No. 19-720

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RILEY BRIONES, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
Sheila Baynes
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

Easha Anand
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

Vikki M. Liles
THE LAW OFFICES OF VIKKI M. LILES, P.L.C.
PO Box 5877
Sun City West, AZ 85376
(602) 252-2110

Counsel for Respondent

QUESTIONS PRESENTED

1. The question presented in *Jones v. Mississippi* (No. 18-1259) is whether there must be a specific finding of permanent incorrigibility before a juvenile is sentenced to life without parole. In this case, the Ninth Circuit vacated Respondent's life sentence not because the district court failed to make a *finding*, but because it failed to even *consider* evidence of Respondent's rehabilitation post-incarceration. Should this case be held for *Jones* simply because both cases "concern the proper scope" of *Miller v. Alabama*, 567 U.S. 460 (2012)?

2. The question presented in the government's petition for certiorari here is "[w]hether *Miller v. Alabama* … entitles respondent to invalidation of a discretionary"—as opposed to a mandatory—"life-without-parole sentence." Pet. (I). The government conceded below that *Miller* does, in fact, apply to discretionary sentences. Should this case be held notwithstanding the government's concession?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING CERTIORARI 7

I. The Decision Below Rests On A Ground Independent Of The Question Presented In *Jones v. Mississippi*. 7

II. The United States Conceded Below The Question It Seeks To Present In This Case. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

ABC, Inc. v. Beshear,
138 S. Ct. 314 (2017)....................................14

Delta Air Lines, Inc. v. August,
450 U.S. 346 (1981)....................................12

District of Columbia v. Wesby,
138 S. Ct. 577 (2018)....................................11

Indiana v. Bowman,
139 S. Ct. 68 (2018)....................................11

Jefferson v. Upton,
560 U.S. 284 (2010)....................................11, 14

Johnson v. United States,
135 S. Ct. 2551 (2015)....................................11

Lawrence v. Chater,
516 U.S. 163 (1996)....................................1, 7

Machado v. Holder,
559 U.S. 966 (2010)....................................2, 13

Mathena v. Malvo,
No. 18-217 (U.S. filed Aug. 16, 2018)....................6

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007)....................................12

Miller v. Alabama,
567 U.S. 460 (2012)..3, 4

Montgomery v. Louisiana,
136 S. Ct. 718 (2016)..................................3, 8, 12

Reno v. Koray,
515 U.S. 50 (1995)..13

Taylor v. United States,
138 S. Ct. 1975 (2018)..11

United Parcel Service, Inc. v. Mitchell,
451 U.S. 56 (1981)..14

United States v. Jones,
565 U.S. 400 (2012)..14

United States v. Olano,
507 U.S. 725 (1993)..13

Wellons v. Hall,
558 U.S. 220 (2010)..1, 11

Youakim v. Miller,
425 U.S. 231 (1976)..13

Statutes

28 U.S.C. § 2255 4

Other Authorities

Appellant's Reply to Supp. Br., *Jones v. State*, No. 2015-KA-00899-COA, 2017 WL 10397671 (Miss. Apr. 3, 2017) 8

Br. for Appellee, *Jones v. State*, No. 2015-KA-00899-COA, 2016 WL 10732769 (Miss. June 17, 2016) 13

Br. for the U.S. as Amicus Curiae Supporting Pet'r, *Montgomery v. Louisiana*, No. 14-280 (U.S. July 29, 2015) 12

Br. in Opp., *Jones v. Mississippi*, No. 18-1259 (U.S. June 11, 2019) 7

Pet., *Jones v. Mississippi*, No. 18-1259 (U.S. Mar. 29, 2019) 1, 5, 7

INTRODUCTION

The government seeks to hold Mr. Briones' case pending this Court's disposition of *Jones v. Mississippi*, No. 18-1259, because both cases "concern[] the proper scope of this Court's decision in *Miller* [*v. Alabama*, 567 U.S. 460 (2012)]." Letter from the Solicitor General at 1 (Mar. 10, 2020). But this Court does not hold a case with a view to grant, vacate, and remand simply because it cites the same precedents as another case on the Court's docket. Instead, the Court should only GVR a case if an intervening precedent produces a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). And neither a ruling on the question presented in *Jones* nor a ruling on the question that the government has formulated in this case would create such a probability.

The question presented in *Jones* is whether this Court's cases require a "specific finding" that a juvenile "is irretrievably depraved, irreparably corrupt, or permanently incorrigible" before a life without parole sentence may be imposed. Pet. 6, *Jones v. Mississippi*, No. 18-1259 (Mar. 29, 2019). But the en banc court below vacated Mr. Briones' sentence because the district court failed to even *consider* evidence of Mr. Briones' post-conviction conduct, not because it failed to make any particular *finding*. Pet. App. 15a. Regardless of how this Court answers the question presented in *Jones*, then, the Ninth Circuit's opinion in this case will stand, and a GVR would not be appropriate. *See Wellons v. Hall*, 558

U.S. 220, 227 (2010) (Scalia, J., dissenting from GVR) ("[T]he decision below does *not* rest upon the objectionable faulty premise, but is independently supported by other grounds—so that redetermination of the faulty ground will assuredly *not* determine the ultimate outcome of the litigation.") (emphasis in original) (internal quotation marks omitted).

Although the government asks only that this Court hold Mr. Briones' case pending *Jones*, it proffers a different question in this case from the one presented in *Jones*: "Whether *Miller v. Alabama* … entitles respondent to invalidation of a discretionary" (as opposed to a mandatory) "life-without-parole sentence." Pet. (I). But as the government acknowledges, it explicitly conceded below that *Miller* applies to discretionary sentences. Pet. 8 n.*. This Court declines to grant petitions where the argument at issue has been waived in the court below; it should not do otherwise just because the government here asks for a hold with a view to GVR rather than an outright grant. *See Machado v. Holder*, 559 U.S. 966 (2010) (Roberts, C.J., dissenting from GVR).

Mr. Briones has had a spotless prison record for the entirety of his incarceration, including during the 15 years before *Miller* during which he could not hope to gain anything from his good behavior. He has waited decades for a constitutionally compliant sentence. And if this case is held pending *Jones*, it is possible that the release date for Mr. Briones' father—the man who recruited him to commit the crime of conviction and convinced him to turn down the plea deal that would have made him a free man

today—will arrive before Mr. Briones even receives a chance to argue for a lesser sentence.

Because there is no reason to believe that the government will be able to satisfy this Court's standards to GVR Mr. Briones' case—in light of resolution of either the question presented in *Jones* or the question presented by the government in this case—this Court should decline to hold Mr. Briones' case, deny the government's petition, and allow Mr. Briones' resentencing to go forward.

STATEMENT OF THE CASE

Riley Briones, Jr., was first sentenced to life without parole 20 years before *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Pet. App. 3a. In 1994, when Mr. Briones was 17 years old, he committed a series of crimes. As relevant here, Mr. Briones drove three fellow gang members to a Subway franchise they planned to rob. *Id.* He waited in the car while they went inside. *Id.* One of the three came out to talk with Mr. Briones shortly before shooting and killing the Subway clerk. *Id.* Mr. Briones was subsequently arrested. *Id.* After turning down a plea offer because his father—a co-defendant—convinced him not to take it, Mr. Briones was convicted of "first-degree / felony murder." *Id.* The statute allowed only for sentences of death or life without parole; Mr. Briones was sentenced to life without parole. *Id.*

In the decades following Mr. Briones' conviction, the legal framework for imposing criminal sentences on children underwent a sea change. Most relevant here, in *Miller v. Alabama*, 567 U.S. 460 (2012), this

Court held that only the "rare juvenile offender whose crime reflects irreparable corruption," rather than "unfortunate yet transient immaturity," may receive life without parole, the "harshest possible penalty" for a juvenile. *Id.* at 479-80. *Miller* thus "mandates … that a sentencer … consider[] an offender's youth and attendant characteristics"—including his "capacity for change"—before sentencing him to life imprisonment without the possibility of parole. *Id.*

Meanwhile, Mr. Briones, too, had changed. He grew out of any anger toward his father. He married the mother of his child. And he became a model inmate; during decades of incarceration, he did not receive a single write-up, not even for such minor infractions as failing to make his bed or having a pen when he wasn't supposed to. Pet. App. 5a-6a.

Following *Miller*, Mr. Briones filed a *pro se* motion pursuant to 28 U.S.C. § 2255 seeking to have his original sentence vacated; the government acquiesced, and Mr. Briones was resentenced in 2016. Pet. App. 4a.

At resentencing, Mr. Briones presented evidence of his childhood, marked by violence, substance abuse, and deprivation, and of the ways his father influenced his criminal conduct. Pet. App. 2a-3a. Mr. Briones also expressed "grief, regret, sorrow" to the victim's family for his crimes. Pet. App. 5a.

Most importantly, Mr. Briones presented evidence of how he had changed since the time of the crime—"he had served nearly eighteen years in pris-

on without a single infraction of prison rules"; "held a job in food service; volunteered to speak with young inmates about how to change their lives; completed his GED; and, in 1999 (sixteen years before his resentencing), married Carmelita, the woman he had been dating since high school and with whom he had a daughter." Pet. App. 4a-5a. "[A]s even the government conceded, Briones had been a model inmate." Pet. App. 5a. And he had done all of that even though "for the first fifteen years of Briones's incarceration, 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." Pet. App. 15a.

The prosecution acknowledged that Mr. Briones has been "really doing well in prison," but ultimately advocated for a life sentence, pointing to the facts of the crime, to the prosecutor's belief that Mr. Briones was not truly remorseful, and to several uncharged acts. Pet. App. 35a, 5a.

The district court reimposed a life sentence, concluding that "some decisions have lifelong consequences." Pet. App. 6a.

On appeal, a divided panel affirmed Mr. Briones' sentence over a dissent by Judge O'Scannlain.[1] Pet.

---

[1] The *Jones* petition cited the three-judge panel opinion as part of the split on the question presented. Pet. 13-14, *Jones*, *supra*, No. 18-1259. However, that opinion was subsequently vacated, and the en banc court's opinion was issued after briefing on the *Jones* petition for certiorari was complete.

App. 41a. The court of appeals granted rehearing en banc and sided with Judge O'Scannlain.

The en banc court vacated Mr. Briones' sentence because the district court failed to consider evidence of Mr. Briones' rehabilitation amassed in the decades following his original sentence. "This is precisely the sort of evidence of capacity for change that is key to determining whether a defendant is *permanently* incorrigible, yet the record does not show that the district court considered it," the en banc court wrote. Pet. App. 15a (emphasis in original). "This alone requires remand." *Id.*

The mandate, which the government did not seek to stay, issued in this case on July 31, 2019. Resentencing proceedings commenced on September 9, 2019, and Mr. Briones' legal team hired an investigator and began meeting with expert and lay witnesses in preparation for his resentencing. On December 6, 2019, the government petitioned for certiorari and requested that this Court hold Mr. Briones' case pending the outcome of *Mathena v. Malvo*, No. 18-217. When the petition in that case was dismissed, the government filed a supplemental letter requesting that this Court instead hold Mr. Briones' case pending its decision in *Jones v. Mississippi*, No. 18-1259.

REASONS FOR DENYING CERTIORARI

I. The Decision Below Rests On A Ground Independent Of The Question Presented In *Jones v. Mississippi*.

Contrary to the government's letter, *Jones v. Mississippi* is not generically about "the proper scope of *Miller*." Letter 1. Instead, *Jones* presents the specific question whether "the sentencing court violate[s] the Eighth Amendment if it imposes a sentence of life without parole upon a juvenile without making a finding of fact on the record that the defendant is permanently incorrigible." Br. in Opp. i, *Jones v. Mississippi*, No. 18-1259 (June 11, 2019). But in this case, the court below held that, regardless of whether the district court was required to make a formal *finding* of incorrigibility, it erred by failing to *consider* an essential category of evidence on that score—specifically, evidence of Mr. Briones' rehabilitation following his incarceration—before imposing a life sentence. Because the question presented in *Jones* does not implicate any "premise" that the decision below "rests upon," there is no reason to believe that a GVR will be warranted in Mr. Briones' case. *See Lawrence*, 516 U.S. at 167.

The question presented in *Jones* is whether a sentence must be set aside where "the sentencing judge did not make a specific 'finding' that [a defendant] is irretrievably depraved, irreparably corrupt, or permanently incorrigible." Pet. 6-7, 15, *Jones*, *supra*, No. 18-1259. That is, the *Jones* petition argues that it is insufficient to merely consider the factors identified in *Miller*. Pet. 6, *Jones*, *supra*, No.

18-1259. Instead, the *Jones* petitioner asserts that "reason dictates—and numerous appellate courts have concluded[—]that there is only one way to implement *Miller*'s and *Montgomery*'s substantive guarantee," namely by requiring a "distinct determination on the record that [a defendant] is irreparably corrupt."[2] Appellant's Reply to Supp. Br., *Jones v. State*, No. 2015-KA-00899-COA, 2017 WL 10397671, at *2 (Miss. Apr. 3, 2017) (internal quotation marks omitted).

The en banc court in Mr. Briones' case found an altogether different error in Mr. Briones' resentencing: The district court's failure to consider Mr. Briones' sterling post-incarceration conduct as evidence of his capacity to change. Evidence of Mr. Briones' rehabilitation since his original sentencing was "precisely the sort of evidence of capacity for change that is key to determining whether a defendant is *permanently* incorrigible, yet the record does not show that the district court considered it." Pet. App. 15a. The en banc court concluded, "This alone requires remand." *Id.*

---

[2] *Montgomery* explained that *Miller* "did not impose a formal factfinding requirement" in order to avoid "intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 136 S. Ct. at 735. Mr. Briones' sentence, of course, was imposed under federal law, such that there are no concerns about such an intrusion. But to the extent the language in *Montgomery* applies to federal courts, too, the en banc court below did not dispute that the Eighth Amendment commands no "formal factfinding requirement."

The court took no position on whether a court must *also* formally find incorrigibility to impose LWOP on a juvenile offender. It held only that regardless of whether a finding is required, if events after an initial sentencing "effectively show that the defendant *has* changed or *is* capable of changing, LWOP is not an option." Pet. App. 15a-16a. "[A] juvenile defendant who is capable of change or rehabilitation is not permanently incorrigible or irreparably corrupt" and thus "is constitutionally ineligible for an LWOP sentence." Pet. App. 10a. For the shrinking pool of defendants still serving sentences imposed pre-*Montgomery*—the only pool of defendants for whom there is still "a substantial delay … between a defendant's initial crime and later sentencing"—the en banc opinion thus commanded that "the defendant's post-incarceration conduct is especially pertinent to a *Miller* analysis." Pet. App. 15a-16a.

In Mr. Briones' case, the en banc court observed that the evidence that Mr. Briones was "not irreparably corrupt or irredeemable because he had done what he could to improve himself within the confines of incarceration" was "abundant" and uncontested: Mr. Briones had a pristine prison record, even though "for the first fifteen years of Briones's incarceration, 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." Pet. App. 15a. At resentencing, the prosecution even "applaud[ed] the defendant for his conduct in prison" and described him as a "model inmate." CA9 ER 242; Pet. App. 5a. And the district court expressly noted

that Mr. Briones "has improved himself while he's been in prison"—that, in other words, rehabilitation could not be "impossible," because Mr. Briones had *already* undergone some measure of rehabilitation—but did not seem to believe that observation had any bearing on its analysis. Pet. App. 6a. "Based on the district court's articulated reasoning at Briones's resentencing," the Ninth Circuit "[could] not tell whether the district court appropriately considered the relevant evidence … of [Briones's] post-incarceration efforts at rehabilitation."[3] Pet. App. 13a.

The court below thus vacated Mr. Briones' sentence and remanded for further proceedings in which evidence of post-incarceration conduct should be considered. And it held that, whatever other flaws there were with the district court's resentencing, its failure to consider that conduct was a sufficient ground for vacatur. Pet. App. 15a ("This alone requires remand.").

---

[3] The en banc court thought the district court "may have hesitated to fully consider Briones's post-incarceration conduct" because the government argued that the court "had to 'make some guesses as to what Judge Broomfield would have done back [at Briones's original sentencing] had Judge Broomfield had the option of something other than a life sentence available to him.'" Pet. App. 15a. "On this point," though, the en banc court held, "the government's argument missed the mark"; the district court was required to consider evidence amassed after the original sentencing because evidence that a juvenile offender *has* changed may foreclose a finding that the offender *cannot* change and is thus permanently incorrigible. *Id.*

The Court's resolution of *Jones* will therefore have no bearing on the soundness of the decision below. Whether or not the Eighth Amendment requires a specific finding, as the *Jones* petitioner argued, the Ninth Circuit held that it at least requires the sentencer to consider whether the defendant has shown a capacity to change following his conviction.

There is thus no basis to hold this case pending *Jones*. The decision below is "independently supported by other grounds," such that the answer to the question presented in *Jones* would not change the outcome of this case. *See Wellons*, 558 U.S. at 227 (Scalia, J., dissenting).[4]

II. The United States Conceded Below The Question It Seeks To Present In This Case.

The government's petition purports to present the question "[w]hether *Miller v. Alabama* … entitles respondent to invalidation of a discretionary"—as opposed to mandatory—"life-without-parole sentence." Pet. (I). But the government conceded below

[4] *See also Jefferson v. Upton*, 560 U.S. 284, 304 (2010) (Scalia, J., dissenting) (faulting majority for summarily vacating "on the basis of an error … not commit[ted]"); *Taylor v. United States*, 138 S. Ct. 1975 (2018) (summarily denying petitioner's request for GVR in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), where brief in opposition argued that sentence below was independently supported by counts unaffected by *Johnson*); *Indiana v. Bowman*, 139 S. Ct. 68 (2018) (summarily denying State's request for GVR in light of *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), where brief in opposition argued that question presented in *Wesby* was distinct from basis for decision below, despite both concerning probable cause standard).

that *Miller* applied to discretionary sentences. Pet. 8 n.*. Accepting that concession, the Ninth Circuit did not discuss the question the government now presents. Because the government's question presented was neither pressed nor passed upon below, this Court should deny certiorari, as is its usual practice. *See, e.g.*, *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (argument not raised below is not "properly before" Supreme Court).

As the government acknowledges, it "previously told lower courts, including the court of appeals in this case, that *Montgomery*'s reasoning 'implicat[es] the validity of discretionary sentences as well as mandatory ones.'" Pet. 8 n.* (citing Gov't C.A. Resp. to Pet. for Reh'g 3). With good reason: Just four years ago, the Solicitor General argued in *Montgomery* itself that *Miller* does not apply where a court has discretion to consider a defendant's youth before imposing a life sentence, and this Court rejected the argument. *See* 136 S. Ct. at 734 ("*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.") (emphasis added); Br. for the U.S. as Amicus Curiae Supporting Pet'r at 5, *Montgomery v. Louisiana*, No. 14-280 (July 29, 2015).[5] And because the government did

---

[5] The Solicitor General notes that "[l]itigants and lower courts cannot lightly disregard any statements in an opinion of this Court." Pet. 8 n.*. That observation cannot excuse the government's express concession, for this Court still holds litigants to their affirmative waiver of legal claims, even where the litigant seeks to overrule existing precedent. *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (brief discussion

not argue below that *Miller* was limited to mandatory life sentences, neither the majority nor the dissent at the Ninth Circuit considered that question.

There could be no serious argument that this Court should hear the government's question presented on the merits in this case, given that this question was neither pressed nor passed upon below. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). And the government should not be able to achieve indirectly through this Court's GVR practice—by raising its new position in an amicus brief in an unrelated case, then requesting that this case be held and ultimately GVR-ed in light of that other case—what it could not achieve directly.[6] *See Machado*, 559 U.S. at

---

sufficient to preserve argument foreclosed by precedent); *United States v. Olano*, 507 U.S. 725, 733-34 (1993) (difference between forfeiture and intentional waiver).

[6] The government does not argue that Mr. Briones' case is independently certworthy, asking only that the case be held pending this Court's decision in *Jones v. Mississippi*. But the government has put forth a different question in this case (whether *Miller* applies to discretionary life-without-parole sentences) than the question presented in *Jones* (whether *Miller* requires a specific finding).

In fact, the Respondent in *Jones* has never argued that *Miller* applies only to mandatory life-without-parole sentences. *E.g.*, Br. for Appellee, *Jones v. State*, No. 2015-KA-00899, 2016 WL 10732769, at *15 (Miss. June 17, 2016) (assuming *Miller* forbids even discretionary life-without-parole sentence if defendant is "not one of the relatively small proportion of juvenile offenders who develop entrenched patterns of problem behavior"). Because the argument that *Miller* applies only to mandatory life-without-parole sentences will be raised, if anywhere, only in the United States' amicus brief in *Jones*, not in any party's brief, this Court should decline to consider it. *E.g.*, *Reno v.*

966 (Roberts, C.J., dissenting from GVR) (GVR is "especially inappropriate in this case, as petitioners do not appear to have raised" the claim in question); *Jefferson*, 560 U.S. at 295 (Scalia, J., dissenting from GVR) (criticizing GVR based on "ground that was neither raised nor passed upon below"); *ABC, Inc. v. Beshear*, 138 S. Ct. 314 (2017) (summarily rejecting request to GVR where brief in opposition demonstrated that question presented was not raised below).

This Court should therefore follow its usual practice and deny this petition, because the question presented was waived in the court of appeals and therefore is not properly before this Court. *See United States v. Jones*, 565 U.S. 400, 413 (2012).

* * *

This Court's resolution of the question presented in *Jones* will not affect this case, which turns on an entirely distinct question. And this case is an improper vehicle for addressing the separate question the government presents here, because the government has waived the issue and the Ninth Circuit did not consider it. This Court should therefore decline the government's invitation to hold this case.

Koray, 515 U.S. 50, 55 n.2 (1995); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

Jones thus will not decide the question the government claims is presented in this case—an additional reason why this Court should not hold this case pending *Jones*.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
Sheila Baynes
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

Easha Anand
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

Vikki M. Liles
THE LAW OFFICES OF VIKKI M. LILES, P.L.C.
PO Box 5877
Sun City West, AZ 85376
(602) 252-2110

April 6, 2020