No. 16-10150

Opinion filed: December 6, 2021
Panel: O'Scannlain & Rawlinson, CJJ; Ezra, DJ (D. Haw.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,

vs.

RILEY BRIONES, JR., Defendant - Appellant.

Appeal from the United States District Court
for the District of Arizona
Hon. Douglas L. Rayes, District Judge, Presiding
D.C. No. 2:96-cr-464-PHX-DLR-4

BRIEF OF AMICUS CURIAE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA IN SUPPORT OF GRANTING REHEARING EN BANC

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to 18 U.S.C. § 3006A, the Federal Public Defender for the District of Arizona represents a number of Arizona state prisoners who have been sentenced to life without parole for homicide crimes committed when they were juveniles. These prisoners are seeking relief in federal court under 28 U.S.C. § 2254 based on *Miller v. Alabama*, 567 U.S. 460 (2012), and later cases. Some of them also have parallel postconviction proceedings pending in Arizona state courts under *State v. Valencia*, 386 P.3d 392 (Ariz. 2016), which applied *Miller* to Arizona's sentencing scheme. The Arizona FPD thus has an interest in ensuring that the law involving the sentencing of juveniles develops to allow judges to exercise the full measure of sentencing discretion imparted not only by the Eighth Amendment, but also by Congress and the legislatures and courts of the various states.

STATEMENT REQUIRED BY FED. R. APP. P. 29(a)(4)(E)

All parties have consented to the filing of this brief. No party or party's counsel authored this brief either in whole or in part. No party, no party's counsel, and no other person contributed money that was intended to fund the preparation or submission of this brief, either in whole or in part.

BACKGROUND

Seventeen years ago, the Supreme Court restored federal judges' authority to consider not only the Sentencing Guidelines but also the "other sentencing goals" set forth in 18 U.S.C. § 3553(a) when imposing

punishment for a criminal offense. *United States v. Booker*, 543 U.S. 220, 259 (2005). Instead of the sole determinant of a sentence, the Guidelines now are "the starting point and the initial benchmark" of the sentencing process. *Gall v. United States*, 552 U.S. 38, 49 (2007).

Under this advisory Guidelines regime, the sentences that the Guidelines recommend are not presumptively reasonable. *Id.* at 50; *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Instead, a judge must "make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 50. If the judge decides that a sentence outside the range recommended by the Guidelines is appropriate, she must "consider the extent of the deviation" from that range and articulate a "sufficiently compelling" justification "to support the degree of the variance." *Id.* "After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* (citing *Rita v. United States*, 551 U.S. 338, 351 (2007)). This sentencing process flows not from the Constitution, but from an act of Congress. *See* 18 U.S.C. § 3553(c) (requiring a sentencing judge to "state in open court the reasons for" imposing a particular sentence); *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1964 (2018) (sentencing statute requires an explanation sufficient to "satisfy the appellate court that [the judge] has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority") (citing *Rita*, 551 U.S. at 356).

Almost three years ago, this Court sitting en banc vacated Mr. Briones's life-without-parole sentence, imposed after resentencing in the wake of *Miller v. Alabama*, 567 U.S. 460 (2012), because the judge did not "explain [the] sentence sufficiently to permit meaningful appellate review." *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc) (citing *Carty*, 520 F.3d at 992). The government asked the Supreme Court to review this decision, and the Court remanded the case for further consideration in light of the intervening decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). *See United States v. Briones*, 141 S. Ct. 2589 (2021). The en banc panel, in turn, remanded the case to the original three-judge panel for further proceedings. *See United States v. Briones*, 1 F.4th 1204 (9th Cir. 2021).

After hearing further oral argument, the three-judge panel affirmed the life-without-parole sentence imposed at resentencing. The panel said that *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." *United States v. Briones*, 18 F.4th 1170, 1175 (9th Cir. 2021) (quoting *Jones*, 141 S. Ct. at 1311). "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.* (quoting *Jones*, 141 S. Ct. at 1313, 1321). The panel concluded that the sentencing judge here, freed of the

mandatory nature of the Guidelines' life-without-parole sentence for first-degree murder, *see* U.S.S.G. § 2A1.1 (base offense level for first-degree murder is 43), § 5A (level 43 is a life sentence regardless of criminal history), necessarily *did* consider Mr. Briones's "youth and attendant characteristics" because "defense counsel advanced an argument based on the defendant's youth." *Briones*, 18 F.4th at 1176 (quoting *Jones*, 141 S. Ct. at 1319).

The panel rejected Mr. Briones's contention that the statutory requirement of an adequate explanation of the sentence was met simply by virtue of the unfettered discretion the sentencing judge had under *Jones*. The panel first found that contention to be "waived twice over" because, according to the panel, Mr. Briones did not raise the contention in his opening brief and because his counsel disavowed any reliance on the sentencing statute at the first oral argument before the panel. *Id.* But neither previous decision of this Court held that argument to be waived, and nothing about the Supreme Court's direction to reconsider this case in light of *Jones* suggests that it now is waived. The panel then also rejected the contention on the merits. Because *Jones* said that "permanent incorrigibility is not an eligibility criterion" for a life-without-parole sentence, the panel reasoned, the sentencing statute did not require a judge to specifically address that substantive limitation on imposing a life-without-parole sentence when explaining the sentence. *Id.* at 1177.

Mr. Briones filed a timely petition for rehearing en banc.

REASONS FOR GRANTING REHEARING

Amicus respectfully suggests two additional reasons for granting rehearing, reasons that raise issues having broad impact beyond the parties in this case. First, the panel's rejection of Mr. Briones's statutory argument involving *Miller*'s substantive limitation on life-without-parole sentences will encourage other judges to disregard their jurisdictions' legislative and judicial efforts to limit the imposition of life-without-parole sentences on juvenile homicide offenders only to those rare cases that the Court in *Miller* envisioned. Second, in the wake of *Jones*'s renewed focus on the adequacy of a sentencing judge's discretion, the panel's waiver analysis should not be allowed to stand.

1. Rehearing en banc would afford the Court an opportunity to clarify that, even after *Jones*, statutory sentencing law still has a role to play in fulfilling *Miller*'s promise that life-without-parole sentences for juvenile homicide offenders should be rare.

In the wake of *Booker*, Congress's directives about the procedures involved in federal sentencing have become front and center in every federal judge's mind. Yet as an alternative holding, the panel now says that Mr. Briones waived any argument about noncompliance with Congress's directives. But nothing about this Court's previous decisions in this case suggests that the statutory argument has been waived here.

When the case was first before the three-judge panel, the majority opinion dismissed his argument about an inadequate explanation by saying that nothing "in the *Miller* case suggests that the sentencing judge [must] use any particular verbiage or recite any magic phrase." *United States v. Briones*, 890 F.3d 811, 819 (9th Cir. 2018) (citing *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016)). Judge O'Scannlain, however, noted that 18 U.S.C. § 3553(c) required such an explanation, and found it wanting in the record. *See id.* at 827 ("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."). And the en banc panel reached it expressly. "We do not suggest the district court erred simply by failing to sue any specific words, but the district court must explain its sentence sufficiently to permit meaningful review." *United States v. Briones*, 929 F.3d 1057, 1069 (9th Cir. 2019) (en banc) (citing *Montgomery*, 577 U.S. at 211; *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc)). Nothing about the fact that the Supreme Court remanded this case for further consideration in light of *Jones* should affect this Court's prior decision to reach the merits of Mr. Briones's statutory argument.

Even if the Court did, notwithstanding its prior opinions that rely on the statutory argument, deem it now to be waived, it should nevertheless consider it on the merits. According to the panel, *Jones* foreclosed the statutory argument "when it held that permanent incorrigibility is not an eligibility criterion" for a juvenile homicide offender to receive a life-

without-parole sentence. *Briones*, 18 F.4th at 1177 (quoting *Jones*, 141 S. Ct. at 1315). But the panel misread this aspect of *Jones*. When the Court in *Jones* spoke of "eligibility criteria" for a particular sentence, it drew on categorical limitations on capital punishment that are required by the Eighth Amendment—the prisoner to be executed must be sane at the time of execution, *see Ford v. Wainwright*, 477 U.S. 399 (1986), must not be intellectually disabled, *see Atkins v. Virginia*, 536 U.S. 304 (2002), and must have committed homicide, *see Kennedy v. Louisiana*, 554 U.S. 407 (2008). *Miller*'s "permanent incorrigibility" limitation, while still a substantive limitation on punishment, was not an "eligibility criterion" in the same sense as sanity, lack of intellectual disability, and committing homicide are in the death-penalty context. As a *constitutional* matter, the Court in *Jones* stressed, "individualized consideration" of "the defendant's chronological age and its hallmark features" could take place within a system that affords "discretion to impose a different punishment than life without parole." 141 S. Ct. at 1316 (citing *Miller*, 567 U.S. at 465, 470, 476, 477, 479, 483, 489). It instead compared the sentencing discretion required by *Miller* to the sentencing discretion required by the Eighth Amendment under *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Lockett v. Ohio*, 438 U.S. 586 (1978). *See* 141 S. Ct. at 1315.

In any event, the Constitution is not the only source of law that governs the procedure for imposing criminal sentences. *Jones* expressly acknowledged as much. Nothing in the *Jones* holding precludes "the States

from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder." *Id.* at 1323. The Court in *Jones* contemplated that categorical bans imposed as a matter of state law, factfinding requirements imposed as a matter of state law, and requiring more precise explanations as a matter of state law would all be permitted alongside its constitutional holding. *Id.* The fact that permanent incorrigibility is not an "eligibility criterion" for a life-without-parole sentence (as that term is understood in the Court's Eighth Amendment death-penalty jurisprudence) thus does not prevent states (or Congress) from requiring sentencing judges to address that factor when explaining a sentence.

To be sure, unlike many states, Congress has not enacted new legislation to specifically curtail the imposition of life-without-parole sentences on juvenile homicide offenders. But that does not mean, as the panel ruled, that pre-existing statutory requirements on federal sentencing judges have no role to play in this arena. To the extent that the en banc court's ruling that "an incorrigibility analysis was necessary to permit meaningful appellate review" of the life sentence was incorrect under *Jones* as a matter of *constitutional* law, *see Briones*, 18 F.4th at 1177, *Jones* nevertheless left room for the possibility that it could be correct as a matter of federal *statutory* sentencing law. The panel rejected Mr. Briones's statutory sentencing argument because it conflated what the Eighth Amendment requires with what § 3553 requires. En banc review would

clarify that these sources of law impose different yet complementary obligations.

To say that the Constitution does not require a sentencing judge to make a specific finding regarding a juvenile's capacity to change over time is not to say that a judge need not address this question *at all* when explaining a sentencing decision. And federal law is clear that when this factor is presented—something that competent defense counsel surely will do, *cf.* *Jones*, 141 S. Ct. at 1319 (assuming that a sentencing judge "*will* consider the defendant's youth" whenever "defense counsel advances an argument based on the defendant's youth")—a sentencing judge must address it. A judge must "state in open court the reasons for… imposition of the particular sentence." 18 U.S.C. § 3553(c). And if the sentence deviates from the Guidelines—meaning here, if the sentence is *not* life without parole—the judge must state the "specific reason for the imposition different from" the sentence recommended by the Guidelines. *Id.* § 3553(c)(2). Even if the sentence imposed *is* life without parole, when "the legal arguments raised at sentencing" are important, § 3553(c) will usually require "more explanation" in order to make clear that the judge "has considered the parties' arguments and taken account of" the statutory sentencing factors. *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018) (citing *Rita v. United States*, 551 U.S. 338, 357 (2007)).

Caselaw echoes the statute. The statute "is concerned with *explanation*, not merely *consideration*." *United States v. Trujillo*, 713 F.3d 1003, 1010 (9th Cir. 2013). Guided by *Miller*, *Montgomery*, and *Jones*, defense counsel will marshal evidence to show that her juvenile homicide offender client has the capacity to change over time, because *Miller*'s substantive limitation on sentencing means that the particular sentence must not be constitutionally disproportionate in each case. *Cf. Jones*, 141 S. Ct. at 1322 (reserving an as-applied Eighth Amendment challenge to life-without-parole sentences). Surely that is a "nonfrivolous reason" for imposing a sentence less than the life sentence recommended by the Guidelines. *Cf. Rita*, 551 U.S. at 357. Caselaw thus requires that the judge "explain why he accepts or rejects" that basis for imposing a less-than-life sentence. *United States v. Carty*, 520 F.3d 984, 992–93 (9th Cir. 2008) (en banc). Merely stating on the record that the judge has "considered all the evidence" may satisfy the constitutional requirement of *Jones*, but under § 3553(c) it is not "not sufficient as an explanation of the judge's" assessment of the juvenile's capacity to change over time. *Id.*

Discretionary sentencing procedures *help* make "life-without-parole sentences for offenders under 18 relatively rare." *Jones*, 141 S. Ct. at 1322 (quoting *Miller*, 567 U.S. at 484 n.10). Once sentencing judges have had a chance to revisit the decision to sentence a juvenile homicide offender to life without parole, and been presented with evidence of capacity to change over time, they often do impose a lesser sentence. *Cf. id.* But the "significant

changes wrought by *Miller* and *Montgomery*," *id.*, are not entirely responsible for making life-without-parole sentences rarer. Court rulings and legislative developments in the states have played their part. Life-without-parole sentences for juveniles were banned in 18 states and the District of Columbia, and 14 more built on the reasoning of *Miller* to channel and narrow the discretion that judges have to impose that sentence in homicide cases. *See* Brief for Former West Virginia Delegate John Ellem et al., as Amici Curiae at 35–36, *Mathena v. Malvo*, 139 S. Ct. 1317 (2019) (No. 18-217), at <https://bit.ly/3tOOzze>. The lower courts, and the legislatures of the various states, along with Congress, all have a role to play in ensuring that juvenile life-without-parole sentences continue to be "uncommon." *Miller*, 567 U.S. at 479.

2. Rehearing en banc would allow the Court to clarify that no appellate waiver occurs when the Supreme Court alters the legal framework within which the issues in the case are litigated.

In *Jones*, the Court insisted that its decision "carefully follows both *Miller* and *Montgomery*" to hold that a discretionary sentencing system is both constitutionally necessary and constitutionally sufficient to implement the substantive limitation on punishment articulated in *Miller*. 141 S. Ct. at 1321. The "discretionary sentencing procedure" imposed in *Miller* "has indeed helped make life-without-parole sentences for offenders under 18 relatively rare." *Id.* at 1322 (cleaned up). At the same time, the Court said, states (and presumably also Congress) may impose "additional sentencing

limits" in cases involving juveniles convicted of homicide, including requiring "sentencers to make additional factual findings before sentencing an offender under 18 to life without parole." *Id.* at 1323. But those additional requirements, the Court stressed, were not required by its interpretation of the Eighth Amendment in *Miller* and *Montgomery*.

Four Justices on the *Jones* Court, however, explained that the majority had changed the Eighth Amendment's requirements for sentencing a juvenile convicted of homicide to life without parole. *See* 141 S. Ct. at 1327 (Thomas, J., concurring) ("The majority, however, selects a third way: Overrule *Montgomery* in substance but not in name."); *id.* at 1328 (Sotomayor, J., joined by Breyer & Kagan, JJ., dissenting) ("Because I cannot countenance the Court's abandonment of *Miller* and *Montgomery*, I dissent."). These Justices adhered to the view that *Miller* and *Montgomery* had created a "categorical exemption for certain offenders" from a life-without-parole sentence. *Id.* at 1326 (Thomas, J., concurring); *see also id.* at 1331 (explaining that *Miller* require a "sentencer [to] decide whether the juvenile offender before it is a child whose crimes reflect transient immaturity or is one of those rare children whose crimes reflect irreparable corruption") (Sotomayor, J., dissenting). They believed that under pre-*Jones* cases, mere discretion to consider a host of facts at sentencing was not constitutionally sufficient to satisfy *Miller*'s substantive limitation on punishment.

So did Judge O'Scannlain, the author of the panel opinion on remand. Before *Jones*, Judge O'Scannlain said that the "critical question before the district court" when it resentenced Mr. Briones "was whether Briones had the capacity to change after he committed the crimes." *United States v. Briones*, 890 F.3d 811, 823 (9th Cir. 2018) (O'Scannlain, J., dissenting in part) (quoting *United States v. Pete*, 819 F.3d 1121, 1133 (9th Cir. 2016)). That question flowed from *Miller* and *Montgomery*. Judge O'Scannlain faulted the sentencing judge for not adequately explaining—in the manner that the federal sentencing statutes requires—whether Mr. Briones is incapable of change. *See id.* at 824–25 (discussing the requirements of *Rita* and *Carty*). In other words, before *Jones*, Judge O'Scannlain believed that the explanation required by Congress helped to ensure that the constitutional limitation on punishment established by *Miller* and *Montgomery* had not been traversed. But *after* the Court decided *Jones*, these concerns had been "mooted by *Jones*'s clarification of *Miller* and *Montgomery*." *Briones*, 18 F.4th at 1174 n.3. Judge O'Scannlain's discussion treats the constitutional minimum requirements for complying with *Miller* that were articulated in *Jones* as satisfying the additional, nonconstitutional parts of the federal sentencing process set up by Congress. According to the panel, then, *Jones* changed the law that governs Mr. Briones's challenge to his sentence.

So if *Jones* changed the law that governs Mr. Briones's sentencing challenge, he must in fairness have an opportunity to argue that he should prevail under the rubric announced in *Jones*. And he did exactly that in his

supplemental brief, arguing that even if the Constitution did not require an explanation specifically focused on capacity to change over time, federal sentencing procedures under the advisory Guidelines regime did. Yet the panel ruled that these statutory arguments were waived, even though *Jones* expressly did not foreclose him from making them.

It is well established that this Court has discretion to "consider arguments raised for the first time on appeal," and will exercise that discretion when "the new issue arose while the appeal was pending because of a change in the law." *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1153 (9th Cir. 2020) (quoting *El Paso City v. America West Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000); *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990)). Such changes in the law include an intervening Supreme Court decision that alters the legal framework within which the parties must present their arguments. *See United States v. Baldon*, 956 F.3d 1115, 1123 (9th Cir. 2020) (explaining that there had been a "change in the law" because the "Supreme Court decided *Stokeling* while Baldon's appeal was pending").

When this case was first before the three-judge panel, the constitutional argument subsumed the statutory one. If the Eighth Amendment required a judge to articulate for the record whether a juvenile homicide offender had the capacity to change over time, then it would have been redundant for Mr. Briones to argue that the federal sentencing statute

did as well. Now, after *Jones*, these arguments are distinct. The panel's decision to deem the statutory argument presented in post-*Jones* supplemental briefing to be waived is inconsistent with this Court's customary practice of entertaining new arguments on appeal that rely on a change in the governing law that took place while the appeal was pending. The Court sitting en banc should correct this misapplication of circuit precedent.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted: March 14, 2022.

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UNITED STATES COURT OF APPEALS
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