

No. _____

In the
Supreme Court of the United States

BRETT JONES,
Petitioner,

v.

MISSISSIPPI,
Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of Mississippi**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the sentencing court violate the Eighth Amendment if it imposes a sentence of life without parole upon a juvenile without making a finding of fact on the record that the defendant is permanently incorrigible?

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OPINIONS BELOW

The opinion of the Mississippi Court of Appeals affirming the order of the Circuit Court of Lee County, Mississippi is reported but is not yet released for publication. *Brett Jones v. State*, – So.3d –, 2017 WL 6387457, Decided December 14, 2017 (Miss. Ct. App. 2017).

JURISDICTION

This court has jurisdiction under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the U.S. Constitution states as follows: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

STATEMENT OF THE CASE

On August 9, 2004 Brett Jones was fifteen years of age and was living with his grandparents in Lee County, Mississippi. Jones’s grandfather was Bertice Jones and discovered Brett Jones’s girlfriend, Michelle Austin, in Brett Jones’s bedroom. Bertice Jones told Austin to leave his house. Brett Jones told Austin that he was going to hurt his granddaddy. Petitioner’s Appendix C, Page 32a-33a.

Later, Bertice Jones walked into the kitchen of his home and found Brett Jones making a sandwich. Brett Jones said he sassed his grandfather, and they began to argue. Jones said his grandfather pushed him, and he pushed him back. Brett Jones said his grandfather

swung at him, and Brett Jones threw a steak knife at him. Petitioner's Appendix C, Page 33a.

Brett Jones said his grandfather came at him, and he stabbed his grandfather with a fillet knife eight times to get away from him. Bertice Jones died. The cause of death was a stab wound to the chest. Bertice Jones had eight stab wounds. He also had cuts on his hands which were classified as "defensive posturing injuries". Petitioner's Appendix C, Page 35a.

The Circuit Court of Lee County, Mississippi tried Brett Jones for the murder of Bertice Jones. Jones defended against the charge by arguing that he acted in self-defense. The jury returned a verdict of guilty of murder, and the court sentenced Jones to a term of life. Under the parole statute, Jones was not eligible for parole. *Jones v. State*, 938 So.2d 312, 313-315 (Miss.Ct.App.2006).

Following this court's opinion in *Miller v. Alabama*, 567 U.S. 460 (2012), the Mississippi Supreme Court vacated and set aside Jones's sentence of life without parole. The court remanded the case for a new sentencing hearing consistent with the holding in *Miller, Id.* *Jones v. State*, 122 So.3d 698, 703 (Miss.2013).

The Circuit Court of Lee County conducted a hearing on February 6, 2015. Jones put on the testimony of six witnesses. He called his mother, his brother, his aunt, his grandmother, and a corrections officer. Jones also testified at the hearing. The court found that Brett Jones was not entitled to parole eligibility under *Miller*. *Jones v. State*, 2017 WL

6387457, *4, –So.3d–. Petitioner’s Appendix D, page 57a.

Jones appealed the circuit court’s decision. The Mississippi Court of Appeals affirmed the circuit court. *Jones v. State*, 2017 WL 6387457, *7, –So.3d–. Petitioner’s Appendix A, at 47a.

Jones sought certiorari from the Mississippi Supreme Court. The court granted certiorari on August 2, 2018. 250 So.3d 1269. The court conducted oral argument.

On November 27, 2018, the Mississippi Supreme Court on its own motion found that there was no need for further review and dismissed the writ of certiorari. As Jones asserts in his petition, the Mississippi Supreme Court’s vote to dismiss was five to dismiss the petition and four who opposed dismissing the petition. Petitioner’s Appendix A, at 1a.

Jones filed a petition for certiorari with this court.

REASONS FOR DENYING THE WRIT

The State of Mississippi opposes granting the writ. The petitioner is asking the Court to declare that trial courts are required to make a finding that a juvenile is permanently incorrigible before sentencing him to life without parole.

Neither *Miller* Nor *Montgomery* Require the Trial Court to Make the Factual Finding.

This Court noted in *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016), that *Miller* did not require trial courts to require the factfinding which Jones now asks the Court to hold mandatory.

“That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States’ sovereign administration of their criminal justice systems. See *Ford v. Wainwright*, 477 U.S. 399, 416–417, 106 S. Ct. 2595, 91 L.Ed.2d 335 (1986) (“[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences”).

The Split Between the States Does Not Require the Issue to be Resolved by this Court.

The split between the various states is not surprising and does not require this Court to grant certiorari. The above mentioned observation in

Montgomery supports a finding that the Court anticipated that the various states might develop different procedures with which “. . . to enforce the constitutional restriction upon [their] execution of sentences.”

The Petitioner argues that there is a split between the states, six states requiring the finding and four states not requiring the finding. Petitioner argues that only this Court can resolve the disagreement. Petitioner is correct that there is a six states to four states split. One question that arises is does this disagreement between states one that needs to be resolved?

The facts in *Miller* were distinguishable from the facts in *Montgomery*. The defendants in *Miller* were both fourteen years of age when they committed their murders in 1999. Henry Montgomery was seventeen years of age when he committed his murder in 1963, and he had been incarcerated forty six years.

Can the rule sought by Jones be appropriate and helpful? This Court said in *Montgomery* that “. . . prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.” There is less information available for prisoners who have been incarcerated a short period of time before being sentenced.

The exception would be prisoners like Henry Montgomery who had been incarcerated for a longer period of time and who could be more accurately

evaluated for the possibility of rehabilitation. That group will be growing smaller over time. The larger group, and probably a growing group, will be the group that contains people who were juveniles when they committed murder and whom were sentenced within one or two years of the crime.

The outcome of the holdings in *Miller* and *Montgomery* resulted in a new rule of substantive law leading to the retroactive effect of the holding in *Miller*. What is to be done with defendants similarly situated to Brett Jones who have already had hearings where the *Miller* factors were considered?

This Case Is Not the Ideal Case to Grant Certiorari.

Brett Jones argues that this case is the ideal vehicle to decide the issue. He argues that in the prior Mississippi cases the state argued that the petitioners failed to preserve the mandatory finding arguments in the state proceedings, but Jones's record precludes any such contention.

The next to last paragraph in *Montgomery* says that “. . . prisoners like Montgomery must be given some opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.” Montgomery was seventeen years of age when he committed his crime and had served fort-six years in prison.

Brett Jones was given the opportunity referred to in *Montgomery* when he was given the hearing. The trial court conducted a hearing. Jones testified along with

his mother, brother, grandmother, cousin, and a corrections officer.

Jones has received a hearing. The court considered the *Miller* factors, as it was required to subsequent to the holding in *Miller*. With all due respect, this is not the ideal case to decide this issue, if it needs to be decided.

The Importance of the Question

Brett Jones argues that the issued is of national importance because meaningful enforcement of *Montgomery's* command demands a required finding of permanent incorrigibility. He argues that the same logic applies to juvenile life without parole sentences that applies to death penalty cases. Jones refers to the necessary finding of at least one aggravating circumstance. The finding Jones is referring to is that the juvenile was irreparably corrupt. If that finding is not made, there is a grave risk that corrigible juveniles will be sentenced to life without parole and thereby held in violation of the Constitution.

This Court in *Miller* said that the sentencing court must consider the characteristics of youth, they are different, and how that counsels aganst life without parole. *Montgomery* then said that *Miller* did not require the fact finding, and the states were left to determine how to enforce the constitution when sentencing a juvenile defendant.

If this Court intended that the sentencing court be required to make the finding of fact regarding the defendant being permanently incorrigible, it would have held that in either *Miller* or *Montgomery*. By

quoting *Ford v. Wainwright*, 477 U.S. 399, 416–417 (1986) saying the Court was leaving to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences, the Court was doing just what it said it was doing. The Court was limiting its involvement in setting out the procedure to achieve the constitutional restriction.

Helpfulness to The Function of the Appellate Courts

Brett Jones argues that the finding is critical to the function of the appellate courts who must determine whether a life-without-parole sentence took account of the defendant’s circumstances or was the result of bias or was otherwise imposed in a freakish manner. He claims that the sentencing authority must determine whether the defendant is permanently incorrigible for appellate review to be meaningful.

What this Court required in the *Miller* opinion, however, is found in the following, “Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller, Id.*, 480. *Montgomery, Id.*, 726, then added that the finding in *Miller* was new substantive law, therefore retroactive, and announced that life in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect “irreparable corruption.”

Certainly, determining “irreparable corruption” is possibly one way of testing the sentence’s proportionality and the constitutionality of the sentence. Without getting too much more into the merits, the question Jones brings before this Court is specifically “Does the Eighth Amendment require the sentencing court to make a finding that the juvenile defendant is permanently incorrigible before sentencing him to life without parole?”

This court does not have to make that determination based upon *Miller* and *Montgomery*. The trial courts can determine the appropriate sentence consistently with the constitution by conducting a hearing, considering the factors found in *Miller*, and considering whether the defendant’s crime does not reflect transient immaturity. *Montgomery, Id.*, 735.

CONCLUSION

The petition for certiorari should not be granted.

Respectfully submitted,

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