appeals when it affirmed Jackson's sentence, is also consistent with and reaffirmed by *Jones.*[3] The court of appeals held that under Wisconsin's discretionary life sentence statute, which allows the sentencing court three options for eligibility for release to extended supervision when imposing a life sentence[4], a juvenile life sentence was not unconstitutional "if the circumstances warrant it," as long as the sentencing court "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Barbeau,* 370 Wis. 2d 736, ¶ 32 (*quoting Miller,* 567 U.S at 480). The holdings in both

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[3] After this court denied review in *State v. Barbeau*, 2016 WI 98, 372 Wis. 2d 275, 891 N.W.2d 408, the United States Supreme Court denied Barbeau's petition for writ of certiorari without comment. *Barbeau v. Wisconsin,* 137 S. Ct. 821 (2017). This denial took place well after the Court's decision in *Montgomery*.

[4] Wis. Stat. § 973.014(1g)(a)1–3 (2015–16) provides that in its discretion, when imposing a life sentence the court has three options: opportunity for release to extended supervision, opportunity for release sometime after 20 years confinement, and opportunity for release in 20 years.

Ninham and *Barbeau* remain true and are good law after *Miller, Montgomery,* and *Jones.*

In its decision affirming the denial of Jackson's motion for resentencing, the court of appeals held that the sentencing court had considered Jackson's "distinctive characteristics of a juvenile offender," and his "youthfulness," as required by *Miller.* (Pet. App. 114.) Before it imposed sentence and determined Jackson's parole eligibility date, the sentencing court considered the "factors relating to Jackson's age" as "were discussed in *Miller*," as well as other relevant sentencing factors such as "gravity of the crime, the protection of the public, punishment, deterrence, and Jackson's rehabilitative needs." (Pet. App. 114–15.)[5] Thus, because Jackson's sentence, while "certainly severe," was "not disproportionately so" based on Jackson's heinous crime, the court of appeals held that the sentencing court had followed *Miller* by considering Jackson's "youth and attendant characteristics" before determining that Jackson was "the rare juvenile offender whose crime reflects irreparable corruption." (Pet. App. 115, citing *Miller*, 567 U.S. at 479–80, 483). Moreover, the court of appeals held that Jackson's as-applied challenge to his sentence did not distinguish his case from the categorical challenges in *Ninham* and *Barbeau* because Jackson's specific sentence "comports with the directives" of both federal and state case law, including *Miller, Montgomery, Ninham* and *Barbeau.* (Pet. App. 115.) Those directives now include the Supreme Court's holding in *Jones* clarifying *Miller* and *Montgomery*: a sentencing court does not need to find that a juvenile offender is permanently incorrigible before imposing a life without parole sentence. In Wisconsin, because a court that imposes a juvenile life-without-parole sentence for homicide under our discretionary sentencing statutes necessarily considers the offender's youthful characteristics as part of the exercise of sentencing discretion, such a sentence does not violate the Eighth Amendment.

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[5] *See McCleary v. State,* 49 Wis. 2d 263, 182 N.W.2d 512 (1971) and *State v Gallion,* 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

In sum, the court of appeals' decision holding that Jackson's sentence was not unconstitutional was sound. Nothing in *Jones*, which clarified *Miller* and *Montgomery*, undermines *Ninham* and *Barbeau*; in fact, *Jones* reaffirms their holdings. Because *Jones* squarely addresses and decides the constitutional issue that forms the basis for Jackson's petition for review, review of the court of appeals' decision by this Court is no longer necessary. Therefore, this Court should deny Jackson's petition for review.

Sincerely,

Anne C. Murphy

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Assistant Attorney General

ACM:skr

cc: Martha K. Askins