No. 16-10150

IN THE
United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RILEY BRIONES, JR.,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 2:96-cv-00464-DLR-4
Hon. Douglas L. Rayes

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Melanie L. Bostwick
Sheila Baynes
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Vikki M. Liles
CJA Appointed Counsel of Record
THE LAW OFFICE OF VIKKI M. LILES, P.L.C.
335 E. Palm Lane
Phoenix, AZ 85004

Easha Anand
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
2443 Fillmore Street
#380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

Katherine Cion
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H St., NE, Suite 275
Washington, DC 20002

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Like its predecessors *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Supreme Court's recent decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), was clear: The Eighth Amendment forbids a life-without-parole sentence for a juvenile offender whose crime reflects the transient immaturity of youth rather than permanent incorrigibility. That was the key premise underlying this Court's en banc decision vacating the life sentence imposed on Riley Briones, Jr., for a crime he committed as a child. But following the Supreme Court's order for "further consideration in light of *Jones*," a three-judge panel of this Court reversed course, concluding that life without parole *can* be constitutionally imposed on a juvenile offender even if he is only transiently immature rather than permanently incorrigible. The panel thus affirmed Mr. Briones's life sentence.

That conclusion is untenable in light of the actual language of *Jones*, which reiterates the "key" holding of *Montgomery*: "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Jones*, 141 S. Ct. at 1315 n.2. Allowing the panel decision to stand

will gut the protections that *Miller*, *Montgomery*, and *Jones* extended to juvenile offenders. And it would consign Mr. Briones—whom even the Government and the district court acknowledged had turned his life around in the decades since he committed his crime—to die in prison.

This Court took this case en banc once before. It should do so again because Mr. Briones demonstrates the central intuition of the Supreme Court's cases regarding juvenile offenders: Children are uniquely capable of change.

STATEMENT OF THE CASE

Factual Background

Riley Briones, Jr.'s childhood was marked by substance abuse and violence. *United States v. Briones*, 929 F.3d 1057, 1060, 1066 n.7 (9th Cir. 2019) (en banc). At least once, he "went to school with blood seeping through his shirt because of his father's abuse." *Id.* at 1060, 1066 n.7. Following his parents' lead, Riley began using drugs and alcohol by age 11. *Id.* at 1060.

In 1994, when Riley was still a child, he and several co-defendants robbed a restaurant. *Id.* at 1060-61. Although Riley's brother "came up with the idea," Riley agreed to the plan, drove four others to the

restaurant, and remained in the car as the getaway driver. *Id.* at 1061. One of Riley's codefendants shot and killed the store clerk. *Id.* at 1061.

When Riley was arrested, the Government offered a plea deal with a 20-year sentence. *Id.* Riley's father was "adamant" that he not take the deal, so Riley rejected it and was convicted at trial of felony murder. *Id.* He was given a mandatory sentence of life without parole.[1] *Id.*

As this Court, sitting en banc, explained, in the decades since he was sentenced, Mr. Briones has changed dramatically. He has maintained a perfect prison disciplinary record, without a single infraction, not even for leaving his bed unmade or having a pen when he wasn't supposed to. *Id.* at 1061-62; Dkt. 9 at 187. He became a role model for younger prisoners. 929 F.3d at 1062. And he did all that even though "his LWOP sentence left no hope that he would ever be released, so the only plausible motivation for his spotless prison record was improvement for improvement's sake." *Id.* at 1066-67.

[1] Riley was convicted of various other offenses, but he has served all of the prison time imposed for those offenses. *Briones*, 929 F.3d at 1061 n.1.

Procedural Background

Following *Miller v. Alabama*, 567 U.S. 460 (2012), the district court held a resentencing hearing for Mr. Briones. At the resentencing, Mr. Briones expressed "grief, regret, sorrow" for the crimes he'd committed, apologized to the victim's family, and presented evidence that in the more than 18 years since his sentence was imposed, he had grown significantly. *Briones*, 929 F.3d at 1061-62. The district court agreed, finding that "[a]ll indications are that [the] defendant…has improved himself while he's been in prison." *Id.* at 1062. But the district court nonetheless reimposed a life sentence.

After a divided panel affirmed Mr. Briones's sentence, 890 F.3d 811 (9th Cir. 2018), this Court reheard Mr. Briones's case en banc. The en banc Court vacated Mr. Briones's sentence for two independent reasons. First, the federal sentencing statute requires that the record "reflect that the court meaningfully engaged in" the "central inquiry" of a sentencing proceeding, here whether Mr. Briones was permanently incorrigible. 929 F.3d at 1067. The record in this case did not. Second, the record did not make clear that the district court understood it could consider evidence of Mr. Briones's post-conviction rehabilitation. *Id.* at 1066-67.

Last year, the Supreme Court issued *Jones v. Mississippi*, holding that the Eighth Amendment, standing alone, does not require a sentencer imposing a life-without-parole sentence on a juvenile to "make a separate factual finding" or "provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility." 141 S. Ct. at 1313.

Jones dealt only with the procedure that attends a juvenile sentencing hearing. It left untouched the substantive rule articulated by previous cases. Indeed, it reaffirmed that rule, explaining that:

> The key paragraph from *Montgomery* is as follows:
>
> "Louisiana suggests that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility. That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. … That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole."

Jones, 141 S. Ct. at 1315 n.2.

At the Government's request, the Supreme Court granted certiorari in Mr. Briones's case, vacated this Court's en banc opinion, and remanded "for further consideration in light of *Jones*." *United States v. Briones*, 141 S. Ct. 2589 (2021).

On remand, the three-judge panel again affirmed Mr. Briones's sentence. This time, it concluded that after *Jones*, the "central inquiry" that the en banc court described from *Miller* and *Montgomery* was no longer relevant. Op.14-16. It thus concluded that *Jones* made the en banc opinion "untenable" and affirmed Mr. Briones's sentence. Op.16.

ARGUMENT

I. The Panel Opinion Misreads *Jones*, Which Reiterated That Courts May Not "Sentence A Child Whose Crime Reflects Transient Immaturity To Life Without Parole."

Jones reiterated *Miller*'s and *Montgomery*'s core holding: The Eighth Amendment does not allow a life-without-parole sentence for a juvenile offender who is merely transiently immature, rather than permanently incorrigible. The panel's conclusion to the contrary entirely overlooks what *Jones* itself called the "key paragraph" of *Montgomery*. And without the panel's misreading of *Jones*, could not have altered the en banc court's conclusion that Mr. Briones's sentence must be vacated.

A. *Miller*, *Montgomery*, and *Jones* Forbid Life-Without-Parole Sentences For Juvenile Offenders Whose Crimes Reflect Only Transient Immaturity.

Recognizing that the penological justifications for a life-without-parole sentence collapse in light of the distinctive attributes of youth—a child's diminished culpability and heightened capacity for change—the

Supreme Court in *Miller v. Alabama* and *Montgomery v. Louisiana* held that the Eighth Amendment allows a life-without-parole sentence only for juvenile offenders whose "crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at 208-09.

For all other juveniles—those whose crimes reflect instead "the transient immaturity of youth"—life without parole is an unconstitutional sentence. *Id.* As *Montgomery* put the point, "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* at 208. Following *Montgomery*, just about everyone involved in this case—the Government, the en banc majority, and the en banc dissent, for instance—agreed on that substantive core of *Miller* and *Montgomery*.[2]

[2] *See, e.g.*, *Briones*, 929 F.3d at 1064 ("The Eighth Amendment dictates that 'sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption.'"); *id.* at 1071 (Bennett, J., dissenting) ("[T]he court's task was to consider whether Briones's crimes reflect 'unfortunate yet transient immaturity' or 'irreparable corruption.'"); 9th Cir. Dkt. 64 at 15 ("The substantive law applicable to Briones's claims is settled … Substantively, LWOP 'is an excessive sentence for children whose crimes reflect transient immaturity.'").

Miller and *Montgomery* left one procedural question open. At the hearing to "separate those juveniles who may be sentenced to life without parole from those who may not," does the Eighth Amendment require any particular factual finding? *Jones*, 141 S. Ct. at 1317-18. *Jones* answered in the negative: The Eighth Amendment does not mandate any particular "degree of procedure" in order to "implement its substantive guarantee" that children whose crimes "reflect transient immaturity" will not be sentenced to life without parole. *Id.* at 1311, 1315 n.2. But *Jones* did not alter that "substantive guarantee."

Were there any doubt, *Jones* rejected calls to overrule *Miller* and *Montgomery* and chose instead to "carefully follow[]" those decisions. *Jones*, 141 S. Ct. at 1321. And *Jones* reiterated what it called the "key paragraph" of *Montgomery*: "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Jones*, 141 S. Ct. at 1315 n.2.

B. The Panel Opinion Misread *Jones*.

Notwithstanding that language, the panel believed that, after *Jones*, a sentencing court *is* free to impose a life-without-parole sentence on a child whose crime reflects transient immaturity. Op.14-15. But neither the panel opinion nor the Government's brief attempted to square that position with *Jones*'s express admonition to the contrary. *See Jones*, 141 S. Ct at 1315 n.2. At oral argument, the Government's only explanation was that the admonition came in a "block quote in a footnote." Oral Arg. 21:24-21:28.[3] But of course, there's no "footnote exception" to this Court's strict obligation to follow the Supreme Court's rulings. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring) ("[T]he state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court.").

The panel opinion instead pointed to three breadcrumbs in *Jones* that, it believed, justified jettisoning *Miller*'s and *Montgomery*'s

[3] *Available at* https://www.ca9.uscourts.gov/media/audio/?20210922/16-10150/.

admonitions that the Eighth Amendment allows life sentences only for the rare, permanently incorrigible juvenile offender.

1. First, the panel noted that *Jones* found that "'a discretionary sentencing system'—where a sentencer can consider the defendant's youth and has discretion to impose a lesser sentence than LWOP—is 'constitutionally sufficient.'" Op.12. But *Jones* was answering only the narrow question before the Court—"the degree of procedure" mandated by the Eighth Amendment to "implement its substantive guarantee." 141 S. Ct. at 1315 n.2. *Jones* held that the Eighth Amendment itself doesn't mandate any particular *procedure* beyond a discretionary system; it did not undermine *Miller*'s and *Montgomery*'s conclusions that the Eighth Amendment, substantively, forbids imposing a life-without-parole sentence on a juvenile offender whose crime reflects transient immaturity.

2. Second, the panel took *Jones*'s remark that "permanent incorrigibility is not an eligibility criterion" to mean that a juvenile offender whose crime reflects "transient immaturity" is nonetheless constitutionally "eligible" for a life-without-parole sentence. Op. 15-17. But that can't be correct, because *Jones* reiterated the "key" holding of

Montgomery—that children whose crimes reflect transient immaturity are *not* constitutionally eligible for a life sentence. *Jones*, 141 S. Ct. at 1315 n.2.

The panel made no effort to square those two statements. But there's an easy way to do so. *Jones* used the term "eligibility criterion" in discussing capital sentencing. *Id.* at 1315. In that context, "eligibility criterion" is a term of art, referring to categories—statutory aggravating circumstances, sanity, and so on—that are "clear and objective" and where the Constitution thus requires explicit factual findings. *Id.*; *Morales v. Woodford*, 388 F.3d 1159, 1174 (9th Cir. 2004); *see Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998).

After *Jones*, it's clear that the determination whether a juvenile offender is permanently incorrigible isn't an "eligibility criterion"—permanent incorrigibility isn't a "clear and objective" standard, and the Eighth Amendment prescribes no particular factfinding requirement for permanent incorrigibility. *Jones*, 141 S. Ct. at 1315. But that doesn't

change the sentencer's central inquiry: whether a crime reflects transient immaturity or permanent incorrigibility. *See Briones*, 929 F.3d at 1063.[4]

3. Third, the panel opinion characterized as "dictum" *Miller* and *Montgomery*'s core teaching that life without parole is an unconstitutional penalty for juvenile offenders whose crimes reflect the transient immaturity of youth. Op.14-15 (discussing *Montgomery*, 577 U.S. at 208-09). For starters, it wouldn't matter if that language *were* dictum—this Court cannot "blandly shrug [] off" dicta from the Supreme Court simply "because they were not a holding." *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000).

[4] *Jones* analogized the permanent incorrigibility analysis to the "selection" phase of a capital sentencing, which tasks the sentencer with "consider[ing] all relevant mitigating evidence and weigh[ing] it against the evidence of the aggravating circumstances." *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982). Unlike the "eligibility criterion," a determination about selection isn't "clear and objective"; a sentencer needn't follow a particular process, make an explicit finding, or explain their decision on the record. But the question whether aggravating evidence outweighs mitigating evidence is still the central inquiry of the penalty phase, and on the rare occasion when it's unclear whether a sentencer engaged in that central inquiry, the Eighth Amendment requires vacatur. *Id.* at 113-16; *see, e.g.*, *People v. Lanphear*, 36 Cal.3d 163, 166-68 (1984) (Eighth Amendment violated by "inconsistent and ambiguous" jury instructions that did not make jury's weighing task clear).

And the notion that the rule forbidding life without parole for transiently immature juvenile offenders was "dictum" would come as a surprise to the *Jones* court, which explained that the "*key paragraph*" in *Montgomery* was the one explaining that States are not "free to sentence a child whose crime reflects transient immaturity to life without parole." 141 S. Ct. at 1315 n.2 (emphasis added). It would come as a surprise to the *Montgomery* court itself, which found *Miller* retroactive *because* it "bar[red] life without parole … for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" and thus created a substantive, rather than a procedural, rule. *Montgomery*, 577 U.S. at 209. And it would come as a surprise to the Government and both the majority and the dissent of the en banc court, all of whom characterized that rule as the *holding* of *Miller* and *Montgomery*. Dkt. 64 at 15; *Briones*, 929 F.3d at 1063-64; *id.* at 1071 (Bennett, J., dissenting).

The Supreme Court has the exclusive "prerogative of overruling its own decisions," and it does so through clear statements, not intimations. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). The hints that the panel purported to identify in *Jones* aren't enough for this Court to ignore what everyone agreed that *Montgomery*

held and what *Jones* actually *reiterated*: A juvenile offender whose crime reflects transient immaturity, rather than permanent incorrigibility, cannot constitutionally be sentenced to life without parole.[5]

C. "Further Consideration In Light Of *Jones*" Should Not Alter The En Banc Court's Conclusion.

An order from the Supreme Court granting, vacating, and remanding (a "GVR") does not reflect any determination by the Supreme Court of the merits of a case. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001). This Court can—and often does—reach the same result following a GVR as it had prior to the GVR.[6] This Court should only change course

---

[5] In its Supplemental Brief, the Government raised an additional argument: It claimed that that the determination whether a juvenile offender is "permanently incorrigible" is no longer the "central inquiry" after *Jones* because *Jones* held that "permanent incorrigibility" is merely one among many "sentencing factor[s] akin to a mitigating circumstance." Dkt. 99 at 25 (quoting *Jones*, 141 S. Ct. at 1315). But that's a misquote. *Jones* didn't describe *permanent incorrigibility* as a sentencing factor; it described "*youth* as a sentencing factor." 141 S. Ct. at 1315 (emphasis added). In other words, a defendant's age is just one of many factors—their upbringing, the nature of the crime, and so on—that bear on the ultimate determination of whether the defendant is permanently incorrigible. *See Miller*, 567 U.S. at 476-77.

[6] *See, e.g.*, *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020); *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832 (9th Cir. 2019); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc).

after a GVR if "a legal premise on which it relied" was altered by the "intervening development[]." *Id.*

The en banc court's primary basis for vacating Mr. Briones's life sentence was that the district court record did not "reflect that the court meaningfully engaged in *Miller*'s central inquiry." *Briones*, 929 F.3d at 1067. That holding relied on two "legal premise[s]." *Tyler*, 533 U.S. at 666 n.6. The first was that "*Miller*'s central inquiry" is "whether the defendant is one of the rare juvenile offenders who is irredeemable." *Briones*, 929 F.3d at 1063. The panel opinion believed this to be the premise that was rejected by *Jones* and justified changing course following the Supreme Court's GVR order. Op.15-16. But as explained *supra*, §§I.A-I.B, *Jones* in fact *reaffirmed* this premise.

The second "legal premise" was that the district court had to "meaningfully engage" with *Miller*'s central inquiry. That premise came not from the Constitution but from the federal sentencing statute; the en banc court did not cite to an Eighth Amendment case but to *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (en banc). *Carty* was a case interpreting 18 U.S.C. § 3553, the federal sentencing statute. It held that §3553 requires an explanation for a sentence "sufficient[] to permit

meaningful appellate review." *Id.* at 992. The en banc court concluded that the record in this case was not clear enough to satisfy § 3553's demands. *Briones*, 929 F.3d at 1066-67. *Jones*, a State case, had nothing to say about the proper interpretation of §3553.[7]

Stripped of the panel's misreading, *Jones* does not alter any of the premises on which the en banc opinion relied. Indeed, *Jones* expressly contemplated that sources of law other than the Eighth Amendment might impose procedural requirements above and beyond the constitutional floor. 141 S. Ct. at 1321, 1323. The federal sentencing statute is just such an other source of law. But for the panel's erroneous determination that *Miller*'s "central inquiry" was no longer whether the

[7] The panel opinion also suggested that this argument has been waived. Op.15. But this Court sitting en banc did not believe so—it ruled for Mr. Briones because it believed the federal sentencing statute's requirement of explanation sufficient to permit appellate review was violated. 929 F.3d at 1067; *see also Briones*, 890 F.3d at 827 (O'Scannlain, J., dissenting) ("I would simply enforce the requirements of 18 U.S.C. § 3553(c) so that we may properly evaluate Briones's *Miller* claim on appeal."). *Jones* said nothing about waiver, and so the en banc court's determination on that score could not be altered by the Supreme Court's GVR order, which did not just remand the case but specifically remanded it "for further consideration *in light of Jones*." *Briones*, 141 S. Ct. at 2589 (emphasis added); *cf. United States v. Thornton*, 511 F.3d 1221, 1225-26 (9th Cir. 2008) (limited remand is "not an occasion to begin" case "entirely anew").

defendant is transiently immature or irreparably corrupt, the en banc opinion thus could not be altered by "further consideration in light of *Jones*."[8]

II. The Question Presented Is Exceptionally Important.

The federal code and three States in this Circuit continue to sentence juvenile offenders to life without parole. *See* Josh Rovner, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW at 2 (May 24, 2021), *available at* https://www.sentencingproject.org/publications/juvenile-life-without-parole. If the panel opinion stands, none of those juveniles will receive the protections *Miller*, *Montgomery*, and *Jones* guarantee. Per the panel's holding, a sentencing court could say, "This child is not

[8] In any event, the en banc opinion relied on a separate, independent basis for vacating Mr. Briones's sentence. *Briones*, 929 F.3d at 1067 ("This alone requires remand."). It concluded the district court may not have understood it was allowed to consider evidence of Mr. Briones's post-conviction rehabilitation. *Id.* at 1066-67. If anything, *Jones* buttressed the en banc court's conclusion on that score: *Jones* analogized juvenile life-without-parole sentencing to the penalty phase of a capital case, and at that phase, the Eighth Amendment requires vacatur if a sentencer does not properly consider a mitigating factor. *Jones*, 141 S. Ct. at 1315-16; *see, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) (jury must not only hear mitigating evidence but be able to "give meaningful effect or a reasoned moral response" to that evidence).

permanently incorrigible—his crime reflects only the transient immaturity of youth—but I'm still sentencing him to life without parole."

Indeed, that's arguably what happened in this case. The en banc court's reading of the district court as not "meaningfully engag[ing]" in "*Miller*'s central inquiry" was, if anything, charitable. After all, the district court announced that Mr. Briones "has improved himself while he's been in prison." *Briones*, 929 F.3d at 1062, 1064. That is, the district court practically conceded that Mr. Briones had undergone rehabilitation and thus that Mr. Briones was *not* one of those rare children who "exhibit[] such irretrievable depravity that rehabilitation is impossible." *See Montgomery*, 577 U.S. at 208. Yet the district court sentenced Mr. Briones to life without parole anyway.

Mr. Briones was a teenager when he drove the getaway car in a robbery (planned by another defendant) that resulted in a murder (committed by another defendant) and then declined a plea deal (that would have released him from prison years ago) at the behest of his father (who himself was released from prison earlier this year). *Briones*, 929 F.3d at 1061, 1066. In the decades since, he has "done what he could to improve himself within the confines of incarceration" and maintained a

spotless prison record. *Id.* at 1066. And he did so even though for much of his sentence, there was no possibility of release. *Id.* at 1066-67.

"[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham v. Florida*, 560 U.S. 48, 69 (2010). "This sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.'" *Id.* at 70. As with a death sentence, then, even a single life-without-parole sentence warrants the closest scrutiny.

Because Mr. Briones should not die in prison, and because the panel's opinion will have consequences for every juvenile offender in this Circuit facing a life-without-parole sentence, this Court should grant the petition.

CONCLUSION

This Court should grant rehearing en banc.

February 18, 2022

Respectfully submitted,

s/ Easha Anand

Melanie L. Bostwick
Sheila Baynes
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Vikki M. Liles
CJA Appointed Counsel of Record
THE LAW OFFICE OF VIKKI M. LILES, P.L.C.
335 E. Palm Lane
Phoenix, AZ 85004

Easha Anand
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
2443 Fillmore Street
#380-15875
San Francisco, CA 94115
easha.anand@macarthurjustice.org
(510) 588-1274

Katie Cion
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H St., NE
Suite 275
Washington, DC 20002

Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 35 and 9th Cir. R. 35-4 and 40-1, I hereby certify that:

1. This brief complies with the type-volume limitations of 9th Cir. R. 40-1 and because this brief contains 3,888 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook typeface.

Dated: February 18, 2022

s/ Easha Anand
Easha Anand

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, I electronically filed the foregoing *Petition for Panel Rehearing and Rehearing En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 18, 2022

s/ Easha Anand
Easha Anand

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RILEY BRIONES, JR., AKA Unknown Spitz, *Defendant-Appellant.*	No. 16-10150 D.C. No. 2:96-cr-00464-DLR-4 OPINION

On Remand from the United States Supreme Court

Argued and Submitted September 22, 2021
Pasadena, California

Filed December 6, 2021

Before: Diarmuid F. O'Scannlain and Johnnie B. Rawlinson, Circuit Judges, and David A. Ezra,[*] District Judge.

Opinion by Judge O'Scannlain

[*] The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

SUMMARY**

Criminal

On remand from the United States Supreme Court, and further remand from the en banc court, the three-judge panel affirmed the district court's imposition of a sentence of life without possibility of parole (LWOP) for crimes committed by Riley Briones, Jr. while a juvenile.

This court affirmed Briones's original life sentence in 1998. Following the Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016) (holding that *Miller*'s rule applied retroactively on collateral review), Briones was resentenced to LWOP in 2016. The three-judge panel affirmed the sentence in *United States v. Briones*, 890 F.3d 811 (9th Cir. 2018). The en banc court subsequently vacated the sentence and remanded in *United States v. Briones*, 929 F.3d 1057 (9th Cir. 2019) (*Briones II*). The Supreme Court remanded for further consideration in light of *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

In *Jones*, a case the Supreme Court took for the express purpose of clarifying how to interpret *Miller* and *Montgomery*, the Supreme Court held that in cases involving LWOP defendants, a discretionary system—where a sentencer can consider the defendant's youth and has

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

discretion to impose a lesser sentence than LWOP—is constitutionally sufficient. *Jones* likewise held that permanent incorrigibility is not an eligibility criterion for the imposition of juvenile LWOP sentences, and rejected the argument that a sentencer must at least provide an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility.

Briones argued—relying on the now-vacated en banc decision in *Briones II*—that the resentencing record does not reflect that the district court meaningfully engaged in *Miller*'s central inquiry, namely, identifying those whose crimes reflect permanent incorrigibility. The panel wrote that *Jones* made altogether clear that—irrespective of any seemingly contrary language in *Miller* or *Montgomery*—permanent incorrigibility is not an eligibility criterion for juvenile LWOP.

The panel held that Briones waived his argument that a requirement of meaningful engagement with *Miller*'s central inquiry comes from this court's cases interpreting the federal sentencing statute, 18 U.S.C. § 3553, as to which *Jones* is irrelevant. The panel wrote that Briones's statutory argument would in any event fail on the merits.

The panel rejected Briones's argument that *Briones II* vacated his LWOP sentence for a second, independent reason—namely, that the district court may not have understood it was allowed to meaningfully consider evidence of his post-conviction rehabilitation. The panel wrote that the district court *did* consider Briones's post-incarceration rehabilitation, and explained that there is no independent statutory requirement that a court imposing juvenile LWOP "meaningfully engage" in a permanent-incorrigibility analysis.

The panel held that Briones waived his as-applied challenge to the substantive proportionality of his sentence, and wrote that all relevant factors militate against exercising discretion to consider the merits of Briones's otherwise-waived substantive disproportionality arguments.

Reviewing for plain error, the panel rejected Briones's wholly speculative arguments advocating for categorical bans on juvenile LWOP.

COUNSEL

Easha Anand (argued) and Damilola Arowolaju, The Roderick & Solange MacArthur Justice Center, San Francisco, California; Vikki M. Liles, The Law Office of Vikki M. Liles P.L.C., Phoenix, Arizona; Melanie L. Bostwick and Sheila Baynes, Orrick Herrington & Sutcliffe LLP, Washington, D.C.; for Defendant-Appellant.

Krissa M. Lanham (argued), and Patrick J. Schneider, Assistant United States Attorneys; Glenn B. McCormick, Acting United States Attorney; Elizabeth A. Strange, Former First Assistant United States Attorney; United States Attorney's Office, Phoenix, Arizona; for Plaintiff-Appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a sentence of life imprisonment without possibility of parole imposed on a juvenile is valid after the Supreme Court's recent decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

I

A

Riley Briones, Jr., a Salt River Pima-Maricopa Indian, was a founder and leader of the "Eastside Crips Rolling 30's," a "violent and cold-blooded" gang which, as described by the resentencing judge in this case, "terrorized the Salt River Reservation community and surrounding area for several years." In this role, Briones participated in and helped to plan a series of violent crimes on and around the Salt River Reservation.

The most serious of these crimes was a murder committed on May 15, 1994, when Briones was seventeen years, eleven months, and eight days old. According to evidence presented at trial, Briones and fellow gang members planned to rob a Subway restaurant, knowing that there would be only one employee present. Briones drove four gang members to the restaurant and parked his car outside while the other four—one of whom was armed with a gun—went in to rob the store. They ordered sandwiches from the lone employee, Brian Patrick Lindsay. While Lindsay was preparing the order, the gunman returned to the car to speak with Briones. Following his conversation with Briones, the gunman went back into the restaurant, shot Lindsay in the face, then shot him several more times as he

lay on the floor. With the cash register locked, the gang members were able to steal only the food they had ordered and a bank bag containing $100. After his fellow gang members got back in the car, Briones looked for a maintenance man whom he thought had seen the robbery. Briones instructed the other gang members to shoot the maintenance man on sight, but they never found him.

Three weeks later, Briones helped plan the firebombing of a rival gang member's home and prepared the Molotov cocktails to be used. Briones's fellow gang member then used the Molotov cocktails to set fire to a house with a family (including an eleven-year-old girl) inside. Several months later, the gang decided to try firebombing the same home again. Briones once again provided Molotov cocktails and drove fellow gang members to a kindergarten and an abandoned trailer home to set diversionary fires. Briones then drove them to the rival gang member's home, which they firebombed. Another month later, Briones helped plan a drive-by shooting of the same home, although he was neither the driver nor the shooter.

Over the next year, Briones continued to participate in gang-related crimes, stopping only when he eventually was arrested (at age 19 ½).[1] For instance, when one fellow gang member revealed that he knew about the Subway robbery and Lindsay murder, Briones pistol-whipped him. After other gang members committed another drive-by shooting of a home with a mother and child inside, Briones made sure the culprits disposed of their clothes and accounted for the shell casings. At trial, the Government also presented

[1] In fact, it appears that Briones continued to participate in gang-related activity, such as carving gang symbols into his jail cell door, even *after* his arrest.

evidence that Briones had discussed plans to blow up the Salt River Police Department and to kill a tribal judge, federal prosecutors, and Salt River Police investigators.

B

1

As a result of these crimes, Briones was arrested in 1995. In 1996, he and four other members of the Eastside Crips Rolling 30's were indicted on a total of 17 federal charges. Briones, specifically, was indicted for the following: one count of First-Degree Felony Murder on an Indian Reservation (18 U.S.C. §§ 1153, 1111, 2111); four counts of Arson on an Indian Reservation (18 U.S.C. §§ 1153, 81); two counts of Conspiracy to Commit Arson on an Indian Reservation (18 U.S.C. §§ 1153, 371, 81); one count of Possession of an Unregistered Destructive Device (26 U.S.C. §§ 5861(d), 5841, 5871); one count of Assault with a Dangerous Weapon on an Indian Reservation (18 U.S.C. §§ 1153, 113(a)(3)); and one count of Tampering with a Witness (18 U.S.C. § 1512(b)(3)). After a jury trial, Briones was convicted of all such offenses.

At his original sentencing hearing in 1997, Briones continued to deny responsibility for his crimes. The district court found that Briones was the leader of the gang and, on the felony murder count, imposed the then-mandatory Guidelines sentence of life imprisonment without parole ("LWOP"). On the remaining non-homicide counts, Briones was sentenced to a total of twenty years' imprisonment (which he has since served), to run concurrently with his life sentence.

On direct appeal, we affirmed Briones's conviction and sentence. *United States v. Briones*, 165 F.3d 918 (9th Cir. 1998) (unpublished table decision).

2

Fifteen years after Briones's original sentencing, the Supreme Court held in *Miller v. Alabama* that "the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders" and instead requires that sentencing judges "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. 460, 479–80 (2012) (emphasis added).

After *Miller*, Briones filed a 28 U.S.C. § 2255 motion to vacate his original LWOP sentence and to have it reconsidered at a resentencing hearing where the district court would have discretion—as required under *Miller*—to impose a lesser sentence if deemed appropriate in light of Briones's "youth and attendant characteristics." *Miller*, 567 U.S. at 483. The district court granted such motion in 2014 and ultimately set a resentencing hearing for 2016.

Several months before Briones's resentencing, the Supreme Court handed down *Montgomery v. Louisiana*, which held that *Miller*'s rule applied retroactively on collateral review. 577 U.S. 190, 206, 212 (2016). In dicta, *Montgomery* also appeared to *extend Miller*'s rule, suggesting that LWOP is "an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth," *i.e.*, "for all but . . . those whose crimes reflect permanent incorrigibility." *Id.* at 208–09.

At the 2016 resentencing hearing, Briones's counsel requested a sentence of 360 months' imprisonment, rather than the Guidelines sentence of life imprisonment, for Briones's first-degree felony murder conviction. Invoking the "hallmark[s] of youth" identified by *Miller*, counsel argued that a life sentence was inappropriate in Briones's case, because his gang activity had been a product of youthful immaturity and a desire for the "feeling of banding together." Counsel pointed to a dysfunctional childhood environment, including parental drug and alcohol abuse, a history of family criminality, Briones's dropping out of school in the tenth grade, and his difficulties as a Native American attending school off the reservation where he lived. To mitigate Briones's culpability in the crime, counsel averred that the Subway robbery scheme was not Briones's idea and noted that he was not the shooter. Briones himself told the court that he "want[ed] to express remorse" and "to express grief," although he never actually took responsibility for any of the crimes of which he was convicted. Finally, his counsel pointed to evidence of rehabilitation, including that, in all Briones's time in prison, he never had been written up for a disciplinary infraction, that he had no gang involvement while in prison, that he had been working continuously, that he had married his girlfriend (with whom he has a now-adult child) after his incarceration, and that he sees his wife regularly.

The Government's counsel countered that Briones still deserved a life sentence. The Government acknowledged that, under *Miller*, "a life sentence for a juvenile is inappropriate in all but the most egregious cases," but argued that Briones's indeed "*is* the most egregious case." While recognizing that Briones was "really doing well in prison," the Government noted that Briones—even as he expressed remorse—had failed to accept responsibility and had

continued to minimize his role in the murder and in the gang. Specifically, the Government contended that it was not credible that Briones was unaware of his fellow gang members' intention to murder Lindsay, and that—on the contrary—circumstantial evidence suggested Briones himself may have ordered the murder (insofar as the gunman reentered the restaurant to shoot Lindsay immediately after speaking with Briones outside). The prosecutor described Briones's gang as "the most violent gang that I have ever been involved in prosecuting," including the Hell's Angels. Finally, the Government pointed out that although Briones was a juvenile when the murder occurred, he was only barely so—he was over seventeen years and eleven months old at the time—and that he had continued to commit violent crimes for another year and a half after turning eighteen, stopping only after he was arrested.

After hearing from the parties and "[u]sing the [G]uidelines as a starting point," the district court calculated a sentencing range of life imprisonment for Briones's felony murder conviction, with no objection from counsel. The resentencing judge noted that, "[i]n addition to the presentence report, I've considered the Government's sentencing memorandum, the defendant's sentencing memorandum[,] . . . the transcript of the [original] sentencing[,] . . . the victim questionnaire and the letters on behalf of [the] defendant." He then found that "[a]ll indications are that [Briones] was bright and articulate, he has improved himself while he's been in prison, but he was the leader of a gang that terrorized the Salt River Reservation community and surrounding area for several years. The gang was violent and cold-blooded." Briones "appeared to be the pillar of strength for the people involved to make sure they executed the plan [to murder Lindsay]," and he "was involved in the final decision to kill the young clerk." The

judge explained that "in mitigation I do consider the history of the abusive father, the defendant's youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs, and he's been a model inmate up to now. However, some decisions have lifelong consequences."

Ultimately, the district court announced that, "[h]aving considered those things and all the evidence I've heard today and everything I've read[,] . . . it's the judgment of the Court that Riley Briones, Jr.[,] is hereby committed to the Bureau of Prisons for a sentence of life."[2]

Briones timely appealed to this court.

3

Briones filed an Opening Brief raising as his only non-foreclosed argument that "[t]he district court did not properly analyze whether [he] is one of the rare person[s] whose juvenile crimes rendered him 'incorrigible.'" In a published opinion, this three-judge panel affirmed Briones's life sentence. *United States v. Briones*, 890 F.3d 811 (9th Cir. 2018) ("*Briones I*").[3]

[2] Because the federal system does not permit parole or early release from life sentences, *see* 18 U.S.C. § 3624(b)(1), Briones's sentence is effectively for life without the possibility of parole.

[3] I authored a separate opinion partially concurring in and partially dissenting from the majority opinion in *Briones I*. *See* 890 F.3d at 822–28 (O'Scannlain, J., concurring in part and dissenting in part). However, for the reasons discussed in Parts II and III, *infra*, the concerns expressed in my partial dissent have been mooted by *Jones*'s clarification of *Miller* and *Montgomery*.

After Briones filed a petition for rehearing en banc, this court ordered en banc rehearing and vacated the original three-judge panel's decision. *United States v. Briones*, 915 F.3d 591 (9th Cir. 2019). The en banc panel subsequently vacated Briones's sentence and remanded. *United States v. Briones*, 929 F.3d 1057 (9th Cir. 2019) (en banc) ("*Briones II*").

4

Following the en banc panel's decision in *Briones II*, the Government timely petitioned for certiorari.

During the pendency of such petition, the Supreme Court issued its decision in *Jones v. Mississippi*, a case it had taken for the express purpose of clarifying "how to interpret *Miller* and *Montgomery*." 141 S. Ct. at 1313. In *Jones*, the Court held that in cases involving juvenile LWOP defendants, a "discretionary sentencing system"—where a sentencer can consider the defendant's youth and has discretion to impose a lesser sentence than LWOP—is "constitutionally sufficient." *Id.* Likewise, the Court held that "permanent incorrigibility is not an eligibility criterion" for the imposition of juvenile LWOP sentences, *id.* at 1315, and rejected the argument that "a sentencer must at least provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility," *id.* at 1319.

Subsequently, the Supreme Court issued an order granting the Government's petition for certiorari in this case, vacating the en banc decision in *Briones II*, and remanding to this court for further consideration in light of *Jones*. *United States v. Briones*, 141 S. Ct. 2589 (2021).

5

On remand from the Supreme Court, the en banc panel from *Briones II* further remanded the case to this three-judge panel. *United States v. Briones*, 1 F.4th 1204 (9th Cir. 2021) (en banc).

II

A

Briones first argues—relying on the now-vacated en banc decision in *Briones II*—that the resentencing record below does not "reflect that the [district] court meaningfully engaged in *Miller*'s central inquiry," namely, identifying "those whose 'crimes reflect permanent incorrigibility.'" *Briones II*, 929 F.3d at 1061, 1067 (quoting *Montgomery*, 577 U.S. at 209).

Jones, however, made clear that the Eighth Amendment requires neither an explicit nor even an *implicit* finding of permanent incorrigibility. *See* 141 S. Ct. at 1313 ("[A] separate factual finding of permanent incorrigibility is not required."); *id.* at 1319 ("[A]n on-the-record sentencing explanation with an implicit finding of permanent incorrigibility (i) is not necessary to ensure that a sentencer considers a defendant's youth, [and] (ii) is not required by or consistent with *Miller* . . . ."). Rather, *Jones* seized upon *Miller*'s language purporting to "mandate[] 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Id.* at 1311 (quoting *Miller*, 567 U.S. at 483). To that end, *Jones* clarified that a "discretionary sentencing system is both constitutionally necessary *and constitutionally sufficient*," because such discretion "suffices to ensure individualized

consideration of a defendant's youth." *Id.* at 1313, 1321 (emphasis added).

Here, the district court plainly considered "youth and its attendant characteristics," *id.* at 1317 (quoting *Montgomery*, 577 U.S. at 210), at Briones's resentencing. Indeed, the resentencing judge explained, on the record, that "in mitigation I do consider the history of the abusive father, the defendant's youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs." And as the Government aptly notes, "*Jones* makes clear that in explicitly addressing these items, the district court did *more* than was required, not less." That is because a sentencer with discretion to consider youth "necessarily *will* consider" it, "especially if"—as here—"defense counsel advance[d] an argument based on the defendant's youth." *Id.* at 1319 (emphasis in original).

Nevertheless, Briones now argues that "*Jones* did not purport to change" what he characterizes as *Miller*'s and *Montgomery*'s "central inquiry" into permanent incorrigibility. In support of this contention, he points to *Jones*'s assurance that "[t]he Court's decision today carefully follows both *Miller* and *Montgomery*." *Id.* at 1321. Such language, Briones urges, must mean that *Jones* left in place *Montgomery*'s dictum that LWOP is "an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth," *i.e.*, "for all but . . . those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at 208–09.

Yet when the *Jones* Court stated that it was "carefully follow[ing] both *Miller* and *Montgomery*," 141 S. Ct. at 1321, it made clear that it read those cases for far narrower propositions than Briones would have us read them here. *See*

id. ("*Miller* held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding. *Montgomery* later held that *Miller* applies retroactively on collateral review. Today's decision likewise does not disturb that holding."). Indeed, *Jones* made altogether clear that—irrespective of any seemingly contrary language in *Miller* or *Montgomery*—"permanent incorrigibility is not an eligibility criterion" for juvenile LWOP. *Id.* at 1315.

B

Perhaps anticipating *Jones*'s foreclosure of his *constitutional* claim, Briones now argues that "the requirement of 'meaningful engagement'" with what *Briones II* characterized as *Miller*'s central inquiry "comes from this Court's cases interpreting the federal sentencing statute, as to which, of course, *Jones* is irrelevant." *Cf. Briones II*, 929 F.3d at 1067 (citing *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) (applying 18 U.S.C. § 3553)).

As a threshold matter, Briones's statutory argument appears to have been waived twice over. He has waived such argument by failing to raise it in his Opening Brief, *see Devereaux v. Abbey*, 263 F.3d 1070, 1079 (9th Cir. 2001) (en banc), and by affirmatively stating at oral argument in *Briones I* that his claim was constitutional rather than statutory, *cf. Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004).

And in any event, Briones's statutory argument would fail on the merits after *Jones*. *Briones II* relied on *Carty* for its holding that "[w]hen a district court sentences a juvenile offender in a case in which an LWOP sentence is possible, the record must reflect that the court meaningfully engaged

in *Miller*'s central inquiry." *Briones II*, 929 F.3d at 1067 (citing *Carty*, 520 F.3d at 992). But *Carty* stated only the *general* proposition that "[o]nce the sentence is selected, the district court must explain it sufficiently to permit meaningful appellate review." 520 F.3d at 992. *Carty* does *not* specifically require—or even refer to—the permanent-incorrigibility analysis that Briones charges the district court with failing to perform. Indeed, *Carty* recognized that "[w]hat constitutes a sufficient explanation will necessarily vary depending upon the complexity of the particular case." *Id.*

Here, then, *Briones II*'s application of *Carty* and § 3553 depended on the premise that such an incorrigibility analysis was necessary "to permit meaningful appellate review" of the district court's chosen sentence under then-controlling Eighth Amendment precedents. *Briones II*, 929 F.3d at 1067 (quoting *Carty*, 520 F.3d at 992). But once again, *Jones* rendered such premise untenable when it held that "permanent incorrigibility is not an eligibility criterion." 141 S. Ct. at 1315.

III

Next, Briones characterizes *Briones II* as having "vacated [his LWOP] sentence for a second, independent reason"[4]—namely, that "the district court may not have understood it was allowed to meaningfully consider evidence of [his] post-conviction rehabilitation." *See* 929 F.3d at 1066–67. Briones argues that "[b]ecause *Jones*

[4] That is, "independent" of the district court's putative failure to engage meaningfully in a permanent-incorrigibility analysis.

had no effect on that portion of [the *Briones II*] opinion, it should be reinstated."

First, Briones's factual premise is simply false. The district court *did* consider Briones's post-incarceration rehabilitation—and explicitly stated as much, noting in its on-the-record resentencing explanation that Briones had "been a model inmate" and "improved himself while . . . in prison."

Moreover, Briones is mistaken to suggest that the *Briones II* majority's treatment of the rehabilitation-evidence issue was "independent" of its view that the district court failed to perform an adequate permanent-incorrigibility analysis—or that "*Jones* had no effect on that portion of [the *Briones II*] opinion." The *Briones II* majority explicitly reasoned that the district court's putative failure to consider Briones's rehabilitation evidence "require[d] remand" *because* that "is precisely the sort of evidence of capacity for change that is key to determining whether a defendant is *permanently* incorrigible." 929 F.3d at 1067 (emphasis in original). But in light of *Jones*'s clarification that "permanent incorrigibility is not an eligibility criterion" for juvenile LWOP, 141 S. Ct. at 1315, the *Briones II* majority's chain of reasoning falls apart.[5] In sum, we

[5] Put slightly differently, *Briones II* appeared to reason that the district court erred by imposing LWOP without making a finding on whether Briones's rehabilitation evidence demonstrated the sort of "capacity for change" that would rule out permanent incorrigibility. 929 F.3d at 1066–67. But of course, the import of such a finding could be only that it might constitute (or at least contribute to) "an 'implicit finding' of permanent incorrigibility." *Jones*, 141 S. Ct. at 1319. And *Jones* flatly "reject[ed]" the argument "that a sentencer must . . . provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility." *Id.*

conclude that there is no independent statutory requirement that a court imposing juvenile LWOP "meaningfully engage" in a permanent-incorrigibility analysis.

IV

Next, and for the first time in his Supplemental Brief on remand, Briones raises two distinct arguments, each based on a separate line of caselaw, in support of a novel as-applied Eighth Amendment challenge to the substantive proportionality of his sentence.[6]

"As a general matter, '[w]e review only issues which are argued specifically and distinctly in a party's opening brief,'" *Devereaux*, 263 F.3d at 1079 (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)), and as a corollary, "an issue will . . . be deemed waived if it is raised for the first time in a supplemental brief," *id.* (citing *Kreisner v. City of San Diego*, 1 F.3d 775, 778 n.2 (9th Cir. 1993)). Nowhere in

[6] First, Briones makes what is essentially a substantive version of the procedural argument he has been pressing all along: He relies on *Montgomery* to argue that, insofar as his "crime reflect[ed] transient immaturity" rather than "permanent incorrigibility," his juvenile LWOP sentence is "disproportionate under the Eighth Amendment." 577 U.S. at 209, 211.

Second, Briones argues that his sentence *also* is substantively disproportionate under the framework set forth in Chief Justice Roberts's concurring opinion in *Graham v. Florida*. *See* 560 U.S. 48, 86–96 (2010) (Roberts, C.J., concurring). Specifically, Briones argues that an examination of his crime of conviction, his sentence, and his characteristics should give rise to "an inference of gross disproportionality," which would be "confirm[ed]" by "intrajurisdictional and interjurisdictional comparisons" between his sentence and other "sentences imposed for the same crime" in the same jurisdiction and other jurisdictions, respectively. *Id.* at 88, 93.

his Opening Brief did Briones challenge—or even mention—the substantive proportionality of his sentence. Rather, his only argument (other than those arguments he expressly conceded were "foreclosed," *see infra* Part V) was that the district court committed *procedural* error "by sentencing [him] . . . *without assessing* whether he is one of the rare juveniles who is permanently incorrigible." Accordingly, Briones's as-applied challenge to the substantive proportionality of his sentence is waived.

Moreover, all relevant factors militate against exercising our discretion to consider the merits of Briones's otherwise-waived substantive-disproportionality arguments. Briones has made no attempt to establish "good cause" for his failure to raise such arguments in his Opening Brief, and the Government did not *sua sponte* raise the issue of substantive proportionality in its Answering Brief. *Cf. United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). Most dispositively, because Briones raises these arguments for the first time in the Supplemental Brief he submitted in response to an order for *simultaneous* briefing, the Government has not had an opportunity to respond to them. As such, the Government surely would be "prejudice[d]," *id.*, if we were to consider either of Briones's novel arguments that his sentence was substantively disproportionate. We therefore decline to reach such arguments.

V

Finally, Briones argues that LWOP is categorically unconstitutional for *any* juvenile offender, or, at least,

categorically unconstitutional for juvenile homicide offenders who were not the direct cause of a victim's death.[7]

Because Briones expressly concedes that he "did not specifically object to the imposition of a life sentence" on either of these grounds in the district court, we review for plain error. *See United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc). "An error is plain if it is 'contrary to the law at the time of the appeal.'" *Id.* (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). And here, Briones also expressly concedes that existing law imposes no categorical ban on LWOP either for juveniles, generally, or for juvenile homicide offenders who did not pull the trigger, more specifically. Effectively, then, Briones has conceded that the district court committed no plain error. We therefore reject his wholly speculative arguments advocating for categorical bans on juvenile LWOP.

VI

The district court's imposition of a new LWOP sentence at Briones's 2016 resentencing hearing is **AFFIRMED**.

[7] In his Opening Brief, Briones acknowledged that both of these arguments were "foreclosed" under existing law and that he was raising them only "to preserve [them] for future litigation."

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			$	$
Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd , and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee / Appeal from Bankruptcy Appellate Panel Docket Fee				$
			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);
TOTAL: 4 x 500 x $.10 = $200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov