No. 20-1155

IN THE
Supreme Court of the United States

JONAS DAVID NELSON,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about significant constitutional issues. With respect to the Eighth Amendment, the Rutherford Institute works to protect the due process rights of prisoners and those facing lengthy prison sentences. One of the Institute's fundamental purposes is to advance the preservation of the most basic freedoms our nation affords its citizens, which in this case is the right to a hearing to demonstrate that one is constitutionally ineligible for a sentence of life imprisonment without the possibility of release.

[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Both parties consented to the filing of this brief by email or letter from their counsel of record.

SUMMARY OF ARGUMENT

This case presents an important question about the procedural rights of youthful defendants facing sentences of life without the possibility of release (LWOR). This Court has held time and again that the Eighth Amendment forbids the automatic imposition of LWOR sentences on defendants under 18 years of age. The Court's logic underlying those holdings has focused on the incomplete mental, emotional, and psychological development of youthful defendants under 18. Yet modern research shows that many defendants just over that threshold share those same characteristics that make defendants under 18 ineligible for automatic LWOR sentences. Indeed, this Court has recognized that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper v. Simmons*, 543 U.S. 551, 574 (2005). Here, Petitioner sought nothing more than a post-conviction hearing at which he could present evidence that although he was 18 years and 7 days old at the time of the offense, he was just as emotionally and psychologically immature as defendants under 18. The courts below wrongly denied him that necessary procedure to assert a critical constitutional right.

I. This Court has relied on the psychological characteristics of youthful defendants in holding that juveniles may not be subject to mandatory LWOR sentences. Youthful defendants are often immature, impulsive, and highly susceptible to peer pressure. Those characteristics make youthful offenders less culpable than other defendants. The Court's reasoning behind these holdings has focused less on rigid rules tied to age, and more on the scientific

literature about brain development and personality characteristics among youthful defendants. It is those characteristics—not chronological age—that the Court has considered in deciding the permissibility of mandatory LWOR sentences.

II. The relevant scientific literature overwhelmingly shows that individuals in their late teens and early twenties are psychologically and emotionally indistinguishable from many youthful defendants under 18. That literature explains that the areas of the brain that regulate higher-level reasoning and mitigate risk-taking do not fully develop until the early twenties. Further, research confirms that the defining psychological characteristics of defendants under 18—impulsivity, susceptibility to peer pressure, and recklessness—remain with most individuals into their late teens and early twenties. Many state and federal laws implicitly recognize these common-sense findings by limiting certain rights and privileges to people older than 21 years of age. There is little reason, then, to presume when applying the Eighth Amendment that all youthful defendants older than 18 have completed their psychological and mental development.

III. This Court's Eighth Amendment rulings have required sentencing hearings for defendants at which they can develop mitigating evidence, including evidence about their incomplete mental development. This Court has recognized that such hearings are necessary to vindicate the important Eighth Amendment rights at stake. Indeed, the Court has explained that the need for an evidentiary hearing approaches its zenith as the rights and consequences at stake become more important. Here, the rights at

stake include the permissibility of a mandatory LWOR sentence for a juvenile barely 18 years old at the time of the offense—a sentence that requires the Petitioner to die in prison. Absent intervention by this Court, the Petitioner will never receive an opportunity to develop evidence that shows he was psychologically, emotionally, and mentally indistinct from youthful defendants under 18 at the time of the offense.

ARGUMENT

I. This Court has deemed mandatory LWOR sentences unconstitutional for youthful offenders because their psychological, emotional, and mental development is incomplete.

This Court's Eighth Amendment jurisprudence about youthful offenders has evolved over time, but its decisions share important common threads. Although the Court has sometimes employed chronological cutoffs to make its holdings administrable, the rationale behind these rulings has not treated age as a magical number. Instead, this Court has focused on the scientific research documenting young offenders' lack of psychological, emotional, and mental development. Informed by this scientific evidence, the Court has consistently emphasized the constitutional infirmity of applying the harshest penalties to youthful offenders without considering the attendant circumstances of their youth.

First, in *Roper*, 543 U.S. at 578, the Court held that the Eighth Amendment forbade the imposition of the death penalty on defendants who were younger

than 18 at the time of the offense. The Court examined the critical differences between juveniles and adults, including juveniles' lack of maturity, their diminished sense of responsibility, their susceptibility to negative influences, and their lack of well-formed character. *Id.* at 569–70. Before *Roper*, a plurality of the Court had "recognized the import of these characteristics with respect to juveniles under 16." *Id.* at 570–71 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 833–38 (1988)). The *Roper* Court determined that these youthful features did not magically disappear at 16, but instead continued to drive social and psychological behavior for all juvenile offenders under 18. *Id.* *Roper* thus stands for more than the inapplicability of the death penalty to juveniles. *Roper* embraced the relevant scientific research to focus on psychological characteristics in adjusting the age at which the Constitution prevents the application of certain sentences.

The Court carried *Roper*'s logic forward in *Graham v. Florida*, 560 U.S. 48, 74 (2010), where it held that the Eighth Amendment prohibits LWOR sentences for juvenile offenders who did not commit homicide. Finding that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," the Court determined that an offender's youth should factor heavily into the Eighth Amendment analysis. *Id.* at 68–69. In plain terms, the Court acknowledged that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.* at 76. The Court noted that the goals of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do not support

imposing the harshest sentences on juvenile offenders without reference to their immature psychological development. *Id.* at 71–74. The Court emphasized that states must give these offenders "some meaningful opportunity" to demonstrate that they do not deserve an LWOR sentence. *Id.* at 75.

Next, in *Miller v. Alabama*, 567 U.S. 460, 465, 489 (2012), this Court again extended its prior rulings, this time holding that a juvenile offender—even one convicted of homicide—cannot receive a mandatory LWOR sentence. Although *Miller* did not foreclose LWOR sentences for juvenile homicide offenders, it requires sentencing courts "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. *Miller* designated mandatory LWOR sentences unconstitutional for those under the age of 18, but the Court's rationale did not depend on that particular age cutoff. Instead, the *Miller* Court emphasized the need for "individualized sentencing," and observed that its prior opinions have "insisted . . . that a sentencer have the ability to consider the '*mitigating qualities of youth*.'" *Id.* at 475–76 (emphasis added). Mandatory penalties are inappropriate for youthful defendants because they "preclude a sentencer from taking account of an offender's age *and the wealth of characteristics and circumstances attendant to it*," which include "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 476–77 (emphasis added). Mandatory sentences likewise "neglect[] the circumstances" of the offense, including "familial [or] peer pressures" and the "incompetencies associated with youth." *Id.* at 477–78. Because mandatory LWOR sentences for juveniles "mak[e] youth (and all

that accompanies it) irrelevant," such schemes "pose[] too great a risk of disproportionate punishment." *Id.* at 479.

Then, the Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), which held that *Miller* announced a substantive rule of constitutional law that applies retroactively to juvenile offenders whose sentences were final before *Miller* was decided. *Montgomery* explained that *Miller* barred life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734. But *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* Accordingly, even a sentence that considers an offender's age still violates the Eighth Amendment if the offender's crime reflects "unfortunate yet transient immaturity." *Id.* Thus, the Court determined that youthful offenders like Montgomery "must be given the opportunity to show their crime did not reflect irreparable corruption." *Id.* at 736. As this Court sees it, although *Miller* announced a new substantive rule, its holding included "a procedural component." *Id.* at 734.

The rationale underpinning these decisions highlights that consideration of youth under the Eighth Amendment does not depend on rigid age-based categories. *E.g.*, *In re Phillips*, 2017 WL 4541664, at *4 (6th Cir. July 20, 2017) (Cole, C.J., concurring) (noting that "recent decisions by several courts, including the Supreme Court, have recognized that the qualities separating juveniles from adults are

not static" and instead "fall along a spectrum that varies as each person ages and matures"). Indeed, this Court's Eighth Amendment precedents have emphasized flexibility and attention to scientific research when assessing the constitutionality of certain penalties for youthful offenders. *See Miller*, 567 U.S. at 471 (noting that the Court's decisions in *Graham* and *Roper* rested on scientific research). For instance, in *Roper*, the 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*, the 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). Observing that the "science and social science supporting *Roper*'s and *Graham*'s conclusions [had] become even stronger" by the time *Miller* was decided, the Court pointed to new scientific evidence submitted by *amici* that confirmed adolescent brains do not fully mature by 18. *Id.* at 472 n.5.

At bottom, this Court's rationale in *Roper*, *Graham*, *Miller*, and *Montgomery* emphasized the psychological and emotional characteristics of youth.[2] The incomplete brain development of youthful

[2] Lower courts have applied these holdings expansively. For instance, the Fourth Circuit determined that although *Miller* and *Montgomery* invalidated mandatory LWOR schemes for juvenile offenders, the logic of those decisions applies to any case in which a juvenile homicide offender received an LWOR sentence, even if that sentence was not mandatory. *Malvo v. Mathena*, 893 F.3d 265, 273 (4th Cir. 2018).

offenders led this Court to recognize that while "[a]n offender's age is relevant to the Eighth Amendment," *Graham*, 560 U.S. at 76, consideration of age alone will not satisfy the Eighth Amendment's mandate. *See Montgomery*, 136 S. Ct. at 734 (holding that a sentencer must consider not only age but also whether the crime reflects "unfortunate yet transient immaturity"). Rather than tie its holdings to chronological age, this Court has repeatedly employed a holistic approach that focuses on the distinctive attributes of youth. *See Miller*, 567 U.S. at 477 (rejecting mandatory sentences that fail to account for circumstances of youth such as home environment and peer pressure).

II. Scientific research consistently shows that many youthful defendants older than 18 are psychologically, emotionally, and mentally indistinguishable from youthful defendants younger than 18.

Modern neurological research confirms that the hallmarks of juvenile behavior—impulsivity, recklessness, and susceptibility to peer pressure—remain after 18 years of age. For example, research confirms that the regions of the brain that regulate higher-level reasoning and emotional control do not fully develop until well after 18 years of age. *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 466 (2009); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 66 (2008). The brains of individuals under 21 years old remain underdeveloped in the three regions that support self-control and emotional regulation: the amygdala, the prefrontal cortex, and the ventral striatum. *See* B.J.

Casey, *Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior*, 66 ANN. REV. PSYCHOL. 295, 300–01 (2015). Indeed, recent functional MRI studies indicate that the brains of people in their late teens and early twenties often do not display the structural development needed for adequate emotional regulation. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8175–76 (2004). After canvassing the relevant literature, many experts in this field concluded that "young adult offenders aged 18–24 are more similar to juveniles than to adults with respect to their offending, maturation, and life circumstances." Rolf Loeber et al., *Bulletin 1: From Juvenile Delinquency to Young Adult Offending*, at 20 (2013), *available at* https://tinyurl.com/yz934fee.

Researchers have explained that incomplete brain development makes the period between the late teens and early twenties one of "heightened vulnerability to risk taking." Steinberg, *supra*, at 466. That propensity for recklessness is borne out in various datasets. For example, "the peak risk years for young men both committing and being a victim of homicide are nineteen and twenty." John H. Blume et. al., *Death by Numbers: Why Evolving Standards Compel Extending* Roper*'s Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 TEX. L. REV. 921, 933 (2020). Likewise, "people in their late teens and early twenties have higher rates of alcohol and illicit drug use, unplanned pregnancy, and sexually transmitted infections than any other age group." *Id.*

Like individuals under 18, many people in their late teens and early twenties are heavily influenced by peer pressure. Individuals older than 18 display a "sensitivity to environmental factors" and ongoing, incomplete character development. *See* Adriel Boals et al., *Adverse Events in Emerging Adulthood Are Associated with Increases in Neuroticism*, 83 J. PERSONALITY 202, 204 (2015). "These factors . . . mean that people in their late teens and early twenties are uniquely susceptible to peer pressure." Blume, *supra*, at 933.

The latest research on this topic continues to reinforce that many people in their late teens and early twenties are psychologically, emotionally, and mentally indistinguishable from individuals younger than 18. One group of scholars recently concluded that people in their late teens and early twenties "are more likely than somewhat older adults to be impulsive, sensation seeking, and sensitive to peer influence in ways that influence their criminal conduct." Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 L. & HUMAN BEHAVIOR 69, 83 (2019). Another scholar who reviewed the latest findings in this area likewise determined that "relative to adults over twenty-one, young adults show diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal." Laura Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMPLE L. REV. 769, 786 (2016).

Beyond the findings summarized above, many other scholars have noted the compelling psychological and neurological research that shows people in their late teens and early twenties display the same emotional and behavioral characteristics as people under 18. *See, e.g.*, Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139 (2016); Emily Powell, Comment, *Underdeveloped and Over-Sentenced: Why Eighteen- to Twenty-Year-Olds Should be Exempt from Life Without Parole*, 52 U. RICH. L. REV. ONLINE 83 (2018); Kevin Lapp, *Young Adults & Criminal Jurisdiction*, 56 AM. CRIM. L. REV. 357 (2019); Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669; *see also* Madison Ard, Note, *Coming of Age: Modern Neuroscience and the Expansion of Juvenile Sentencing Protections*, 72 ALA. L. REV. 511 (2020).[3] All this research is consistent with this Court's observation in *Roper* that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." 543 U.S. at 574.

Consistent with the latest scientific research on brain development, federal law is replete with provisions that impose limitations on people in their late teens and early twenties. For example, federal law prohibits the sale of certain firearms to persons under 21. *See* 18 U.S.C. § 922(b)(1), (c)(1). The Fifth Circuit rejected a Second Amendment challenge to

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[3] Of course, the best way to determine whether this research is credible, reliable, and accurate is to subject it to the rigors of an evidentiary hearing, which is exactly what Petitioner in this case seeks.

these restrictions because they reflect Congress' rational conclusion that "minors under 21" "tend to be relatively immature." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 203 (5th Cir. 2012), *cert. denied* 571 U.S. 1196 (2014). Federal law also provides states with significant financial incentives to prevent individuals under 21 from purchasing or consuming alcoholic beverages, and to extend the age of eligibility for foster care services to 21. *See* 23 U.S.C. § 158(a) (drinking age); Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-351, § 201(a), 122 Stat. 3949 (2008). Federal immigration law limits visa applications from persons under 21. *See* 8 U.S.C. § 1151(b)(2)(A)(i). And in the criminal-law context, a 2014 report from the U.S. Department of Justice recommended that legislators raise the age for adult criminal court to at least 21 given that the latest research suggests that "young adult offenders ages 18–24 are, in some ways, more similar to juveniles than to adults." *See* Blume, *supra*, at 936.

States and localities impose similar restrictions on people under 21 years of age. For example, "all fifty states and the District of Columbia impose a minimum-age restriction of twenty-one years for the consumption, purchase, or possession of alcohol, while many impose a similar restriction for recreational marijuana." *Id.* at 935. Likewise, "[o]ver 530 cities and counties in thirty-one states now prohibit the sale of tobacco to people under twenty-one," and "[f]orty-one states impose a minimum age of twenty-one to obtain concealed-carry permits for firearms." *Id.*

Taken together, the latest scientific data confirm that many youthful defendants older than 18 are

psychologically, emotionally, and mentally indistinguishable from defendants younger than 18. This Court recognized in *Graham*, *Miller*, and *Montgomery* that mandatory LWOR sentences for juveniles are unconstitutional because juveniles are impulsive, susceptible to peer pressure, and have not yet completed their neurological development. The latest research reveals that those same characteristics are present in many people in their late teens and early twenties, which makes mandatory LWOR sentences for that age group—especially a defendant barely 18 years old—just as constitutionally problematic.

III. Petitioner is entitled to a hearing at which he can develop evidence that he is psychologically, emotionally, and mentally indistinguishable from juvenile defendants.

All of the scientific evidence recited above—the very information this Court has found relevant to interpreting the Eighth Amendment's guarantees—means nothing if a defendant does not have the opportunity to present it to a sentencer. Petitioner's case is a particularly strong example of the need for a hearing to determine whether he, at 18 years and 7 days old, was just as psychologically youthful as someone only eight days younger.

The trial court imposed an LWOR sentence on Petitioner automatically, within an hour of a jury finding him guilty. Due to the mandatory nature of his sentence, the sentencing court did not consider "the mitigating qualities of [his] youth," *Miller*, 567 U.S. at 476, despite some indications of those qualities in the record. *See, e.g.*, Pet. App. 117a (social

functioning consistent with that of a 12-year-old); 119a (deficits with adaptive functioning that were inconsistent with chronological age); 120a (vulnerability to exploitation by individuals in social hierarchies). To this day, Petitioner has not had an opportunity to develop and present evidence that, at the time of the offense, he was no different from youthful offenders under 18. This procedural failure contradicts this Court's findings that sentencers must consider "youth and its attendant characteristics" before imposing an LWOR sentence. *Montgomery*, 136 S. Ct. at 735.

An individualized hearing is the only way Petitioner can present evidence that his sentence violates the Eighth Amendment. This Court has repeatedly held that certain procedural rights—like individualized hearings—are necessary to protect substantive constitutional rights. Indeed, this Court has observed that "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). The Court has "frequently recognized the importance of the facts and the factfinding process in constitutional adjudication." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 n.5 (1986). "[T]he more important the rights at stake[,] the more important must be the procedural safeguards surrounding those rights." *Speiser*, 357 U.S. at 520–21. One can think of few rights more important than the protection of a young offender from "the law's harshest term of imprisonment." *Miller*, 567 U.S. at 474.

Holding true to this premise, this Court has required procedural protections to guard Eighth Amendment rights. *See, e.g.*, *Sumner v. Shuman*, 483 U.S. 66, 75 (1987) ("We believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."). As the *Montgomery* Court recognized, although *Miller* announced a substantive rule of law, it also set forth a critical procedural protection by "requir[ing] a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence."[4] 136 S. Ct. at 734.

The need for individualized hearings stems from this Court's insistence that the Eighth Amendment be viewed "according to the evolving standards of decency that mark the progress of a maturing society." *Miller*, 567 U.S. at 469. Yet Petitioner has no vehicle through which to show that at the time of the offense,

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[4] In light of this Court's emphasis on procedural safeguards, federal courts have identified other areas of the law that require individualized consideration of an offender's age. Most recently, courts have looked to attributes of youth when reconsidering sentences under the First Step Act of 2018, including sentences imposed on defendants who were over 18 at the time of their crimes. *See, e.g.*, *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020) (approving of district courts' consideration of 19- to 24-year-old defendants' "relative youth" in finding them eligible for compassionate release under the First Step Act); *United States v. McDonel*, 2021 WL 120935, at *4–5 (E.D. Mich. Jan. 13, 2021) (reducing a 100-year sentence under the First Step Act because it was disproportionately severe for a 19-year-old defendant), *appeal docketed*, No. 21-1152 (6th Cir. 2021).

consistent with this Court's observation that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," *Roper*, 543 U.S. at 574, he was psychologically indistinguishable from his slightly younger peers. Unless this Court steps in, Petitioner will die in prison without ever having received an evidentiary hearing on his Eighth Amendment claim.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

March 24, 2021 Respectfully submitted,

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