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

BRIEF OF *AMICI CURIAE* THE CAMPAIGN FOR FAIR SENTENCING OF YOUTH AND PHILLIPS BLACK, INC. IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *Amici Curiae* state that no subsidiaries or any corporation and no publicly held corporation owns 10% or more of their stock.

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INTEREST OF *AMICI*[1]

The **Campaign for Fair Sentencing of Youth** is a national coalition that leads and supports efforts to implement fair and age-appropriate sentences for youth, with a focus on abolishing life without parole sentences for youth. The Campaign provides technical assistance on strategic communications, litigation and advocacy to attorneys, advocates, organizers and others working at the state and federal levels, and has gathered and analyzed comprehensive data regarding juvenile life without-parole sentences and resentencings from across the country. The Campaign engages in public education and communications efforts to provide decision-makers and the broader public with the facts, stories and research that will help them to fully understand the impacts of these sentences upon individuals, families, and communities.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *Amici* and their counsel contributed money that was intended to fund the preparing or submitting of the brief. *Amici* files this brief with the consent of both parties under Ninth Circuit Rule 29-2(a).

Phillips Black, Inc. is a non-profit organization dedicated to providing the highest quality of legal representation to prisoner in the United States sentenced to the severest penalties under law, including those facing death in prison for offense committed prior to age eighteen. Phillips Black further contributes to the rule of law by consulting with counsel conducting representation in such cases, conducting clinical training, and developing research on the administration of justice. Phillips Black attorneys frequently publish scholarship and teach courses on the Eighth Amendment, criminal law, and criminal procedure.

INTRODUCTION

A sentence of life without the possibility of parole is, for children, the harshest penalty under law. Because its harshness and because of the unique capacity children have for change, the Eighth Amendment limits that punishment to all but the rarest of children, those who are incapable of change. Before irrevocably condemning a child to die in prison, a sentence must consider the mitigation aspects of the child standing before them. Nothing in *Jones v. Mississippi* undermined this categorical protection and obligation. To the contrary, *Jones* reaffirmed

the categorical protection barring life without the possibility of parole for virtually all children. Likewise, the Court in *Jones* made it clear that a refusal to give weight to the mitigating aspects of youth would also be reversible error. *Jones* simply held that federalism based concerns—irrelevant here—weighed against requiring a formal fact finding in addition to the other constitutionally required protections already in place.

And the extant protections remain vital, especially for persons such as Mr. Briones. That is, individualized consideration required by the Eighth Amendment guards against the arbitrary imposition of extreme punishment. Unfortunately, the administration of life without the possibility of parole on children has fallen disproportionately on non-white children. And in the federal system, Native Americans are grossly overrepresented. This Court should grant review and reverse the panel decision.

ARGUMENT

I. VIRTUALLY ALL JUVENILES REMAIN EXEMPT FROM THE PUNISHMENT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

The Supreme Court has repeatedly held that the Constitution offers juveniles categorical protection from certain severe punishments. Because of their diminished capacity, special vulnerabilities and transient character, children are exempt from the death penalty for all offenses and from life without the possibility of parole for nonhomicide offenses. *See Roper v. Simmons*, 543 U.S. 551, 570 (2005); *see also Graham v. Florida*, 560 U.S. 48, 67–69 (2010). For the same reasons, all but the "rare" child is categorically exempt from mandatory impositions of life without parole. *See Miller v. Alabama*, 567 U.S. 460, 479 (2012) (quoting *Roper*, 543 U.S. at 573). On the one hand, those children who are permanently incorrigible may be subject to life without the possibility of parole. But most children, those who are capable of reform, are as a category exempt from the punishment. *Id.* at 475–78; *see also Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2021).

No subsequent cases unsettle this categorical protection. The Supreme Court did recently hold that the Eighth Amendment does not

require states to make a separate, on-the-record factual finding to effectuate this categorical limitation. *See Jones*, 141 S. Ct. at 1311. That holding is grounded in federalism. When the Court issues substantive constitutional protections in criminal sentencing, it is careful to "limit the scope of attendant procedural requirement[s] to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016); *see also Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986) ("we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences"). Federalism concerns are necessarily not implicated in federal criminal proceedings. Instead, principles of federal sentencing law counsel in favor of a clear demonstration that a juvenile is permanently incorrigible before they are sentenced to life without parole.

A. Juveniles Who Are Capable of Reform Cannot Constitutionally Be Irrevocably Condemned to Die in Prison

Youth and its attendant circumstances "render suspect any conclusion that a juvenile falls among the worst offenders." *Roper*, 543 U.S. at 570. On that basis, the Court held that the Eighth Amendment

exempted all children from execution, leaving life without parole as the most serious juvenile penalty permitted by law. *Id.* at 575–79. When inflicted on a child, life without parole imposes a total "denial of hope" mandating that "whatever the future might hold in store . . . [the child] will remain in prison for the rest of his days." *Graham*, 560 U.S. at 60 (quotations omitted). While the death penalty is unique, the Supreme Court has acknowledged that "life without parole sentences [imposed on children] share some characteristics with death sentences that are shared by no other[s]." *Id.* at 69.

For this reason, the Court has repeatedly imposed categorical restrictions on the imposition of life without parole. In *Graham*, it barred the imposition of life without parole for juvenile nonhomicide offenders. *Id.* at 82. Imposing a life without parole sentence on a juvenile is "especially harsh" and therefore requires special justification to demonstrate how it satisfies valid penological goals. *Id.* at 70.

The Supreme Court has held that neither retribution, nor deterrence, nor incapacitation can justify this punishment in the juvenile context. *Id.* at 71–75. "[T]he case for retribution is not as strong with a minor as with an adult" because minors are simply "less

culpable." *Roper*, 543 U.S. at 571. Because "criminal sentence[s] must be directly related to the personal culpability of the criminal offender," inflicting life without parole on a juvenile requires thorough and compelling reasoning. *Tison v. Arizona*, 481 U.S. 137, 149 (1987). The same is true for deterrence as juveniles have a "lack of maturity and an underdeveloped sense of responsibility [that] . . . often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569–70. As they age, children learn to exercise better judgment. On similar grounds, lesser culpability undercuts the case for incapacitation. Unless "the juvenile offender forever will be a danger to society," which requires a "judgment that the juvenile is incorrigible," life without parole cannot be justified. *Graham*, 560 U.S. at 72. Rehabilitation plainly cannot support a sentence of life without parole because it "forswears altogether the rehabilitative ideal." *Id.* at 74.

Reinforcing the limited circumstances in which life without parole may be justified, the Supreme Court prohibited its mandatory imposition for juveniles convicted of homicide. *See Miller*, 567 U.S. at 465. Mandatory sentences are constitutionally problematic in that they prevent courts from assessing whether "the law's harshest term of

imprisonment proportionately punishes a juvenile offender." *Id.* at 474. To permit courts to consider the "mitigating qualities of youth," *Johnson v. Texas*, 509 U.S. 350, 367 (1993), and the "wealth of characteristics and circumstances attendant to it," the Court held that mandatory life without parole sentences violated the Eighth Amendment. *Miller*, 567 U.S. at 476.

In *Montgomery v. Louisiana*, the Court once again stressed the categorical limits on imposing life without parole on juveniles. 577 U.S. 190 (2016). *Montgomery* held that *Miller*'s prohibition should apply retroactively, reasoning that *Miller* imposed a substantive prohibition by "forbidding a certain category of punishment for a certain class of defendants because of their status." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). In other words, juveniles who are not permanently incorrigible are a distinct class who, by virtue of this characteristic, are entirely exempt from life without parole sentences.

Jones v. Mississippi repeatedly reaffirmed these limitations on sentencing juveniles to life without parole, making clear that the decision did "not overrule *Miller* or *Montgomery*." 141 S. Ct at 1321. The Court reasserted that "a State may not impose a mandatory life-

without-parole sentence on a murderer under 18" to permit the sentencer to consider "the defendant's youth" and that this protection was "substantive." *Id.* at 1311–12. The only question in *Jones* was whether state courts were required to implement *Montgomery*'s substantive guarantees via a particular procedure. The Court answered no. But nothing in the decision changes the categorical protection at issue here: There is a narrow, relatively rare class of juveniles whose conduct means they may be sentenced to life without parole. And even if that class is not "akin to sanity or a lack of intellectual disability," *id.* at 1315, "sentencing a child whose crime reflects transient immaturity to life without parole . . . is disproportionate under the Eighth Amendment." *Montgomery*, 577 U.S. at 211. *Jones* did not eliminate that substantive guarantee.

B. Federal Sentencing Law Requires A Showing That Juveniles Are Eligible For Life Without the Possibility of Parole Before That Punishment Can Be Imposed

Miller did not impose a formal factfinding requirement to implement its substantive constitutional guarantee. The Court was clear that this decision reflected its care "to limit the scope of any attendant procedural requirement to avoid intruding more than

necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 577 U.S. at 211; *Ford*, 477 U.S. at 416–17. However, it warned that "[f]idelity to this important principle of federalism . . . should not be construed to demean the substantive character of the federal right at issue." *Montgomery*, 577 U.S. at 211. A sentencing court is not "free to sentence a child whose crime reflects transient immaturity to life without parole" even if formal factfinding is not mandated in the course of its decision making. *Id.* Thus, while the Court gave states leeway to enforce the constitutional guarantee, it was federalism related concerns that led the Court to take this deferential approach.

When a federal court is sentencing a federal defendant, no such concerns apply. This Court need not hesitate in applying its usual standard and reversing a sentence where there is evidence that "the district court failed to consider evidence" presented at sentencing. *United States v. Meredith*, 685 F.3d 814, 818–27 (9th Cir. 2012) (reversing an order of restitution on the grounds that the district court did not consider evidence raised by defense counsel).

In the underlying panel decision, the court references a number of statements by counsel and the court as evidence that the re-sentencing court complied with the mandates of *Miller*. *See United States v. Briones*, 18 F.4th 1170, 1175–76 (9th Cir. 2021). The mere fact that counsel raised an argument cannot evince that the court has considered it, much less considered it adequately. If it did, then the inquiry into the court's sentencing decision would effectively collapse into an ineffective assistance of counsel claim, asking only if counsel had failed to raise viable arguments relevant to sentencing.

When a reviewing court assesses a sentence, the inquiry is focused on the court's reasoning and explanation and the extent to which those support the sentence. *Id.* at 1176–77. As such, scrutiny of sentencing must be focused on the district court's reasoning. While the court does not have to mechanically list each sentencing factor, its opinion must demonstrate engagement with those factors and allow the appellate court to determine whether the sentence is justified in light of binding law. Here, where the district court's reasoning did not reflect that engagement and the record does not enable a reviewing court to

properly assess the court's determination on incorrigibility, the sentence cannot stand.

II. CAREFUL REVIEW OF JUVENILE SENTENCING PROCEEDINGS PROTECTS FAIRNESS AND LIMITS ARBITRARINESS

As the harshest sentence under law for juveniles, sentencing courts must provide individualized consideration in implementing it. *Miller*. Doing so, followed by careful appellate review, ensures that the sentence is not imposed on an arbitrary or capricious basis. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

The extreme nature of irrevocably sentencing a child to die in prison, the high Court has required that sentencers reserve such sentences to the "rarest of juvenile offenders, whose crimes reflect permanent incorrigibility[,] . . . irreparable corruption[,] . . . or irretrievable depravity such that rehabilitation is impossible." *Montgomery*, 577 U.S. at 207–08. This requires an "individualized consideration of mitigating circumstances" that "suitably direct[s] and limit[s] . . . discretion 'so as to minimize the risk of wholly arbitrary and

capricious action.'" *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)).

Simply having the discretion to consider a child's youth during sentencing does not meet the demands of the Eighth Amendment. Instead, a sentencer must consider the mitigating aspects of that youth. *Miller*, 567 U.S. at 476. The panel decision inaptly requires nothing beyond bare consideration of youth during sentencing, no more. It allows the imposition of a sentence of life without the possibility of parole, even where the sentencer has found that the child before it is capable of rehabilitation. This violates both the substantive protection provided by *Miller* and the Court's insistence that a refusal to properly consider the mitigation aspects of youth may itself be unconstitutional. *Jones* 141 S. Ct. at 1320 n.7 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 114–15 (1982)).

This Court's decisions in other criminal cases, where the stakes are much lower, illustrate that federal courts must demonstrate that they have applied the legal standard to the facts at hand, not merely insist that they have done so.

For example, this Court vacated a sentence due to inadequate explanation for an upward departure from the sentencing guidelines. *See United States v. Miqbel*, 444 F.3d 1173, 1174 (9th Cir. 2006). Mr. Miqbel was found to have violated the conditions of his supervised release. *Id.* at 1175. The sentencing guidelines recommend a three- to nine-month term of imprisonment, but the district court sentenced him to twelve months incarceration. *Id.* The district court's sole explanation was that it had "considered the guidelines under Chapter 7" and had "carefully given consideration to a sentence within those guidelines, but... f[ou]nd that a sentence within those guidelines would be insufficient to meet the purposes of sentencing under these circumstances." *Id.*

On appeal, the court held this barebones explanation was inadequate to justify an upward departure. *Id.* at 1183. The court started from 18 U.S.C. § 3553(c), which obligates sentencing courts to give "*specific* reason[s] for the imposition" an upwards departure. *Id.* at 1177 (emphasis in original). From this broad statutory requirement, the court derived a common law threshold of (in)adequacy. *Id.* The district court's formless reasoning violated § 3553(c), mandating reversal. *Id.* at

1181, 1183. At resentencing, the district court was obligated to provide "an adequate statement of reasons for the sentence imposed." *Id.* at 1181.

Similar considerations should animate post-*Jones* reviews of sentences of life without the possibility of parole in juvenile sentencing proceedings. Life without the possibility of parole is the most serious punishment possible for children. Like *Miqbel*'s demand for specificity, individualized consideration must show why this child is supposedly eligible for life without the possibility of parole. A court must explain which factors, characteristics, and actions render them beyond redemption.

III. SENTENCES OF LIFE WITHOUT THE POSSIBILITY OF PAROLE HAVE HISTORICALLY, AND CONTINUE TO, DISPROPORTIONATELY FALL ON CHILDREN OF COLOR

Unfortunately, the administration of life without the possibility of parole on children in the United States has been disproportionately applied to defendants of color. The reporting and scholarship of amici the Campaign for Fair Sentencing of Youth and Phillips Black, Inc. has highlighted these disparities.

Sentences to life without the possibility of parole are systematically imposed on youth in deeply arbitrary and racially disproportionate ways. Of the approximately 2,800 children sentenced to life without parole prior to the Supreme Court's decision in *Miller,* more than 2000 (73%) are children of color. *See* Campaign for Fair Sentencing of Youth The discretion at sentencing mandated in *Miller*, absent safeguards and appellate scrutiny, has not improved racially disproportionate imposition of the most severe sentences. Since *Miller* overturned mandatory sentencing schemes requiring life without parole, racial disparities have only grown. Of new sentences imposed since *Miller* was decided, 78% of life without the possibility of parole sentences imposed on children have been imposed on children of color. These disparities are particularly acute for Black defendants. While Black youth made up 61% of those children sentenced to life without the possibility of parole prior to *Miller*, they make up 72% of those sentenced since 2012. *Jones*, 141 S. Ct. at 1334 n.2 (Sotomayor, J., dissenting) (quoting The Campaign for the Fair Sentencing of Youth, *Tipping Point* 7 (2018)).

Likewise, the research of Phillips Black attorneys has established "[n]on-whites are overrepresented among the JLWOP population in ways perhaps unseen in any other aspect of our criminal justice system." *Jones*, 141 S. Ct. at 1334 n.2 (Sotomayor, J., dissenting) (quoting John Mills, et al. .*Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 579–80 (2016)).

Just as the race of the victim plays an outsized role in capital sentencing, similar trends pervade JLWOP sentences. *See, e.g.*, Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27, 55 (1984) (finding race of victim impact in capital cases across jurisdictions). Of youth arrested for murder, 23% are Black children suspected of killing a white person, but 43% of JLWOP sentences are for a Black child convicted of killing a white person. *See* The Sentencing Project, *The Lives of Juvenile Lifers: Findings from a National Survey* 3 (Mar. 2012). White youth accused of killing a Black victim are only half as likely to receive a sentence of life without the

possibility of parole as their proportion of arrests for killing a Black victim. *Id.*

The Campaign for Fair Sentencing of Youth continues to monitor resentencing outcomes and imposition of life without the possibility of parole sentences on children. In the federal system, 76% of youth sentenced to life without parole before *Miller* were children of color. The Campaign for Fair Sentencing of Youth, *Racial Disparities in Youth Sentencing* 1 (Mar. 2022) available at https://cfsy.org/wp-content/uploads/Final-Racial-Disparities-Fact-Sheet-March-2022-1.pdf. Of resentencings to date, only three have resulted in the reimposition of life without parole. *Id.* All of those reimpositions of the harshest sentence available have been levied against youth of color, with two of three against Native Americans, including Mr. Briones. *Id.* Even when resentenced to something less than life without parole, Native Americans have still faced significantly harsher outcomes than their white counterparts. Of those children serving life without the possibility of parole in the federal system, the median new sentence at resentencing is 38.5 years. *Id.* This is already significantly higher than the average sentence faced by a defendant in state court where the

median outcome at resentencing is 25 years before review, but outcomes for Native youth at resentencing have been even worse - the lowest sentence imposed on a Native youth at resentencing is 54 years. *Id.* White youth by comparison received a median new sentence of 28 years. *Id.*

Enforcing the Eighth Amendment's substantive, categorical prohibition—and the individualized consideration designed to effectuate it—will ensure that federal sentencers guard against the arbitrary imposition of the harshest penalty under law.

CONCLUSION

Amici urge the Court to grant rehearing en banc.

Respectfully submitted,

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March 14, 2022

CERTIFICATE OF COMPLIANCE

I certify that the foregoing *Amicus* Brief in Support of Petition for Rehearing En Banc complies with the length limits permitted by Circuit Rule 29-2(c)(2). The brief is 3,409 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

PHILLIPS BLACK INC.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 14, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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