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Ms. Sheila Reiff
Clerk of Supreme Court
P.O. Box 1688
Madison, WI. 53703-1688

Re: *State v. Jevon Jackson,* Case No. 2017AP000712, District I

Dear Ms. Reiff:

The Wisconsin Supreme Court has issued an order for the parties in State v. Jevon Jackson to file a letter or brief which discusses the effect of *Jones v. Mississippi* on the issues presented in Mr. Jackson's petition for review. This letter constitutes Mr. Jackson's response to the court's order.

Jackson's petition for review presents one issue: whether his *de facto* life without parole sentence for a homicide he committed as a juvenile is unconstitutional. In brief, he argued that four United States Supreme Court decisions fundamentally altered the way courts must approach the sentencing of juveniles, and that the sentencing court did not follow the mandate of *Miller v. Alabama,* 567 U.S. 460 (2012) and *Montgomery v. Louisiana,* __U.S. __, 136 S. Ct. 718 (2016) when sentencing him. As a result, Jackson must be resentenced with the standards of *Miller* and *Montgomery* guiding the sentencing court's discretion.

Jackson's petition for review was held in abeyance pending the United State Supreme Court's decision in *Jones v. Mississippi*, (Case No. 18-1259, decided 4/22/2021).

At the age of 15, Brett Jones killed his grandfather. He was subsequently convicted of murder. Under Mississippi law at that time, murder carried a mandatory sentence of life without parole. (Slip op. at 3). The trial court accordingly sentenced Jones to life without the possibility of parole. In the wake of *Miller v. Alabama* and *Montgomery v. Louisiana,* Jones sought relief from his sentence. (Id.) The State Supreme Court ordered a new

sentencing hearing where the sentencing judge could consider Jones's youth and exercise discretion in resentencing him. (Slip op. at 4).

At the resentencing hearing Jones presented evidence of his childhood experiences, circumstances of the crime, and his maturation and progress in prison. He argued he should not be sentenced to the harshest possible penalty and further that the record did not support a finding that the offense reflects irreparable corruption. At the close of the hearing, the sentencing court acknowledged it had the discretion to impose a sentence other than life without parole pursuant to *Miller*; however, the court again sentenced Jones to life without parole. (Slip op. at 4).

Jones appealed and his case eventually made its way to the Supreme Court. Jones argued that a sentencer who imposes a life-without-parole sentence is required to make a specific factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible. (Slip op. at 5). Jones argued that the trial judge did not make such a finding in his case.

Although the Supreme Court reaffirmed the holdings of *Miller* and *Montgomery*, the Court rejected Jones' argument that a sentencing judge must make a specific factual finding of permanent incorrigibility when imposing a life-without-parole sentence. (Slip op. at 5). The Court also rejected Jones' alternative argument that the sentencing judge must provide an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility when imposing a life-without-parole sentence. Although the Court declined to say it agreed or disagreed with the sentence imposed, it said that Mississippi's discretionary sentencing system was constitutionally sufficient. (Slip op. at 5).

Jackson concedes, then, as he must, that Wisconsin's sentencing system is not facially unconstitutional as it requires courts to exercise discretion at sentencing. [1] He also concedes that a court need not make specific findings of fact when sentencing a youthful offender such as Jones. But that does not end the matter. Jackson's case still warrants review by this court, for three reasons.

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[1] Contrary to the holding in *Jones*, Wisconsin law *does* require a sentencing court to place the rationale for the sentence imposed on the record. *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197; *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

First, *Jones* left *Miller* and *Montgomery* intact. This means that sentencing courts are required to consider that youth and its attendant characteristics are constitutionally mitigating. It is here that the differing procedural postures of *Jones* and Jackson are critical. Jones received the hearing that Jackson seeks here. Jones had a resentencing hearing post-*Miller* at which his attorney presented evidence and argued that he was not permanently incorrigible and therefore not one of the rare few juvenile offenders who should die in prison. Jackson has thus far been denied such a hearing.

Jevon Jackson was sentenced in 1995, decades before the Supreme Court decided *Miller*. Indeed, at the time of Jackson's sentencing, a 16-year-old could be sentenced to death. It was not until 2005 in *Roper v. Simmons*, 543 U.S. 551 (2005) that the Supreme Court declared the death penalty unconstitutional for all persons under the age of 18 at the time of their crimes. The view of child offenders has changed dramatically from the time of Jackson's sentencing to that of today. Despite that change, Jackson has been denied the opportunity to have a sentencing court consider the constitutional mitigation of his youth in his case.

Second, the Court in *Jones* made clear that the sentencing court is required to view youth as a mitigating factor; youth is neither a neutral nor an aggravating factor. As such, a rote reference to age, such as "I note that the defendant is 16-years old" would not constitute consideration of the mitigation of youth. And certainly, the Court said, the sentencer cannot refuse to consider youth as mitigation. Citing to *Eddings v. Oklahoma*, 455 U.S. 104, 113-115 (1982), the Court said the sentencing court cannot refuse to consider youth as a mitigating factor. (Slip op. at 9).

In Jackson's case, the record shows the sentencing court considered Jackson's age to be an aggravating factor rather than a mitigating factor. The court spoke at length about the problem of children with guns and its agreement with the presentence writer that Jackson's crimes were a symbol of the "unraveling of society." (Petition App. at 132). The court also juxtaposed its reference to Jackson's age with the needs of the community, offsetting his youth against what the court perceived as "the needs of the public and the community." (*Id.* at 130).

Third, the Court in *Jones* did not consider whether Jones' sentence was disproportionate: "....this case does not properly present--and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality

regarding Jones' case." (Slip op. at 21). Jones claimed the court was required to make either a specific or implicit finding of incorrigibility and had failed to do so; his case did not turn on whether the resulting sentence was disproportionate.

Jackson's case *does* raise an as-applied claim of disproportionality. He does not argue for a categorical ban on life-without-parole sentences for juveniles. He acknowledges *Miller*'s allowance for the possibility of a life-without-parole sentence imposed on a child, albeit noting the Court's caution that such a sentence should be exceedingly rare.

Miller, which *Jones* affirms, declares that "the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." *Miller*, 132 S. Ct at 2466. *Roper* identified the three general differences between children and adults. First, they possess a lack of maturity and an underdeveloped sense of responsibility. Second, they are more vulnerable or susceptible to negative influences and peer pressure. And third, the personality traits of a juvenile are more transitory and less fixed than that of an adult. These characteristics of youth lead to the conclusion, again articulated in *Roper*, that juveniles as a group have diminished culpability. *Roper*, 125 S. Ct. at 1195.

In Jackson's case, however, the court did not view him as lacking culpability. The court said: "I'm also considering your demeanor at trial, *your degree of culpability—and you were the main actor*—your social traits, your character, your remorse, be it truthful or not, your repentance, cooperation, but also I have to consider the rights of the public." (Petition App. at 36; emphasis added). The court did not see Jackson as less culpable in light of his age; instead it put total culpability on Jackson's shoulders as he was "the main actor" as compared to the friend.

Given the diminished culpability of juveniles, the penological justifications for the most severe penalty available in Wisconsin—life without the opportunity for release on parole—are diminished as well. *See Roper*, 125 S. Ct. at 1196. The penological justifications identified in the *Roper* line of cases, retribution, deterrence, incapacitation and rehabilitation, are greatly reduced with juvenile offenders.

Writing about retribution, the Court said this: "Retribution is not proportional if the law's most severe penalty is imposed on one whose

culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. " *Roper* 1196.

Retribution, however, was the cornerstone of the judge's rationale in Jackson's sentencing. The court did not, for example, suggest that the retributive quality of Jackson's sentence would be lessened in light of his youth. On the contrary, the court repeatedly stated its hope that Jackson would "suffer." The judge told Jackson: "I think a death penalty would be [an] insufficient penalty for you in this case because you're not going to suffer." (Petition App. at 37). And "...life imprisonment may deprive you of freedom but it's not going to have you suffer, and I think there should be a good deal of suffering." (*Id.*). The judge told Jackson he didn't know how God could forgive Jackson and said he hoped Jackson "would have to endure some personal hell for eternity for what [he] did." (*Id.* at 36-37).

These and the judge's other references to the suffering he hoped Jackson would endure demonstrates disproportionality that renders Jackson's sentence violative of the Cruel and Unusual Punishments Clause of the Eighth Amendment. Jackson was 16-years-old at the time of his crimes. He had grown up without a father and in poverty. In his 16 years before his imprisonment, he lived in eight different places, including the basement of relatives. He was assaulted by another student, leading to hospitalization, a year prior to the crimes in this case. His mother was jailed on multiple occasions. Jackson had a gun that day because he and his friend took it from the friend's father's dresser drawer. The crime was one of opportunity. He and his friend had planned to rob someone, not commit a homicide. Even the prosecutor noted at sentencing that Jackson had not set out to kill anyone; he and his friend had set out to rob someone. Instead, he tragically killed a young mother. His crime was tragic, just as the crimes in *Miller*, *Montgomery* and *Roper* were tragic. The terrible facts of the crime, however, do not on their own constitute justification for a sentence of life-without-parole for a juvenile. The mitigation of youth and the opportunistic and impulsive nature of his crime demonstrate that the most severe punishment available in Wisconsin is disproportionate for *this* youthful offender.

The sentencing court here also gave no meaningful consideration to rehabilitation, ignoring the "less fixed" nature of Jackson's character due to his youth. The court merely said Jackson had "very limited rehabilitative needs." (Petition App. at 33). At no point did the court suggest a recognition that Jackson could mature into an entirely different person who could be safely returned to the community. The result is a disproportionate sentence.

Jones reaffirmed the *Roper* line of cases: *Roper*; *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010); *Miller* and *Montgomery*. In so doing the Court reaffirmed the truth that children are different from adults, and their differences render suspect the rationale for imposing the most severe sentence available in Wisconsin. While *Jones* does not require a specific finding of fact of incorrigibility at sentencing, a sentence that does not take into consideration the unique attributes of the child being sentenced risks disproportionality. That is what happened here. The court sentenced Jevon Jackson before the Supreme Court decided *Roper* or any of the cases that built on *Roper*, and as a result, the court did not have the benefit of those cases. The result was a disproportionate sentence.

In sum, Jackson's case warrants review by this court. *Jones* decided that courts need not make a specific finding of incorrigibility when sentencing a youthful offender to life-without-parole. But *Miller* and *Montgomery* still govern the sentencing of juvenile offenders. Jackson has never had a sentencing hearing at which the court applied the mitigating factors of youth when deciding upon the appropriate sentence. As a result, his sentence is disproportionate and resentencing is required.

Respectfully submitted,

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Jevon Jackson