

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 23-2316

DONNELL WILSON,
Petitioner-Appellant,

v.

RON NEAL,
Warden, Indiana State Prison,
Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division
Cause No. 3:22-cv-205-JD-MGG
Hon. Jon E. DeGuilio, Judge

BRIEF OF RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

Petitioner-Appellant Donnell Wilson's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

- I. Whether Wilson filed his petition within the statute of limitations.
- II. Whether Wilson can show that his 100-year sentence violates the Eighth Amendment under either deferential review or de novo review.

STATEMENT OF THE CASE

Nature of the Case

On March 15, 2022, Donnell Wilson filed a petition for a writ of habeas corpus challenging his 100-year sentence for his 2014 Lake County, Indiana, convictions for two counts of murder and one count of robbery (R. 1). Wilson's earliest release date is February 16, 2063, when he will be 66 years old. The district court found that Wilson's petition was timely, but that it was without merit (SA 2a-22a). The district court granted "a certificate of appealability on the issue of whether the Indiana Supreme Court contradicted or unreasonably applied clearly established law as determined by the Supreme Court of the United States by determining that the Eighth Amendment does not require individualized consideration to sentence juvenile homicide offenders to de facto life sentences" (SA 22a).

Facts of the Crime

The Indiana Supreme Court recounted Wilson's conviction in his appeal from the denial of post-conviction relief:

In March 2013, sixteen-year-old Donnell Wilson, his then-girlfriend, her brother Jonte Crawford, and another of the Crawfords' relatives were all walking home from playing basketball in their hometown of Gary, Indiana. When the group encountered fifteen-year-old Derrick Thompson, Wilson and Jonte flashed the handguns they were carrying and began harassing and intimidating Thompson, making references to the local Tre 7 gang. The pair then took Thompson's smartphone and headphones and walked away.

A short time later, the group happened upon brothers Shaqwone Ham and Charles Wood. Wilson and Jonte were members of several interrelated gangs, including the Get Fresh Boys, Tre 7, and Glen Park Affiliated, which were all at odds with the Bottom Side gang, to which Ham and Wood belonged. Wilson had previously argued in person with the brothers and their disputes had continued online with the brothers threatening to fight Wilson. The groups initially exchanged greetings, but Wilson and Jonte soon began to argue with the brothers. Wilson exclaimed, "Oh, y'all looking for me? I'm in your hood." Seconds later, he fatally shot Wood in the head. When Ham tried to run, Jonte shot him several times, killing him too. It is unclear from the record if Wilson also shot at Ham. The brothers were unarmed.

Three hours before the murders, Wilson—who had previously made several gang-related posts on Twitter—sent out a new tweet declaring "Glen Park or get shot," referring to the Gary neighborhood where he lived. An hour after the murder, he tweeted "Chillen wit my bros #[GetFreshBoys]." Jonte and Wilson were quickly arrested, and police found Thompson's possessions on Jonte. Wilson was charged with two counts of murder, Class B felony armed robbery, and a Class D felony conspiracy to commit criminal gang activity. The State also sought a criminal gang enhancement.

While Wilson was lodged in the Lake County Jail awaiting trial, he told his cellmate he killed Ham and Wood because they were affiliated with the rival Bottom Side gang. He also explained how his gang affiliation had led to Twitter disputes with members of the Bottom Side gang. Wilson, along with some fellow inmates, later jumped this cellmate because he was from the "other side of the bridge" dividing Gary. During this period, Wilson was also recorded on a jailhouse video conference stating he wanted to "smash" a member of a rival gang incarcerated in the same facility and indicated a desire to continue participating in gang activity.

After a four-day trial beginning in June 2014, a jury found Wilson guilty on all counts. The trial court sentenced Wilson to a term of sixty years for the first murder conviction, fifty-five consecutive years for the second murder conviction, six consecutive years for armed robbery, and two years for criminal gang activity, with an additional sixty consecutive years added under the criminal gang enhancement, for an aggregate sentence of 183 years. Wilson's trial counsel did not retain any experts in preparation for the sentencing hearing and did not present any witnesses at sentencing. When handing down the sentence, the court cited several aggravating factors, but found Wilson's youth to be a mitigating factor.

Wilson v. State (Wilson III), 157 N.E.3d 1163, 1167–68 (Ind. 2020) (record citations and footnotes omitted) (SA 28a-29a).

Direct Appeal

On direct appeal, Wilson challenged his convictions on three grounds, contending that (1) the trial court erred by admitting Twitter messages into evidence without foundation, (2) his conviction for conspiracy to commit criminal gang activity should be vacated because it was duplicative of the gang enhancement, and (3) the trial court erred when it excluded Wilson from a portion of his trial after a violent outburst (R. 7-3 at 5-6). The Court of Appeals of Indiana found in favor of Wilson on the criminal-gang-activity issue and vacated the conviction, thereby reducing his sentence by two years. *See Wilson v. State (Wilson I)*, 30 N.E.3d 1264, 1269 (Ind. Ct. App. 2015) (App. 14a). Wilson's other arguments were rejected. *Id.* Wilson sought transfer to the Indiana Supreme Court, which denied transfer on August 13, 2015 (R. 7-2 at 4).

State Post-Conviction Proceedings

On August 11, 2016, Wilson filed a petition for post-conviction relief in the state trial court (R. 7-9 at 8). The trial court denied the petition on November 21, 2018 (R. 7-9 at 14). Wilson appealed. The Court of Appeals of Indiana reversed the trial court and ordered a new sentencing hearing (R. 7-14). However, the Indiana Supreme Court granted transfer (R. 7-18 at 3). The Indiana Supreme Court found that appellate counsel was ineffective for not asking the Indiana Supreme Court for appellate review of his sentence. *Wilson III*, 157 N.E.3d at 1181 (SA 44a). The Indiana Supreme Court then exercised that appellate review and reduced Wilson's sentence to 100 years. *Id.* at 1184 (SA 47a). The court determined that "A 100-year sentence means that after receiving good time credit Wilson will likely be eligible for release in his mid-to-late sixties, meaning that he has reasonable hope for a life outside prison." *Id.* (SA 47a). Wilson sought rehearing, which was denied on January 22, 2021 (R. 7-18 at 4). On February 12, 2021, the trial court—without a hearing—issued an updated sentencing judgment consistent with the Indiana Supreme Court's reduction (R. 7-1 at 12-13).

Wilson attempted to appeal the updated judgment. On February 24, 2021, the Court of Appeals of Indiana dismissed the attempted appeal as improper (R. 7-21 at 2). Wilson did not seek transfer to the Indiana Supreme Court (R. 7-21 at 2).

Federal Habeas Corpus Proceedings

On March 15, 2023, Wilson filed a petition for a writ of habeas corpus in the Northern District of Indiana (R. 1). The district court determined that the petition was timely (SA 11a). On the merits, the district court determined that the state

court adjudicated Wilson's Eighth Amendment claim on the merits, and Wilson did not show that this determination was contrary to or an unreasonable application of clearly established federal law (SA 17a-22a). The district court granted a certificate of appealability on the Eighth Amendment claim and entered judgement on June 1, 2023 (SA 23a).

SUMMARY OF THE ARGUMENT

Wilson filed his petition outside the one-year statute of limitations. The Indiana Supreme Court granted him relief during collateral review. It reduced his sentence as a remedy for his claim of ineffective assistance of appellate counsel. This appellate remedy did not constitute a new judgment that gave Wilson a new statute of limitations. But even if it did, Wilson's petition was still untimely because he did not file it within a year of the court's decision. Because the petition was untimely, this Court should remand to the district court to dismiss Wilson's habeas petition for lack of jurisdiction.

The Indiana Supreme Court determined that the *Miller* line of cases under the Eighth Amendment only apply to juvenile life-without-parole sentences and not juvenile term-of-year sentences. Wilson ignores this holding and cites no Supreme Court of the United States case that controls the issue. To secure federal habeas relief, Wilson must show that the state court's decision is contrary to or an unreasonable application of clearly established federal law. He does not even attempt to show this. Further, the Indiana Supreme Court determined that the 100-year sentence it imposed after considering Wilson's age allowed Wilson to have a

life outside of prison, meaning the sentence is not a de facto life sentence. Wilson also ignores this holding and attempts to convince this Court to find to the contrary under de novo review. But again, to gain relief, Wilson must first show that the state court's decision is contrary to or an unreasonable application of clearly established federal law. He cites no Supreme Court of the United States case that mandates a different result.

Even if this Court were reviewing de novo, Wilson fails to show a constitutional violation. Before sentencing a juvenile offender to life without parole, the sentencer must have discretion to give less than a life sentence while considering the juvenile's age. Even if the standard for life without parole were applied here, the Indiana Supreme Court had discretion to sentence Wilson to a lower term-of-years sentence and explicitly considered his youth. Wilson has failed to show that he is entitled to habeas relief.

ARGUMENT

I.

Regardless of whether the Indiana Supreme Court's disposition of Wilson's state post-conviction proceedings started a new limitations period, Wilson did not file his petition within the limitations period.

Wilson's petition was untimely, so the Court should dismiss his appeal. The district court found that Wilson's petition was timely filed, and this Court reviews that decision de novo. *Mahaffey v. Ramos*, 588 F.3d 1142, 1144 (7th Cir. 2009). Pursuant to 28 U.S.C. § 2244(d)(1), a petition for writ of habeas corpus seeking federal collateral relief from a state conviction must be filed within one year. The one-year period of limitation runs from the latest of four dates: (1) the date on which

the judgment became final by the conclusion of direct review or the expiration of time within which to seek review; (2) the date on which an unconstitutional impediment to appeal, created by the state, was removed; (3) the date on which the constitutional right asserted was recognized by the Supreme Court of the United States and made retroactively applicable to cases on collateral review; or (4) the date on which the factual predicate for the claims could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). However, the statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *Artuz v. Bennett*, 531 U.S. 4, 5 (2000).

The first question to be answered is whether the Indiana Supreme Court’s reduction of Wilson’s sentence opened a new one-year statute of limitations. It did not. If the Supreme Court’s reduction did not give a new statute of limitations period, the petition was untimely. If the reduction did give a new statute of limitations period, the next question is when that new one-year period started. That new period would have started at the conclusion of the out-of-time direct appeal, which was the last day a petition for a writ of certiorari could be filed from the denial of rehearing. The trial court’s order did not affect the timing. Either way, Wilson’s petition was untimely.

The Indiana Supreme Court’s disposition of Wilson’s post-conviction appeal did not result in a new judgment to restart the statute of limitations period. Under *Magwood v. Patterson*, 561 U.S. 320 (2010), a state court can disturb the finality of

its judgment through resentencing and restart the statute of limitations. *See Turner v. Brown*, 845 F.3d 294, 296-99 (7th Cir 2017). However, just because a defendant's sentence has "changed" does not mean he is in "the same position as Magwood." *White v. United States*, 745 F.3d 834, 836 (7th Cir. 2014). Magwood was sentenced to death and shortly before his scheduled execution, the federal district court granted a conditional writ of habeas corpus, finding his death sentence unconstitutional. *Magwood*, 561 U.S. at 326. He received a new sentencing proceeding that resulted in a new judgment after a "complete and new assessment of all of the evidence, arguments of counsel, and law." *Id.* (quoting the state trial court). The Court determined that Magwood's application for habeas corpus was the first for this new, "intervening" judgment so it was not successive. *Id.* at 339. But Wilson is not in Magwood's position.

The Indiana Supreme Court reviewed Wilson's sentence under its Indiana Constitutional authority to review and revise sentences. Ind. Const. art. 7, § 4, Ind. App. R. 7(B). The Indiana Supreme Court did not find that the sentence was legally wrong; it exercised its independent power to revise sentences. *Wilson III*, 157 N.E.2d at 1181 ("[A]ppellate review and revision ultimately boils down to the appellate court's collective sense of what is appropriate.") (internal quotation omitted) (SA 44a). The fact that it exercised its authority to reduce Wilson's sentence does not create a new judgment to be reviewed. Wilson's state court review

was completed at the end of his post-conviction proceedings.¹ There were no longer any state court proceedings to toll the statute of limitations. Wilson needed to file his petition within the remaining time that he had. Neither Wilson nor the district court cited any case that restarted the limitations period based on appellate resentencing. Wilson is in the same position had the Indiana Supreme Court denied his claim completely. He would be arguing that the Indiana Supreme Court wrongly decided his federal claim. The fact that the Indiana Supreme Court gave him relief that he is unsatisfied with does not give him a new one-year statute of limitations. The Indiana Supreme Court's sentence revision did not constitute a new judgment.

Because the Indiana Supreme Court's reduction in sentence did not open a new statute of limitations window, Wilson's federal action was not timely. Wilson's convictions were final on November 11, 2015, with the expiration of time within which to seek a writ of certiorari from the Supreme Court of the United States. *See Griffith v. Kentucky*, 479 U.S. 314, 321 & n.6 (1987) (explaining that a conviction is "final" when the time for seeking direct review from the judgment affirming the conviction has expired). So Wilson had one year, until November 11, 2016, to file his petition. Wilson's habeas petition was filed on March 15, 2022. Therefore, Wilson was several years too late in filing his petition.

¹ Wilson claims that this sentence "stands unreviewed by any state court" (Doc. 15 at 12), but it was a product of the Indiana Supreme Court's review. Wilson never explains what other court would review that sentence, and it is nonsensical to say the Indiana Supreme Court has never reviewed the sentence that it selected.

The tolling provision of section 2244(d)(2) does not salvage the timeliness of this petition. Wilson filed his post-conviction relief petition on August 11, 2016. By the time Wilson filed his petition in state court, 274 days of the one-year period had passed, leaving Wilson with 91 days left. Wilson's post-conviction proceedings ended on January 22, 2021, when the Indiana Supreme Court denied rehearing. Therefore, Wilson had until April 23, 2021, to file his petition. Wilson waited almost a year after the statute of limitations had run to file his petition on March 15, 2022. His petition was untimely.

Likewise, the trial court's act of issuing a sentencing judgment in accordance with the Indiana Supreme Court's decision did not create an intervening judgment. The trial court had no discretion to deviate from the Indiana Supreme Court's decision; it did not hold a hearing; and it did not produce a new opportunity for appeal. It was a clerical act of making the paperwork consistent with the Indiana Supreme Court's decision. *See White*, 745 F.3d at 837 (“*Magwood* does not reset the clock or the count, for purposes of § 2244 and § 2255, when a prisoner's sentence is reduced as the result of a retroactive change to the Sentencing Guidelines.”). The trial court's revised sentencing statement did not restart the statute of limitations clock.

However, even assuming the trial court's sentencing order restarted the clock, the petition was still untimely. The trial court issued its sentencing statement on February 12, 2021. This habeas petition was filed on March 15, 2022, which is over one year after that date. Wilson argued that his petition was filed within the

statute of limitations period because the time period did not start until after the time for filing an appeal was over (R. 1 at 3). Under 28 U.S.C. § 2244(d)(1)(A), the one-year period begins running on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” As determined by the Court of Appeals of Indiana, the trial court’s order was not appealable (R. 7-22). Because this sentence was not subject to direct review, under this section, the time expired for seeking review on the date it was issued. Wilson discovered this order was not subject to direct review because he attempted to appeal, and the appeal was quickly dismissed as improper (R. 7-22). Wilson cannot claim that he reasonably relied on the 30 extra days before realizing his petition was late. The Court dismissed his appeal two days after he filed it in February 2021. Assuming he received a new one-year period, he still had almost the whole year left to file his petition, but he did not file his petition within that time.

The district court’s reliance on *Jimenez v. Quarterman*, 555 U.S. 113 (2009), to find that the petition was timely is misplaced because even if Wilson were compared to Jimenez, Wilson’s petition was still untimely. Jimenez received a new direct appeal in a post-conviction proceeding. The Court found that this action restored the pendency of the direct appeal so that the conviction was not yet final. *Id.* at 120. This means that the conviction becomes final for 28 U.S.C. § 2244(d)(1)(A) when the out-of-time direct appeal concludes. *Id.* at 121. Applying that rationale to Wilson’s case would mean that the Indiana Supreme Court’s decision on post-conviction would be his out-of-time direct appeal because the court

decided his direct appeal issue had it been raised by original appellate counsel. That decision was issued on November 17, 2020 (SA 27a). The time for seeking certiorari expired on February 15, 2021, *see* U.S. Sup. Ct. R. 10, making that date the date the conviction became final. *See Griffith*, 479 U.S. at 321 & n.6. Therefore, the one-year statute of limitations would have expired on February 16, 2022, and Wilson did not file his petition until March 15, 2022. Even using the *Jimenez* theory, Wilson's petition was untimely.² The Court should dismiss his appeal without addressing the merits.

II.

Even if the Court considers the merits of Wilson's appeal, he is not entitled to habeas relief.

The Indiana Supreme Court's decision that the Eighth Amendment does not prevent de facto life sentences for juveniles who commit murder is not contrary to or an unreasonable application of clearly established law. Wilson ignores this holding and argues that the Indiana Supreme Court did not decide a different question,

² The district court uses *Jimenez* to say the conviction would be final 90 days from the trial court entering its order (SA 10a-11a). But the state appellate court determined that Wilson could not appeal from that order. The district court does not explain how an improper appeal can extend the date a conviction is final for 28 U.S.C. 2244(d)(1)(A). Under Indiana law and the state courts' actions, his conviction was final when the Indiana Supreme Court denied rehearing, from which Wilson had 90 days to seek a writ of certiorari. An act of a trial court on remand from which the defendant cannot appeal does not extend the conclusion of direct review. *See Chamblee v. Florida*, 905 F.3d 1192, 1196-97 (11th Cir. 2018). If the Indiana Supreme Court's decision is treated as an out-of-time direct appeal, then it was final when the time for seeking certiorari expired.

namely whether Wilson's sentence is a de facto life sentence.³ But he is wrong about that and, in any event, the answer to that question is irrelevant given the state court's holding that sentencing a juvenile offender to a de facto life sentence does not violate the Eighth Amendment. The district court explained why the state court's decision was not contrary to or an unreasonable application of federal law (SA 14a-22a),⁴ and Wilson does not challenge this analysis; instead, he continues to ignore the Indiana Supreme Court's decision. By failing to argue the Indiana Supreme Court's decision was wrong, he has waived this argument on appeal. *See Bradley v. Village of Uni. Park, Ill.*, 59 F.4th 887, 897 (7th Cir. 2023) (noting appellant may waive non-jurisdictional issue or argument by failing to raise it in the party's opening brief on appeal).

³ It is unclear what constitutes a de facto life sentence. This Court has described it as a "sentence[] so long that, although set out as a term of years, [it is] in reality a life sentence. *Kelly v. Brown*, 851 F.3d 686, 686 (7th Cir. 2017) (citing *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016)). Courts have found similar sentences to not be de facto life sentences. *See, e.g., United States v. Friend*, 2 F.4th 369, 378 (4th Cir. 2021) (holding defendant's term-of-years sentence which allow release in his sixties was not equivalent to life imprisonment). While some courts have considered lower sentences to constitute a de facto life sentence, there is no consensus. *See Casiano v. Commissioner of Correction*, 115 A.3d 1031, 1045 (Conn. 2015) (finding there is no consensus at what point a sentence becomes a de facto life sentence). Because there is no clearly established federal law on this point and other courts are not in agreement, Wilson cannot show that the Indiana Supreme Court's decision that his sentence is not a de facto life sentence is unreasonable.

⁴ As the district court points out, several other courts have decided cases consistently with the Indiana Supreme Court's disposition (SA 19a) (citing *U.S. v. Sparks*, 941 F.3d 748 (5th Cir. 2019); *State v. Soto-Fong*, 474 P.3d 34, 41 (Ariz. 2020); *State v. Slocumb*, 827 S.E.2d 148, 156 (S.C. 2019); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018); *Lucero v. People*, 394 P.3d 1128, 1134 (Colo. 2017); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017); *Willbanks v. Dept. of Corrections*, 522 S.W.3d 238, 246 (Mo. 2017); *Vasquez v. Cmmw.*, 781 S.E.2d 920, 925 (Va. 2016); *State v. Brown*, 118 So.3d 332, 342 (La. 2013)).

A. Because there is no clearly established law from the Supreme Court of the United States that a state may not sentence a juvenile offender to a de facto life sentence, the Indiana Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law.

The Supreme Court of the United States has not held that states cannot sentence juvenile offenders to de facto life sentences for murder. That means federal habeas relief is not available to Wilson. “Under the AEDPA [Anti-Terrorism and Effective Death Penalty Act of 1996], a federal court may grant habeas relief only if the state court’s adjudication of the petitioner’s constitutional claims was based on unreasonable fact-finding or was contrary to, or involved an unreasonable application of, clearly established federal law.” *Starkweather v. Smith*, 574 F.3d 399, 402 (7th Cir. 2009) (citing 28 U.S.C. § 2254(d)); *see also Williams v. Taylor*, 529 U.S. 362, 376-77 (2000); *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). A court reviewing claims under this standard is confined to the decisions of the Supreme Court of the United States. 28 U.S.C. § 2254(d); *see Marshall v. Rodgers*, 569 U.S. 58, 61-62 (2013); *Williams*, 529 U.S. at 406; *Yancey v. Gilmore*, 113 F.3d 104, 106 (7th Cir. 1997).

Because no case exists for Wilson to rely on, it is not surprising that he cites no case for the holding that he needs to receive habeas relief. As the district court stated, “[i]t is undisputed that no Supreme Court case squarely addresses the issue of whether individualized consideration is required for de facto life sentences for juvenile homicide offenders” (SA 17a). Wilson makes no attempt to dispute this proposition on appeal. He continues to rely on *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) (Doc. 15 at 19). Because it is not Supreme Court precedent, however, that

case does not constitute “clearly established federal law.” *See Marshall*, 569 U.S. at 61-62. Because there is no clearly established federal law, Wilson cannot show that the Indiana Supreme Court’s decision that his sentence did not violate the Eighth Amendment is contrary to or an unreasonable application of clearly established federal law. When there is a lack of holdings from the Supreme Court of the United States, “it cannot be said that the state court ‘unreasonabl[y] appli[ed] clearly established Federal law.’” *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (quoting 28 U.S.C. § 2254(d)(1)).

B. Under de novo review, Wilson’s lengthy sentence does not violate the Eighth Amendment.

If this Court were to ignore the state court’s decision, as Wilson wants, he still loses under de novo review. This Court reviews the district court’s factual findings for clear error and its legal ruling de novo. *Lee-Kendrick v. Eckstein*, 38 F.4th 581, 586-87 (7th Cir. 2022). Wilson’s lengthy sentence was a product of a discretionary sentencing that took into account his youth. His sentence does not violate the Eighth Amendment, as explained in *Jones v. Mississippi*, 141 S.Ct. 1307, 1313 (2021).

Wilson’s 100-year sentence is the result of the Indiana Supreme Court’s completely discretionary review under its state constitutional power to revise

sentences, and the court considered Wilson's youth.⁵ The fact that Wilson was a minor when he committed his crimes was at the center of the Indiana Supreme Court's review. *Wilson III*, 157 N.E.3d at 1184 ("[T]he main factor weighing in favor of a shorter sentence is Wilson's age.") (R. 7-19 at 14). Putting aside the questions of whether Wilson's sentence is a de facto life sentence⁶ and whether *Miller v. Alabama*, 567 U.S. 460 (2012), applies to de facto life sentences, Wilson fails to show that his sentence violates the Eighth Amendment. *See Kelly v. Brown*, 851 F.3d 686, 687 (7th Cir. 2017) (holding 110-year sentence with parole at age 70 for juvenile offender allowable under Eighth Amendment when sentencing court had discretion and considered age).

Under the *Miller* line of cases ending in *Jones*, Wilson fails to show he is entitled to relief. Wilson does not even cite *Jones* in his brief, which is the controlling case from the Supreme Court of the United States on this issue. In *Jones*, the Court held that a state may sentence a juvenile offender convicted of murder to life without parole if it is a product of a discretionary sentencing system. 141 S. Ct. at 1313 (The sentencing procedure "complied with [our] precedents because the sentence was not mandatory and the trial judge had discretion to

⁵ It is unclear the relief sought by Wilson. In his conclusion of his brief, he asks that the "criminal gang enhancement be removed" and "any other appropriate relief." Doc. 15 at 22. He does not ask for a new sentencing hearing or request a particular sentence reduction, which further demonstrates that he has failed to point to a particular constitutional problem with his sentence.

⁶ The State did not waive whether Wilson's sentence is a de facto life sentence, but explicitly argued it was not (R. 7 at 12 n.6).

impose a lesser punishment in light of [offender's] youth"). Even if *Miller* and *Jones* apply to Wilson's sentence, he fails to explain why that would entitle him to relief.⁷ The Indiana Supreme Court had complete discretion to revise Wilson's sentence and reduced his sentence because of his youth. The court concluded, "[T]he main factor weighing in favor of a shorter sentence is Wilson's age. A 100-year sentence means that after receiving good time credit Wilson will likely be eligible for release in his mid-to-late sixties, meaning that he has reasonable hope for a life outside prison." (SA 47a). Even if Wilson had been sentenced to a life-without-parole sentence, he would not be entitled to relief because it was the product of a discretionary sentencing system that considered his youth, so it does not violate the Eighth Amendment. If he cannot show that he is entitled to relief under a de jure life-without-parole sentence, then he clearly cannot show that he is entitled to relief for his term-of-years sentence that allows for a meaningful opportunity for release during his lifetime. Wilson fails to demonstrate that he is entitled to habeas corpus relief.

⁷ Wilson claims that the firearm enhancement violates *Miller* because it is mandatory (Doc. 15 at 20). But the enhancement is a component of a sentence which alone is not a life sentence, and there is no clearly established law on this question. Even so, the question is academic. Wilson could receive a 100-year sentence without the enhancement by running the two murders consecutively, as was his sentence before the Indiana Supreme Court revised his sentence. If *Miller* and *Jones* prevent the application of the firearm enhancement, then Wilson could still be sentenced to 100 years.

CONCLUSION

This Court should find the petition untimely and remand to the district court to dismiss the petition for lack of jurisdiction or affirm the denial of the petition on the merits.

Respectfully submitted,

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