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

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INTRODUCTION

Jones v. Mississippi, 141 S. Ct. 1307 (2021), held that the Eighth Amendment does not require a factual finding—explicit or implicit—before sentencing a juvenile to life without parole. 141 S. Ct. at 1311. The Court's opinion in this case anticipated that holding: It reiterated no fewer than three times that the Eighth Amendment does not require a finding of fact. *United States v. Briones*, 929 F.3d 1057, 1070, 1071 (9th Cir. 2019) (en banc). And it rejected the dissent's accusation that "although the majority claims otherwise, the majority's opinion vacates the district court's sentence because the district court failed to find that Briones was permanently incorrigible," explaining instead that it was vacating the sentence because the district court record did not conform to federal sentencing principles and because the district court may have believed itself unable to consider evidence of Mr. Briones's spotless prison record in the decades since he was convicted. *Id.* at 1073 (Bennett, J., dissenting). The argument that *Jones* rejected—and that this Court had already rejected prior to *Jones*—had nothing to do with why this Court vacated Mr. Briones's sentence.

Jones declined to overrule *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), despite calls to do so. *Jones*, 141 S. Ct. at 1321; *id.* at 1323 (Thomas, J., concurring). And when it listed the cases it took itself to be overruling, Mr. Briones's was not among them, even though the *Jones* petitioner cited this case in seeking certiorari.[1] This Court should take the Supreme Court at its word: *Jones* held only that the Eighth Amendment does not mandate a particular procedure for identifying those juveniles who may be constitutionally sentenced to life without parole. Because this Court's opinion did not rely on any procedural requirement under the Eighth Amendment, *Jones* has no effect on it.

STATEMENT OF THE CASE

Factual Background

This Court relied on the following facts in its opinion: Riley Briones Jr.'s childhood was marked by abuse, violence, and deprivation. He "endured physical abuse from his father"; at least once, he "went to school with blood seeping through his shirt because of his father's

[1] *Jones*, 141 S. Ct. at 1313 (listing cases); Pet. for Writ of Certiorari at 3, *Jones v. Mississippi*, No. 18-1259 (U.S. Mar. 29, 2019).

abuse." *Briones*, 929 F.3d at 1060, 1066 n.7. Following his parents' lead, Riley began using drugs and alcohol by age 11. *Id.* at 1060. And when Riley's father joined the Eastside Crips gang, Riley—then a teenager—did so as well. *Id.*

In 1994, when Riley was still a child, he and other gang members committed a series of crimes. *Id.* "The most serious of these crimes was the robbery of a Subway restaurant." *Id.* at 1060-61. Although Riley's brother, Ricardo, "came up with the idea," Riley agreed to the plan, drove four gang members to the restaurant, and remained in the car as the getaway driver. *Id.* at 1061. When the only armed member of the gang exited the restaurant, Riley spoke with him before the gang member reentered the restaurant and shot the Subway clerk. *Id.*

Riley was arrested and charged with felony murder. *Id.* The Government extended a plea deal to Riley and his four co-defendants, including his father and brother, offering each of them 20-year sentences. *Id.* Riley's father was "adamant" that no one take the deal, so

Riley rejected the plea offer and was convicted at trial of felony murder. *Id.* He was given a mandatory sentence of life without parole.[2] *Id.*

As this Court explained, in the decades since he was sentenced, Mr. Briones has turned his life around. He has maintained a perfect disciplinary record during his decades in prison, without a single infraction of even a minor prison rule. *Id.* at 1061-62. He held down a job in food service, completed his GED, and volunteered as a counselor for younger inmates. *Id.* at 1062. And he married Carmelita, the woman he had been dating since high school and with whom he had a daughter. *Id.*

Procedural Background

Following the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), the district court granted Mr. Briones's motion to vacate his sentence and held a second sentencing hearing. Shortly before Mr. Briones was resentenced, the Supreme Court issued its decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which

[2] Riley was convicted of various other offenses, but he has served all of the prison time imposed for his non-homicide crimes. *Briones*, 929 F.3d at 1061 n.1. "[T]he only sentence remaining is the LWOP sentence for the Subway robbery." *Id.*

"provided additional guidance about the proper application of *Miller* and specified that a sentence of life without the possibility of parole is constitutionally permissible only for 'the rarest of juvenile offenders'—specifically, those whose 'crimes reflect permanent incorrigibility' and 'irreparable corruption,'" as opposed to "'transient immaturity.'" *Briones*, 929 F.3d at 1061 (quoting *Montgomery*, 136 S. Ct. at 734).

At Mr. Briones's 2016 resentencing, he put on evidence that in the more than 18 years since his life-without-parole sentence was imposed, he had changed dramatically, becoming a model inmate, hard worker, and loving husband. *Id.* at 1061-62. He also expressed "grief, regret, sorrow, pain, sufferings" for his crimes and apologized to both his family and the victim's family. *Id.* at 1062. The Government conceded that Mr. Briones had changed in the decades since he was convicted and sentenced. *Id.* at 1061-62; *see* ER242 ("And I applaud the defendant for his conduct in prison. He's really doing well in prison."). But the Government argued that a life without parole sentence remained appropriate, in part because the district court had to "make some guesses as to what [the original sentencing judge] would have done,"

rather than consider the evidence about Mr. Briones's conduct in the decades since. *See Briones*, 929 F.3d at 1067.

The district court reimposed life without parole on Mr. Briones. The district court began with a calculation of Mr. Briones's sentence under the federal Sentencing Guidelines, which yielded a life sentence. *Id.* Like the Government, the district court conceded that "[a]ll indications are that [the] defendant … has improved himself while he's been in prison." *Id.* But it concluded that "some decisions have lifelong consequences" and reimposed a life sentence. *Id.*

Following a 2-1 opinion affirming Mr. Briones's sentence, written by Judge Rawlinson with Judge O'Scannlain dissenting, this Court reheard Mr. Briones's case en banc. 890 F.3d 811 (9th Cir. 2018). The en banc Court noted that the Supreme Court's Eighth Amendment cases "do[] not require a sentencer to make any explicit findings before imposing a life sentence on a defendant who was a juvenile at the time of the offense." 929 F.3d at 1070-71; *see id.* at 1071 ("*Montgomery* confirmed that there is no factfinding requirement before imposing such a sentence."). It vacated Mr. Briones's sentence for two independent reasons. First, this Court held that the federal sentencing statute

requires that the sentencing record "reflect that the court meaningfully engaged in *Miller*'s central inquiry": Whether Mr. Briones was capable of change or, instead, permanently incorrigible. 929 F.3d at 1067. The record in this case did not. Second, the record did not make clear whether the district court understood that it could consider evidence of Mr. Briones's post-conviction rehabilitation. *Id.* at 1066-67. "This alone requires remand," this Court explained. *Id.* at 1067.

The Government petitioned for certiorari. In April, the Supreme Court issued its opinion in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), 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 of permanent incorrigibility" or to "provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility." *Id.* at 1313. Its holding, however, did not preclude legislatures "from imposing additional sentencing limits" or other requirements. *Id.* at 1323. The Supreme Court granted certiorari in Mr. Briones's case, vacated this Court's opinion, and remanded for reconsideration in light of *Jones*. *United States v. Briones*, No. 19-720, 2021 WL 1725145 (U.S. May 3, 2021).

STANDARD OF REVIEW

A Supreme Court order granting, vacating, and remanding a case "simply indicate[s] that, in light of intervening developments, there [i]s a reasonable probability that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001). So-called "GVR" orders "require only further consideration" from the lower court. *Lawrence v. Chater*, 516 U.S. 163, 168 (1996).

GVR orders do not reflect any determination by the Supreme Court of the merits of a case. *See Tyler*, 533 U.S. at 666 n.6 (cautioning against reading a view on the merits into a GVR order); *Brown v. United States*, 135 S. Ct. 2924 (2015) (Alito, J., concurring in the decision to grant, vacate, and remand) ("On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief."). This Court can—and often does—reach the same result following a GVR as it had prior to the GVR.[3]

[3] *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);

ARGUMENT

I. This Court's Opinion Is Not Affected By *Jones*.

This Court's opinion vacated Mr. Briones's life sentence for two independent reasons. *Jones* affects neither. First, this Court explained that the district court had not "meaningfully engaged in *Miller*'s central inquiry." *Briones*, 929 F.3d at 1067. *Jones* did not alter "*Miller*'s central inquiry," and the requirement of "meaningful engagement" came from the federal sentencing statute, not from the Eighth Amendment. *See Briones*, 929 F.3d at 1067 (citing *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (en banc)). Second, this Court held that the district court "may have hesitated to fully consider" evidence of Mr. Briones's post-conviction rehabilitation, such as his perfect prison record. *Id.* *Jones* did not affect that rationale, either; it cast no doubt on the relevance of post-conviction rehabilitation in evaluating a life-without-parole sentence for a juvenile.

Jones does not undermine either of the bases on which this Court's opinion rested. The opinion should therefore stand.

E.F. v. Newport Mesa Unified Sch. Dist., 726 F. App'x 535 (9th Cir. 2018); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc).

A. This Court's Conclusion That The District Court Did Not "Meaningfully Engage[] In *Miller*'s Central Inquiry" Is Not Altered By *Jones*.

This Court vacated Mr. Briones's sentence because the record below did not "reflect that the court meaningfully engaged in *Miller*'s central inquiry," namely, identifying "those whose crimes reflect permanent incorrigibility and irreparable corruption."[4] *Briones*, 929 F.3d at 1061, 1067. *Jones* did not purport to change that "central inquiry." 141 S. Ct. at 1321 ("The Court's decision today carefully follows both *Miller* and *Montgomery*."). And the requirement of "meaningful engagement" comes from this Court's cases interpreting the federal sentencing statute, as to which, of course, *Jones* is irrelevant. *See Briones*, 929 F.3d at 1067 (citing *Carty*, 520 F.3d at 991).

[4] The Government and the dissenting opinion agreed with this Court as to that "central inquiry." *See, e.g.*, *Briones*, 929 F.3d at 1071 (Bennett, J., dissenting) (life without parole may only be imposed where "circumstances … support that the juvenile offender's crimes reflect permanent incorrigibility, not transient immaturity"); United States' Response to Pet'n for Reh'g or Reh'g En Banc 11, *United States v. Briones*, No. 16-10150, Dkt. 64 (9th Cir. Oct. 31, 2018) ("The substantive law applicable to Briones's claims is settled … Substantively, LWOP is an excessive sentence for children whose crimes reflect transient immaturity.").

This Court's opinion reversing Mr. Briones's sentence is thus unaffected by *Jones*.

1. *Jones* reiterated what it called the "key paragraph from *Montgomery*," which holds as follows:

> 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. Despite calls to overrule or limit *Montgomery* (including from Justice Thomas in his concurrence), the Supreme Court in *Jones* reaffirmed the core holding of that case: Sentencing a "transient[ly] immatur[e]" juvenile to life without parole violates the Eighth Amendment. *Id.* at 1315 n.2, 1322. The "central inquiry" that this Court identified in its en banc opinion—"whether a crime reflects 'transient immaturity' (in which case, an LWOP sentence for a juvenile is impermissible) or '*irreparable* corruption' (in which case an LWOP sentence for a juvenile is constitutionally permitted)"—remains unchanged by *Jones*. *Briones*, 929 F.3d at 1063.

Jones dealt only with the "degree of procedure" mandated by the Eighth Amendment "in order to implement its substantive guarantee."

141 S. Ct. at 1315 n.2. It concluded that the Eighth Amendment requires neither "a separate factual finding of permanent incorrigibility" nor "an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility." *Id.* at 1314, 1321. But that conclusion "does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.* at 1315 n.2.

The "central inquiry" for purposes of choosing a sentence for a juvenile homicide offender remains unchanged.

2. Although the Supreme Court explained that the Eighth Amendment did not impose any requirement of an "on-the-record sentencing explanation," it acknowledged that other sources of law may impose such a requirement. *Id.* at 1321, 1323 ("Importantly, like *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder."). In this case, for the proposition that the district court must "meaningfully engage" with *Miller*'s central inquiry, this Court relied on just such an other source of law—the federal sentencing statute. *Briones*, 929 F.3d at 1067.

In support of the "meaningfully engage" proposition, this Court cited not to any Eighth Amendment cases, but to *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (en banc). *See Briones*, 929 F.3d at 1067. In *Carty*, this Court interpreted 18 U.S.C. § 3553, the statute under which all federal defendants are sentenced, and, in particular, that statute's requirement that district courts provide a "statement of reasons" before imposing a sentence. *Id.* at 992. It held that a district court must explain its sentence "sufficiently to permit meaningful appellate review" and that such a statement "furthers the proper administration of justice." *Id.* "What constitutes a sufficient explanation will necessarily vary depending upon the complexity of the particular case" and its various other features. *Id.*

Jones had nothing to say about the proper interpretation of the federal sentencing statute. It thus did not undermine this Court's conclusion that the statute requires "meaningful engagement" with the "central inquiry" of sentencing.

3. This Court pointed to a number of indicators making clear that the district court did not "meaningfully engage[] in *Miller*'s central inquiry." *Briones*, 929 F.3d at 1067. For example, "the district court's

sentencing remarks focused on the punishment warranted by the terrible crime Briones participated in, rather than whether Briones was irredeemable." *Id.* at 1066. But "when courts consider *Miller*'s central inquiry, they must reorient the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant's criminal history." *Id.* In addition, "[t]he district court's statement that it considered some factors in 'mitigation' suggests that the district court applied the Guidelines and began with a presumption that LWOP would be appropriate," a presumption that this Court held was inappropriate in all cases but "particularly in juvenile LWOP cases after *Miller*." *Id.*

Jones, of course, did not affect that reading of the district court record. Because *Jones* altered neither "*Miller*'s central inquiry" (indeed, it reiterated and endorsed that inquiry) nor the federal sentencing statute's requirement of "meaningful engagement" nor this Court's determination that the district court had not "meaningfully engaged in *Miller*'s central inquiry," this Court's opinion stands.

4. One final note: This 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," practically conceding 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." *Briones*, 929 F.3d at 1062, 1064; *Montgomery*, 136 S. Ct. at 733. Yet the district court went on to sentence Mr. Briones to life without parole—a sentence that, as *Jones* reiterated, "is disproportionate under the Eighth Amendment" unless a crime reflects permanent incorrigibility. *Jones*, 141 S. Ct. at 1315 n.2.

Even if the Eighth Amendment does not require a sentencer to say anything, it surely forbids a sentence where the sentencer more or less acknowledges the sentence violates the constitutional rule. In capital cases, for instance, sentencers need not make an on-the-record finding at the penalty phase that mitigating evidence outweighed evidence of any aggravating circumstance. *See Jones*, 141 S. Ct at 1320; *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982). But surely there would be an Eighth Amendment problem if the sentencer in a capital case

announced, "The evidence in mitigation well outweighs the evidence of the aggravating circumstances, but the death penalty is appropriate anyway." A sentencer needn't say anything—but if the sentencer says something, it can't be flatly incompatible with the legal rule.

If the district court in this case "engage[d]" in "*Miller*'s central inquiry" at all, it apparently answered that inquiry in a way that should have foreclosed a life without parole sentence. Mr. Briones's sentence must be vacated.

B. *Jones* Only Buttresses This Court's Conclusion That The District Court's Failure To Consider Post-Conviction Rehabilitation Evidence Was Reversible Error.

This Court vacated Mr. Briones's life without parole sentence for a second, independent reason. *Briones*, 929 F.3d at 1067. It concluded the district court may not have understood it was allowed to meaningfully consider evidence of Mr. Briones's post-conviction rehabilitation. *Id.* at 1066-67. *Jones* does not raise any doubt that post-conviction rehabilitation evidence is relevant at a *Miller* sentencing; that failing to consider such evidence is reversible error; or that the district court did not understand it could consider such evidence in this case. And this Court held that the district court's misunderstanding on that front was

an independently sufficient basis to vacate Mr. Briones's sentence: "This alone requires remand." *Briones*, 929 F.3d at 1067. Because *Jones* had no effect on that portion of this Court's opinion, it should be reinstated.

1. This Court's opinion in *United States v. Pete* explained why a sentencer must be allowed to consider evidence of post-conviction rehabilitation. 819 F.3d 1121, 1130 (9th Cir. 2016). First, the federal sentencing statute requires a district court to consider evidence of post-conviction rehabilitation as a general matter, no matter the kind of crime or defendant. *Id.* (citing *Pepper v. United States*, 562 U.S. 476, 490 (2011); *United States v. Hernandez*, 604 F.3d 48, 53-55 (2d Cir. 2010)). Second, post-conviction rehabilitation evidence is particularly relevant at a *Miller* sentencing. As this Court explained, "the critical question under *Miller*" is a defendant's "capacity to change after he committed the crimes." *Id.* at 1133. "As to that consideration, whether [the defendant] *has* changed in some fundamental way since that time, and in what respects, is surely key evidence." *Id.*

The Supreme Court has confirmed that post-conviction rehabilitation evidence is "key evidence" at a *Miller* hearing. In

Montgomery v. Louisiana, for instance, the Supreme Court pointed to post-conviction rehabilitation evidence—evidence that petitioner had become a trainer and coach for a prison boxing team, contributed time to the prison's silkscreen department, and offered advice to other prisoners—to illustrate his "evolution from a troubled, misguided youth to a model member of the prison community." 136 S. Ct. at 736. It explained that post-conviction rehabilitation evidence is "an example of one kind of evidence" a juvenile offender might use to show that a life without parole sentence is inappropriate. *Id.*[5]

2. *Jones* did not cast doubt on that conclusion. It reiterated that *Miller* "require[d] sentencers to consider relevant mitigating circumstances," namely youth and its "attendant characteristics." *Jones*, 141 S. Ct. at 1316, 1320 n.7. *Jones* itself did not opine directly on whether post-conviction rehabilitation was such an "attendant

[5] In the capital sentencing context, too, a sentencer must be allowed to consider evidence of post-incarceration rehabilitation. *See, e.g.*, *Ayers v. Belmontes*, 549 U.S. 7, 15-16 (2006) ("[It would] be counterintuitive if a defendant's capacity to redeem himself through good works could not extenuate his offense and render him less deserving of a death sentence. … [This type] of evidence suggest[s] the crime stemmed more from adverse circumstances than from an irredeemable character."); *Skipper v. South Carolina*, 476 U.S. 1, 6-7 (1986).

characteristic" that must be considered. *Id.* But it did not reverse *Montgomery*, and, of course, it did not alter the federal sentencing cases on which *Pete* also relied. *See Jones*, 141 S. Ct. at 1321 ("The Court's decision today carefully follows both *Miller* and *Montgomery*."). This Court's conclusion in *Pete* thus stands: "[W]hen a substantial delay occurs between a defendant's initial crime and later resentencing, the defendant's post-incarceration conduct is especially pertinent to a *Miller* analysis." *Briones*, 929 F.3d at 1067 (discussing *Pete*, 819 F.3d at 1133).

Nor did *Jones* undermine this Court's conclusion that it is reversible error for a sentencer to refuse to consider such an "attendant circumstance." *See* 141 S. Ct. at 1320 n.7. If anything, *Jones* buttressed this Court's conclusion on that score. *Jones* explained that the process the Eighth Amendment requires in juvenile life-without-parole cases is similar to the process it requires at the penalty phase of a capital case. And at the penalty phase of a capital case, the Eighth Amendment requires vacatur if a sentencer is prevented from properly considering any mitigating factor. *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); *Eddings*, 455 U.S. at 112-16 (limitations on mitigating evidence violate the Constitution); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality op.) (same).

3. In this case, as this Court explained, Mr. Briones "offered abundant evidence on the critical issue: that he was not irreparably corrupt or irredeemable because he had done what he could to improve himself within the confines of incarceration." *Briones*, 929 F.3d at 1066. As the government conceded, Mr. Briones was a "model inmate": "By the time the district court resentenced Briones in March 2016, he was almost forty years old and he had served nearly eighteen years in prison without a single infraction of prison rules." *Id.* at 1061-62. He got his GED, married the woman he had been dating since high school, and volunteered to counsel younger inmates. *Id.* And he did all 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." *Id.* at 1066-67.

At resentencing, the Government argued that the court should ignore that "abundant evidence." *Id.* at 1066-67. It told the district court

that it "had to make some guesses as to what [the judge who originally sentenced Mr. Briones] would have done," suggesting that the district court was forbidden from weighing evidence that was not available in the mid-1990s, when Mr. Briones was originally convicted and sentenced. *Id.* At the time Mr. Briones was sentenced, this Court had not yet clarified that "when a substantial delay occurs between a defendant's initial crime and later sentencing, the defendant's post-incarceration conduct is especially pertinent to a *Miller* analysis." *Id.* at 1067 (discussing *Pete*, 819 F.3d at 1133).

Analyzing "the district court's articulated reasoning at Briones's resentencing," this Court concluded that, perhaps because of the Government's argument, the district court "may have hesitated to fully consider Briones's post-incarceration conduct." *Id.* at 1066-67. Because that evidence is "precisely the sort of evidence of capacity for change that is key to determining whether a defendant is *permanently* incorrigible," this Court's doubt that the district court considered it was a sufficient and independent basis for this Court to reverse. *Id.* at 1067 ("This alone requires remand.").

Jones does not undermine this Court's conclusion that sentencers *must* be able to consider post-conviction rehabilitation, where that evidence is available; if anything, *Jones* strengthens that conclusion. And, of course, *Jones* cannot affect this Court's reading of the record in this case and thus cannot affect its doubt that the district court understood that it could consider that key evidence. This Court should thus reinstate its decision vacating Mr. Briones's sentence.

II. A Life Without Parole Sentence Violates The Eighth Amendment As Applied To Mr. Briones.

Mr. Briones's sentence violates the Eighth Amendment as applied for two independent reasons.[6]

A. First, Mr. Briones's sentence violates the Eighth Amendment as applied because he has shown himself capable of change. An as-applied Eighth Amendment challenge is simply one that a particular sentence is disproportionate to the crime in question. *Graham v. Florida*, 560 U.S. 48, 59 (2010). And the Supreme Court has explained that sentencing "a child whose crime reflects transient immaturity"—rather than "permanent incorrigibility"—to life without parole is per se

[6] *Jones* left open the possibility of such a challenge. 141 S. Ct. at 1322.

"disproportionate under the Eighth Amendment." *Montgomery*, 136 S. Ct. at 735; *see also Jones*, 141 S. Ct. at 1337 n.6 (Sotomayor, J., dissenting); Transcript, *Jones v. Mississippi*, No. 18-1259, at 35-36 (U.S. Nov. 3, 2020) (question by Justice Barrett describing "as-applied challenge" as one "directly challenging the substantive decision that he's permanently incorrigible"). If a juvenile offender is not, in fact, permanently incorrigible—if he does not "exhibit[] such irretrievable depravity that rehabilitation is impossible"— his sentence thus violates the Eighth Amendment as applied.

Mr. Briones is such an offender. First, the district court found that Mr. Briones "has improved himself while he's been in prison"—a conclusion that Mr. Briones has rehabilitated himself or, at the very least, that rehabilitation cannot be "impossible." *Briones*, 929 F.3d at 1062. Even the prosecution agreed that Mr. Briones had become a "model inmate." *Id.*; *cf. Skipper*, 476 U.S. at 7-9 (conclusions of "more disinterested" parties who "would have had no particular reason to be favorably disposed" toward defendant given greater weight).

Second, Mr. Briones presented extensive evidence of his post-conviction rehabilitation. He has transformed his relationships with his

family and with the mother of his child, grown out of his youthful anger, grappled with his crime, and sought to better himself (by getting his GED and working while incarcerated) and those around him (by counseling other inmates), all while maintaining a spotless prison record. *Id.* at 1066-67. And he did all of that, as this Court noted, 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." *Id*.

Third, the considerations that the Supreme Court identified in *Miller* make clear that Mr. Briones was a product of his circumstances, not of irreparable corruption. The *Miller* court noted that many juveniles "lack the ability to extricate themselves from horrific, crime-producing settings." 567 U.S. at 471. Mr. Briones was no exception. He was raised by a physically abusive father, began drinking alcohol and using drugs before he was a teenager, and was indoctrinated into the gang his father founded and led. *Briones*, 929 F.3d at 1066. In addition, Mr. Briones, like many juvenile offenders, "might have been charged and convicted of a lesser offense if not for incompetencies of youth—for

example, his inability to deal with … prosecutors (including on a plea agreement)." *Miller*, 567 U.S. at 477-78. Mr. Briones was offered a plea to 20 years—which would have made him a free man today—but turned it down only because of "his father's inexplicable insistence" that he do so. *Briones*, 929 F.3d at 1066. These and other circumstances provide context for his conviction and original sentence and buttress the notion that they were the products of transient immaturity—immaturity he has grown out of since that time.

And finally, Mr. Briones's crime, while undoubtedly serious, is not among the worst homicide offenses. The Supreme Court has explained that even among those juveniles who commit homicide offenses, only the "rarest offenders" are permanently incorrigible. *Miller*, 567 U.S. at 479-80. On the spectrum of juveniles who have committed homicide offenses, Mr. Briones's crime is among the least brutal. Mr. Briones was convicted of felony murder; the jury did not have to find he intended for a homicide to occur.[7] He did not plan the homicide or even the robbery

[7] The jury instructions required the Government to prove only (1) that Mr. Briones "committed or aided and abetted in the commission of a robbery"; (2) that Mr. Briones "or another person caused the death" of the victim; (3) that "the defendant *or another person* acted with malice

that led to the homicide. *Briones*, 929 F.3d at 1061. And he did not pull the trigger; indeed, he was not even in the restaurant when the trigger was pulled. *Id.*

In sum, Mr. Briones's conduct since his conviction, the circumstances that led to the crime of conviction, and the crime itself all confirm what the prosecution and the district court acknowledged: Mr. Briones is not "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 567 U.S. at 479-80. A life-without-parole sentence is disproportionate for such an offender. Mr. Briones's sentence thus violates the Eighth Amendment as applied to his case.

B. Mr. Briones's sentence also violates the Eighth Amendment as applied under a separate line of cases holding that the Eighth Amendment contains a "narrow proportionality" principle. 560 U.S. at 88 (Roberts, C.J., concurring). As Chief Justice Roberts explained in his concurrence in *Graham*, the analysis under that line of cases proceeds in two steps. *Id.* First, a reviewing court examines the crime of conviction, the sentence, and the offender's characteristics and assesses

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aforethought"; and (4) that "the defendant is an Indian." Jury Instructions 7-8, *United States v. Antone*, CR 96-464-PHX-RCB (D. Ariz. May 8, 1997) (emphasis added).

whether the sentence "leads to an inference of gross disproportionality." *Id.* In cases where "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," courts "proceed to an 'intrajurisdictional' comparison of the sentence at issue with those imposed on other criminals in the same jurisdiction and an 'interjurisdictional' comparison with sentences imposed for the same crime in other jurisdictions." *Id.* "If these subsequent comparisons confirm the inference of gross disproportionality," the sentence must be invalidated. *Id.*

1. The "threshold inference of gross disproportionality" is holistic, taking account of the facts of the crime, the sentence imposed, and the characteristics of the offender. In *Graham*, for instance, the Chief Justice concluded that a life-without-parole sentence for a juvenile who committed a home invasion robbery raised such an inference, because the offender's "youth made him relatively more likely to engage in reckless and dangerous criminal activity than an adult" and "enhanced his susceptibility to peer pressure" and because he was not "*particularly* dangerous—at least relative to the murderers and rapists for whom the sentence of life without parole is typically reserved." *Id.* at 91-92. Even

sentences imposed for homicide crimes can raise such a threshold inference. In *Enmund v. Florida*, for instance, the Supreme Court found a capital sentence imposed on a defendant convicted of felony murder raised an inference of gross disproportionality. 458 U.S. 782, 798 (1982). "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed, yet the State treated them alike." *Id.*

Although "[t]here is no question that the crime for which [Mr. Briones] received his life sentence…is a serious crime deserving serious punishment," *see Graham*, 560 U.S. at 91 (Roberts, C.J., concurring), the Supreme Court has repeatedly explained that defendants who neither kill nor intend to kill are among the least blameworthy of homicide offenders. *Enmund*, 458 U.S. at 798; *Solem v. Helm*, 463 U.S. 277, 292-93 (1983); *see also Miller*, 567 U.S. at 489-91 (Breyer, J., concurring) (arguing that juveniles who commit felony murder "d[o] not kill or intend to kill" and thus cannot be sentenced to life without parole under *Graham*). Mr. Briones was such an offender. *Supra*, 23-26. Nothing about the circumstances of the crime establish that Mr. Briones "was *particularly* dangerous—at least relative to the murderers

and rapists for whom the sentence of life without parole is typically reserved." *Graham*, 560 U.S. at 92 (Roberts, C.J., concurring).

The "threshold determination" step also takes account of the severity of the sentence. A life without parole sentence is "the second-harshest sentence available under our precedents for any crime" and the harshest sentence that can be imposed upon a juvenile. *Id.*; *see also Solem*, 463 U.S. at 297 (particular scrutiny warranted when penalty is "the most severe punishment that the State could have imposed"). "[T]his 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.'" *Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 105 Nev. 525, 526 (1989)).

Finally, and most importantly, courts must consider the offender himself. *Id.* at 92 (Roberts, C.J., concurring). Mr. Briones was a child when he committed the crime of conviction. His "age places him in a significantly different category" from defendants who commit their crimes as adults. *Id.* at 91. As the Supreme Court has held in case after case, horrific acts committed in childhood do not preclude the possibility

of maturation and rehabilitation. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005); *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings*, 455 U.S. at 115-17). Mr. Briones exemplifies that possibility, having grown from a child raised in a "horrific, crime-producing setting" to an adult who has done his utmost to improve himself even behind bars. *See Roper*, 543 U.S. at 569; *supra*, 23-26.

Mr. Briones's sentence serves no penological goal, either. "The case for retribution is not as strong with a minor as with an adult," because juvenile offenders have less control over their circumstances. *Miller*, 567 U.S. at 471-72. "Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Miller*, 567 U.S. at 472. And incapacitation and rehabilitation cannot justify Mr. Briones's sentence. His spotless prison disciplinary record, his efforts to improve himself and the lives of those around him, and his growth in the years since he was convicted make clear that there is no reason to assume he "forever will be a danger to society." *Miller*, 567 U.S. at 472-73. Mr. Briones "demonstrate[s] the truth of *Miller*'s central

intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

In short, Mr. Briones is among the least culpable homicide offenders—a child who was convicted without any proof that he either killed or intended to kill—yet he was sentenced to the harshest penalty available, even in the face of the Supreme Court's admonition that such penalties rarely serve any penological goals when imposed on juveniles. The "threshold comparison of the crime committed and the sentence imposed" thus "leads to an inference of gross disproportionality." *Graham*, 560 U.S. at 88 (Roberts, C.J., concurring).

2. Both intra- and interjurisdictional comparisons of Mr. Briones's sentence confirm that threshold inference. Start with Mr. Briones's sentence as compared to those meted out in the rest of the federal system. In 2016, the year Mr. Briones was re-sentenced, the median sentence in the federal system for *all* murders (the vast majority of which were committed by adults) was 210 months, or 17.5 years—less time than Mr. Briones had already served at the time of his resentencing. Sentence Length In Each Primary Offense Category tbl. 13, United States Sentencing Comm'n,

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table13.pdf.

So far as counsel can tell, Mr. Briones is also one of only *three* juveniles in the federal system who has been resentenced to life without parole after *Miller*. *See* Appendix. As Judge O'Scannlain documented in his dissent at the panel stage in this case, one of those three, Johnny Orsinger, "committed four murders as a juvenile—including two while facing trial"; "two of the victims were a 63-year-old grandmother and her nine-year-old granddaughter, and the defendant had killed the little girl by hand, crushing her head with rocks." *United States v. Briones*, 890 F.3d 811, 828 (9th Cir. 2018) (O'Scannlain, J., dissenting). Judge O'Scannlain contrasted Johnny Orsinger's life sentence with that of Mr. Briones in explaining why he would vacate the latter. *Id.* The other juvenile resentenced to life without parole after *Miller*, Edward McCain, "emptied his pistol" into two fellow drug dealers, then went to find more bullets to finish them. *United States v. McCain*, 974 F.3d 506, 510-11 (4th Cir. 2020). His time in prison has been marked by violence: He has stabbed one fellow inmate, shanked another, and, at age 26, sexually assaulted a third. *Id.* at 511-12. The circumstances of Mr. Briones's

crime and his conduct in prison since then make clear he does not belong in the same category as those two.

Indeed, Mr. Briones's crimes are, at the very least, no more serious than those of other federal juvenile offenders resentenced to far shorter terms. Among those juvenile offenders originally sentenced to life without parole who have been released following *Miller* are Joseph Wang and Alex Wong, members of the "Green Dragons" gang who themselves shot and killed two restaurant employees after the manager refused to pay extortion money, *see United States v. Wong*, 40 F.3d 1347, 1374 (2d Cir. 1994), and Amaury Rosario, who shot and killed four unarmed people and wounded a fifth while attempting to rob a grocery store, *see United States v. Rosario*, No. 12-CV-2432, 2018 WL 3785095 (E.D.N.Y. Aug. 9, 2018).

Finally, Mr. Briones's sentence far outstrips the sentences of two other federal defendants who are particularly salient comparators. Riley's father, who indoctrinated Riley into the gang he founded, will be released in 2022. *See* Federal Bureau of Prisons Inmate Locator, https://www.bop.gov/inmateloc/ (Riley Sr Briones, Register Number: 42440-008). And Riley's brother Ricardo, who planned the Subway

robbery, will be released in 2025. *See id.* (Ricardo Briones, Register Number: 42207-008).

A "comparative analysis" of Mr. Briones's sentence against others in the federal system thus confirms the intuition that his sentence is grossly disproportionate to the circumstances of the crime.

3. Finally, an "interjurisdictional comparative analysis" further confirms the inference of gross disproportionality. *See Graham*, 560 U.S. at 88 (Roberts, C.J., concurring). Nationwide, only around three percent of juvenile offenders who faced life without parole before *Miller* were resentenced to life without parole after *Miller*. *National trends in sentencing children to life without parole* 2, The Campaign for the Fair Sentencing of Youth (Feb. 2021), https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf. Indeed, Mr. Briones would almost certainly not have been sentenced to life without parole in 33 of the 50 States today. *Cf. Solem*, 463 U.S. at 293-94 (interjurisdictional analysis looks at which other States would allow a particular sentence); *Gonzalez v. Duncan*, 551 F.3d 875, 887 (9th Cir. 2008). In 25 States and the District of Columbia, juvenile life without parole is now altogether barred. *States that Ban Life without Parole for*

Children, The Campaign for the Fair Sentencing of Youth, https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/ (last accessed June 19, 2021). In another six, not a single juvenile offender is serving life without parole. *Id.* And at least two States that allow life without parole for certain juvenile offenders would not allow it for a crime like Mr. Briones's. *See* 18 Pa. Cons. Stat. §§ 2502, 1102.1; N.C. Gen. Stat. §§ 14-17, 15A-1340.19A-B.

As salient as the number of States that refuse to sanction juvenile life without parole is the "consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002). When *Miller* was decided in 2012, just four States banned life without parole sentences. 567 U.S. at 482-83. Today, more than four times as many States—25 plus the District of Columbia—bar the sentence. *National trends in sentencing children to life without parole*, *supra*, at 2.

Comparing Mr. Briones's sentence against those imposed in other jurisdictions thus confirms the "threshold determination" that life without parole is grossly disproportionate to his crimes. His sentence should be vacated.

CONCLUSION

For the foregoing reasons, this Court should reinstate its opinion vacating and remanding Mr. Briones's sentence.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by the Court's May 4, 2021, order. The brief is 6,862 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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APPENDIX

Name	Post-*Miller* Resentencing	Source
Angel Alejandro	25 years; has been released from prison.	7:98-CR-290-CM-LMS Am. Judgment 2 (S.D.N.Y. May 23, 2014).
Kendrick Allen	Procedural bar to resentencing after *Miller*.	2:94-cr-00001-JRG-RSP-1 Final Judgment (E.D.Tex. Dec. 30, 2014).
Lonnie Barnett	25 yrs.	1:05-cr-00264-RDA-2 (E.D.Va. Aug. 28, 2009).
Leobardo Barraza	50 yrs.	4:06-cr-00476-SNLJ-1 Am. Judgment (E.D.Mo. Aug. 7, 2019), aff'd No. 19-2718 (8th Cir. Dec. 11, 2020).
Leeander Blake	40 yrs.	1:06-cr-00394-ELH-1 Am. Judgment (D. Md. May 21, 2019).
Riley Briones	LWOP.	2:96-cr-464 Am. Judgment (D.Az. Mar. 30, 2016).
Donnie Bryant	80 yrs (40 yrs for homicide offense).	2:06-CR-234-PMP-GWF Am. Judgment 2 (D. Nev. Jan. 17, 2014), aff'd No. 14-10047, 2015 WL 1884376

		(9th Cir. Apr. 27, 2015).
Eric Carrion-Cruz	Procedural bar to resentencing after *Miller*.	No. 13-1662 (1st Cir. March 3, 2014).
Jonathan Delgado	Awaiting resentencing.	*United States v. Delgado*, 971 F.3d 144 (2d Cir. 2020); 1:09-cr-00331-RJA-34 Minute Entry (W.D.N.Y. May 19, 2021).
Harold Evans-Garcia	37 yrs.	3:96-CR-105-GAG Am. Judgment 2 (D.P.R. Mar. 3, 2015), appeal pending (1st Cir. filed June 7, 2021).
Philip Friend	52 yrs.	3:99-cr-00201-HEH-RCY-4 Judgment (E.D.Va. Feb. 3, 2020), appeal pending, No. 20-4129 (4th Cir. oral argument held Mar. 11, 2021).
Corey Grant	65 yrs.; vacated by Third Circuit panel; en banc opinion pending.	2:90-cr-00328-DMC Am. Judgment (D.N.J. Sept. 27, 2016)
Masontae Hickman	40 yrs.	1:96-CR-00054-001 Am. Judgment (E.D.Tex. Aug. 6, 2014).
Darryl James	Deceased.	N/A.
Robert James Jefferson	50 yrs.	0:97-CR-276-MJD-JGL Third Am.

		Judgment 2 (D. Minn. Feb. 4, 2015).
Kamil Johnson	42 yrs.	0:02-CR-013-PJS-FLN Am. Judgment 2 (D. Minn. Mar. 27, 2015), appeal dismissed, No. 15-1753 (8th Cir. June 1, 2015).
Gary Johnson	50 yrs.	3:08-cr-00010-NKM-RSB-1 Am. Judgment (Mar. 24, 2017).
Roger Kwok	37 yrs.	90-CR-1019-SJ-08 Am. Judgment (E.D.N.Y. Sept. 1, 2016).
Robert Lawrence	31 yrs; has been released.	5:92-CR-035-DNH Am. Judgment 2 (N.D.N.Y. Jan. 17, 2014).
Bao Hoang Lu	20 yrs.	2:99-cr-00433-WBS-5 Am. Judgment 2 (E.D.Cal. June 30, 2020).
Emmanuel Martinez	Procedural bar to resentencing after *Miller*.	No. 14-2737 (7th Cir. Oct. 16, 2015).
Edward McCain	LWOP.	No. 18-4723 (4th Cir. June 19, 2017).
Wilson Mejia-Velez	Awaiting resentencing.	1:92-cr-00963-ERK-2 (E.D.N.Y. May 17, 2021).
Kenneth Montgomery	Procedural bar to resentencing after *Miller*.	No. 16-6262 4th Cir. May 23, 2016

Michael Morgan	35 yrs; has been released.	4:92-cr-04013-WS-CAS-12 Am. Judgment (N.D.Fla. Aug. 18, 2017).
Johnny Orsinger	LWOP.	No. 15-10412 (9th Cir. Oct. 6, 2017).
David Perez-Montanez	30 yrs.	3:96-CR-244-PG Am. Judgment 2 (D.P.R. Feb. 10, 2014).
Branden Pete	54 yrs.	3:03-CR-355-SMM Am. Judgment 1 (D. Ariz. July 28, 0214)
Amaury Rosario	28 yrs; has been released.	1:12-cv-03432-ARR; 99-CR-533-ARR Statement of Reasons at 14 (E.D.N.Y. Aug. 9, 2018).
Bryan Sheppard	20 yrs; has been released.	4:96-cr-00085-FJG-4 Am. Judgment (W.D.Mo. March 3, 2017).
Torvos Simpson	Procedural bar to resentencing after *Miller*.	2:94-CR-00001-002 (E.D.Tex. Dec. 30, 2014).
Tony Sparks	35 yrs.	6:99-cr-00070-LY-3 Am. Judgment (W.D.Tex. Mar. 19, 2018).
Dwayne Stone	40 yrs.	1:05-CR-401-ILG Am. Judgment 3-4 (E.D.N.Y. Aug. 13, 2014), aff'd, No. 14-2103, (2d Cir. Oct. 30, 2015).

Hilton Thomas	40 yrs.	1:97-cr-00355-WMN-3 Am. Judgment (June 2, 2016).
Timothy Vallejo	Procedural bar to resentencing after *Miller*.	No. 16-4143 (7th Cir. Dec. 20, 2016).
Joseph Wang	30 yrs; has been released.	1:90-cr-01019-DLI-7 Am. Judgment (E.D.N.Y. May 26, 2017).
Jerome Williams	35 yrs; has been released.	4:94-CR-056-ICH Second Am. Judgment 2 (E.D. Mo. June 5, 2015).
Alex Wong	35 yrs; has been released.	1:90-cr-01019-RJD-9 Am. Judgment (E.D.N.Y. Apr. 8, 2016).
Steve Wright	15 yrs.	4:02-cr-00116-BCW-3 Judgment (W.D.Mo. Sept. 27, 2017).