C.A. No. 16-10150
En Banc Opinion, 929 F.3d 1057, *vacated*, --- S. Ct. ---- (May 3, 2021)

D. Ct. No. CR-96-00464-PHX-DLR

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RILEY BRIONES, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED STATES' SUPPLEMENTAL BRIEF ON REMAND REGARDING *JONES v. MISSISSIPPI*, 141 S. Ct. 1307 (2021)

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III. INTRODUCTION AND SUMMARY OF ARGUMENT

As the district court found at sentencing, Riley Briones, Jr. was the leader of "a violent and cold-blooded" gang "that terrorized the Salt River Reservation community and surrounding area for several years." Shortly before turning eighteen, Briones participated in the murder of a Subway restaurant clerk, Brian Patrick Lindsay. Over the next two years, Briones committed multiple additional crimes, including fire-bombings and attempted murder. Prior to his arrest (at age 19½), Briones plotted to kill a tribal judge, federal prosecutors, and Salt River investigators.

Briones was convicted by a jury and originally sentenced to mandatory life-without-parole (LWOP). Following *Miller v. Alabama*, 567 U.S. 460 (2012), the government conceded Briones was entitled to a resentencing at which the district court had discretion to sentence him to a term less than life. The parties agreed, and the judge acknowledged, the district court had discretion to do so. After considering the abuse Briones suffered as a child, his "youth, immaturity, his adolescent brain at the time," the impacts of "constant abuse of alcohol and other drugs[,]" and Briones's "model" prison record, the district court reimposed life.

An en banc majority vacated Briones's sentence and remanded on the basis that the sentencing record did not reflect the district court "appropriately" considered evidence of Briones's "capacity for change," which it believed to be "key to

determining whether a defendant is *permanently* incorrigible." *United States v. Briones*, 929 F.3d 1057, 1066-67 (9th Cir. 2019) ("*Briones II*"). The Supreme Court vacated that opinion and remanded for further consideration in light of *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

The en banc majority opinion was based on two premises rejected by *Jones*. Because "permanent incorrigibility is not an eligibility criterion" for juvenile LWOP, 141 S. Ct. at 1315, the district court wasn't required to affirmatively analyze it. Moreover, and independently, the district court's sentencing explanation met the necessary standard. *Id*. at 1318 ("An on-the-record sentencing explanation with an implicit finding of permanent incorrigibility . . . is not necessary to ensure that a sentencer considers a defendant's youth" and is "not required by or consistent with *Miller*.").

There is no question the district court knew it had discretion to impose a lesser sentence and could consider—in fact, *did* consider—Briones's youth at the time of the crime. The Supreme Court has now made clear that neither *Miller* nor *Montgomery v. Louisiana*, 577 U.S. 190 (2016), require more. Applying *Jones*, this Court should affirm.

IV. BACKGROUND

A. Relevant Facts and Procedural History

Three weeks shy of his eighteenth birthday, Briones—a founder and leader of the violent "Eastside Crips Rolling 30's" gang—participated in the cold-blooded murder of a Subway restaurant clerk, Brian Patrick Lindsay. *Briones II*, 929 F.3d at 1067 (Bennett, J., dissenting).

The gang planned the robbery and murder at the Subway. *Id.* Briones drove four other gang members, one armed with a gun, to the restaurant and waited in the car while the others went in. *Id*. at 1068. Immediately before the murder, the gunman (Arlo Eschief) returned to the car and conferred with Briones. *Id*. Eschief then walked back inside, shot Lindsay in the face, and leaned across the counter to fire five more shots as Lindsay lay dying on the floor. *Id*. When the gang members returned to the car with $100 and their sandwiches, Briones instructed one of them to grab a rifle from the back seat. *Id*. Briones drove the gang around the parking lot, attempting to find and kill a maintenance worker who had been working in front of the Subway. *Id*.

Briones spent the eve of his eighteenth birthday constructing Molotov cocktails used by another gang member to firebomb the house of a rival. *Id*. When that firebombing failed, Briones—by then eighteen—tried again. *Id*. That time, Briones drove other gang members to abandoned buildings to start diversionary fires

to prevent the fire department from responding promptly. *Id*. Briones again personally constructed the Molotov cocktails used in the second firebombing, provided gasoline for a diversionary fire, and drove gang members to the site. *Id*.

As an adult, Briones continued his crime spree. He helped plan a drive-by shooting of the same rival's home, picking up the assault rifle used in the shooting. *Id*. Months later, in an attempt to keep fellow Eastside Crips member Norval Antone from talking about the Subway murder, Briones broke a beer bottle on Antone's face and pistol-whipped him until he was unconscious. *Id*. When Antone regained consciousness, he overheard Briones and others discussing how to dispose of his body. *Id*.

When deputy marshals arrested Briones at age 19½, he reached for his leg; deputies found a pistol in his waistband near where he was reaching. (6-SER-1369-72.)[1] Prior to arrest, Briones also participated in the gang's plans to blow up the Salt River Police Department, and kill a tribal judge, federal prosecutors, and Salt River Police investigators. *Id*. at 1069. Briones followed one investigator to lunch but didn't shoot because there were too many witnesses. *Id*. He also led the gang in target practice from a hilltop to simulate rooftops near the federal building. *Id*.

[1] "ER" refers to the Excerpts of Record, and "SER" to the Supplemental Excerpts of Record. Both will be followed by the relevant page number(s), and the SER will be preceded by the volume number.

A jury convicted Briones of all charged offenses, including the felony murder of Lindsay. *Id*. Briones was an adult when he rejected the government's plea offer. (3-SER-772–73.) And at his sentencing in 1997—when he was 21 years old—Briones continued to deny responsibility. *Id*.; *see also* ER-110 ("I feel bad for what happened to their families, but I know that . . . nobody here is guilty of that."). The district court sentenced Briones to then-mandatory life on the murder count. *Briones II*, 929 F.3d at 1060. This Court affirmed. *United States v. Briones*, 165 F.3d 918 (9th Cir. 1998) (unpublished).

1. Post-*Miller* Resentencing.

After the Supreme Court decided *Miller*, Briones filed a 28 U.S.C. § 2255 motion to vacate his sentence. *Briones II*, 929 F.3d at 1061. The government conceded that Briones's mandatory life sentence was constitutionally flawed, *id*., but "reserv[ed] the right to argue for any appropriate sentence" on resentencing. (ER-139.)

The district court and parties agreed that at resentencing, the judge could sentence Briones to a term less than life. The district court said so explicitly. (ER-139 ("Movant is entitled to a resentencing hearing during which the [c]ourt may consider whether some sentence other than mandatory [LWOP] is appropriate."); *see also* ER-217–18.) Both parties repeated the point. (*E.g.*, 1-SER-40, 42 ("The United States understands that this court has the discretion to impose any sentence

that it believes is appropriate."); ER-222, 237 (defense counsel requesting sentence of 360 months and recognizing district court's authority to determine "the appropriate sentence").) The parties acknowledged the entire purpose for resentencing was to give the district court discretion (ER-241), and directed their advocacy to convincing the district court what the appropriate sentence would be.

The parties premised their respective positions on *Miller*'s requirement that the district court consider Briones's youth at the time of the crime. Defense counsel dedicated twelve of the thirteen pages in her sentencing memorandum to laying out the *Miller* standard—examining the evolution of the Supreme Court's case law and *Miller*'s "hallmarks of youth" in depth, and then analyzing those factors as applied to Briones under 18 U.S.C. § 3553(a). (1-SER-2–13.) Citing *Miller*, counsel explicitly argued that "[b]efore sentencing a juvenile to [LWOP], a court must consider the offender's chronological age and its 'hallmark features.'" (1-SER-9.) Her resentencing allocution similarly focused on *Miller*, discussing the ways in which Briones showed immaturity and an inability to deal with authorities, and emphasizing Briones's "post-sentencing rehabilitation"—which she noted both before and at resentencing was an appropriate consideration. (ER-219–34, 237; 1-SER-11.)

The government likewise analyzed the *Miller* factors, describing the sentencing court's task as "distinguishing between the juvenile offender whose

crime reflected unfortunate yet transient immaturity, and the 'rare juvenile offender whose crime reflects irreparable corruption.'" (1-SER-36 (quoting *Miller*, 567 U.S. at 479-80), 40; ER-241–42, 250-52.) The prosecutor acknowledged that "*Miller*, *Graham* and the other cases have indicated that a life sentence for a juvenile is inappropriate in all but the most egregious cases," but argued that Briones's was "the most egregious case." (ER-242 (citing *Graham v. Florida*, 560 U.S. 48, 78 (2010).)

At resentencing, Briones presented two witnesses (including himself) "in support of each of [the *Miller*] 'hallmarks of youth[.]'" (1-SER-9.) Defense counsel's questioning focused on the *Miller* factors.[2] (ER-152–68, 171–204.) Briones made a statement expressing "[g]rief, regret, sorrow, pain, sufferings" about the crime, saying "it haunt[ed him] to have that on [his] hands." (ER-238–39.)

The prosecutor—who had met with Briones the day before, and believed he was still minimizing his role based on statements that contradicted the trial evidence (ER 242–43)—demonstrated inconsistencies between the testimony of the witnesses at the resentencing hearing, the defense resentencing pleadings, and the trial evidence. (ER-168–70, 205–14.) Specifically, Briones testified that he (1) "didn't think [him]self a leader" in the gang because "there wasn't really any leadership in

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[2] Briones affirmatively declined to present evidence of a recent neuropsychological examination, because it was "now 22 years" after the crime and "there would be nothing to show that his brain was not fully developed because he's 40 years old." (ER-223.)

the gang" (ER-205–06); (2) didn't tell the other gang members they needed to find and kill the Subway maintenance man, but instead just "mention[ed] that that guy saw me" (ER-208); and (3) "didn't realize" the clerk would be killed and was "surprised when [he] heard the shots." (ER-206–07.) Citing trial evidence, the prosecutor demonstrated that each one of these statements—and additional comments Briones had offered the day before, like having pistol-whipped Antone "because he was freaking out under the influence of drugs[,]" not "because . . . he might spill to the authorities" (ER-245)—was inconsistent with the actual facts. (ER-243–250.) But, the prosecutor argued, Briones's subsequent good prison conduct should be weighed against his refusal to "take full responsibility for his involvement not only in the murder but within the gang itself." (ER-252.)

The district court stated that it had considered "the presentence report," the parties' sentencing memoranda, "the transcript of the [original] sentencing," "the victim questionnaire and the letters on behalf of defendant that were contained in the presentence report," "all the evidence" the judge had heard that day, and "everything [the judge had] read." (ER-219, 254.) The district court asked questions throughout the hearing, demonstrating it had read the submissions closely and was readily familiar with them. (*E.g.* ER-195, 217–18, 228, 248, 252–53.)

After calculating the guidelines and using them "as a starting point," discussing the statutory ranges, giving counsel and Briones the chance to speak, and

soliciting information on the victim's family's views, the district court pronounced sentence:

> Well, in mitigation I do consider the history of the abusive father, the defendant's youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs, and he's been a model inmate up to now.
>
> However, some decisions have lifelong consequences. This robbery was planned, maybe not by the defendant but he took over and was all in once the plan was developed. He drove everybody there. He appeared to be the pillar of strength for the people involved to make sure they executed the plan. The murder of the clerk was planned. It wasn't an accident, it wasn't unexpected. Although the defendant did not pull the trigger, he was in the middle of the whole thing. He stayed in the car, apparently, to avoid responsibility.
>
> And circumstantially, at least, it appears that defendant was involved in the final decision to kill the young clerk. Eschief came out to the car and spoke to him and walked right back in and shot him in the head. He spoke to the defendant right before he pulled the trigger. I don't know what other conclusion can be drawn than that the defendant was involved in the final decision and encouraged the shooter to pull the trigger.
>
> All indications are that defendant was bright and articulate, he has improved himself while he's been in prison, but he was the leader of a gang that terrorized the Salt River Reservation community and surrounding area for several years. The gang was violent and cold-blooded.
>
> Having considered those things and all the evidence I've heard today and everything I've read, . . . Riley Briones, Jr. is hereby committed to the Bureau of Prisons for a sentence of life.

(ER-217-54.) Briones appealed.

2. Three-Judge Panel Proceedings.

Briones filed an opening brief raising as the only non-foreclosed issue that "[t]he district court did not properly analyze whether Mr. Briones is one of the rare person[s] whose juvenile crimes rendered him 'incorrigible.'" (Op. Br. at 15.)[3]

The three-judge panel heard argument and issued a published opinion affirming Briones's life sentence. *United States v. Briones*, 890 F.3d 811 (9th Cir. 2018) ("*Briones I*"). Judge O'Scannlain concurred in part and dissented in part.

The panel majority understood Briones to be arguing that the district court "failed to make an explicit finding that Briones was 'incorrigible,' that the district court failed to adequately consider the 'hallmarks of youth' discussed in *Miller*, and that the district court did not adequately consider Briones's rehabilitation." *Id*. at 818. Because Briones failed to raise any of those arguments in the district court, *id*. at 821 n.6, the majority reviewed them for plain error. *Id*. at 818.

[3] As part of this argument, Briones claimed the district court shouldn't have begun sentencing with a guidelines calculation. All members of this Court to consider the case have correctly rejected it. *See Briones I*, 890 F.3d at 816, 822; *Briones II*, 929 F.3d at 1065 n.5. Briones also raised two arguments that he acknowledged were "foreclosed"—namely, that the Eighth Amendment categorically prohibits LWOP for all juvenile offenders or at least any juvenile offender who was "not the person who killed the victim." (Op. Br. 15-17.) All members of the three-judge panel rejected those arguments, and the en banc Court did not address them. *Briones I*, 890 F.3d at 821-22. Those arguments are outside the scope of supplemental briefing.

The majority found no error, plain or otherwise. *Id.* at 816-21. The majority understood *Miller* to "require[]" the sentencing judge "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 820-21 (quoting *Miller*, 567 U.S. at 480). But the majority determined that the sentencing judge "followed th[at] mandate because he said so on the record—that he had considered everything he heard and read in conjunction with the sentencing hearing, including counsel's impassioned arguments regarding how the 'hallmarks of youth' particular to Briones counseled against imposition of a life sentence." *Id.* The majority also found the sentencing judge's explanation of the sentence to be adequate, emphasizing that "[n]othing in the *Miller* case suggests that the sentencing judge use any particular verbiage or recite any magic phrase." *Id.* at 819.

Judge O'Scannlain agreed with the panel majority that all but one of Briones's arguments were foreclosed or rejected. *Id*. at 816 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)); *id.* at 822 (O'Scannlain, J., concurring in part and dissenting in part). As to the remaining argument, Judge O'Scannlain acknowledged that the district court considered *Miller*'s "hallmark features" of youth, because it "expressly said it considered 'the defendant's youth, immaturity, and his adolescent brain' at the time of the crime." *Id*. at 823 (alterations omitted). And, Judge O'Scannlain stated, if "*Miller* could be understood merely as a procedural requirement,

mandating that sentencing courts must consider certain hallmark characteristics of youth and that they must be permitted to impose a sentence less than life[,]" "the district court likely would have complied with its dictates." *Id*.

However, Judge O'Scannlain interpreted *Montgomery* as "ma[king] clear" *Miller* stood for more, prohibiting a sentence of LWOP unless the district court found Briones to be "within the class of the rare juvenile offenders who are permanently incorrigible." *Id*. at 823-24. Based on this view, Judge O'Scannlain believed the sentencing record did not allow the Court to determine whether the district court applied the correct legal rule. *Id*. at 824, 827. Thus, Judge O'Scannlain would have "remand[ed] for an actual determination of Briones's incorrigibility[.]" *Id*. at 826.

3. <u>En Banc Proceedings</u>.

Briones filed a petition for rehearing en banc presenting the question as "[w]hether the Eighth Amendment is satisfied by the mere consideration of a defendant's youth." (Pet'n for Reh'g En Banc ("Pet.") at 20.) The petition faulted the district court for never "assess[ing] whether Briones fell into that tiny class of juvenile offenders" who "exhibit [ ] such irretrievable depravity that rehabilitation is impossible."[4] (Pet. at 1-2, 12-14.) This Court granted en banc rehearing.

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[4] The petition and amici also raised several new arguments attacking Briones's conviction and sentence that had never been raised in the district court. (Pet. at 3 n.1

The en banc majority vacated Briones's sentence and remanded. *Briones II*, 929 F.3d at 1067. In the majority's view, "*Montgomery* made clear that, after *Miller*, juvenile defendants who are not permanently incorrigible or irreparably corrupt are *constitutionally ineligible* for a sentence of [LWOP]." *Id.* at 1064. The majority thus framed "*Miller*'s central inquiry" as "whether the defendant is one of the rare juvenile offenders who is irredeemable, or whether the defendant is capable of change." *Id.* at 1065. On that basis, the majority laid down a rule for sentencing courts considering juvenile LWOP: "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*. at 1066.

The majority found the record insufficient to show that the district court had "meaningfully engaged" in that inquiry. *Id.* at 1067. In the majority's view, evidence Briones had improved himself in prison was "precisely the sort of evidence of capacity for change that is key to determining whether a defendant is *permanently* incorrigible." *Id*. But the majority stated it could not "tell whether the district court appropriately considered the relevant evidence of Briones's youth or the evidence of his post-incarceration efforts at rehabilitation." *Id.* at 1066.

& 6 n.2.) The en banc majority appropriately did not consider these questions. *See United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015).

Judge Bennett, joined by Judge Ikuta, dissented because "[t]he district court fully complied with" *Miller*'s requirements. *Id*. at 1070 (Bennett, J., dissenting). They would have held that the district court complied with *Miller*, because—as the court "explicitly stated"—it considered Briones's "youth and attendant characteristics" and his "post-incarceration efforts at rehabilitation." *Id*. at 1071. Because "there is no requirement under *Miller* that the district court make any specific findings before imposing a [LWOP] sentence," and the district court considered all the *Miller* factors, there was "no error here—constitutional, plain, or otherwise." *Id*. at 1073.

The United States petitioned for certiorari. (Dkt. 91.) The Supreme Court granted the petition, vacated the en banc court's opinion, and remanded for further consideration in light of *Jones*. (Dkt. 95.)

V. ARGUMENT

The en banc majority opinion cannot be reconciled with *Jones*, for two independent reasons. First, *Jones* rejected its underlying premise. Contrary to the majority's reading of *Montgomery* and *Miller*, permanent incorrigibility is not an eligibility criterion that must be met before a juvenile offender can be sentenced to LWOP. Second, *Jones* held that there is no constitutional requirement that the district court make any findings whatsoever regarding permanent incorrigibility. Instead, "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a . . . discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Jones*, 141 S. Ct. at 1313.

A. The En Banc Majority Opinion Cannot Be Reconciled With *Jones*.

1. Standard of Review

This Court reviews all sentencing decisions for abuse of discretion. *Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). However, plain error review applies to sentencing arguments—even constitutional ones—not raised below. *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc). Arguments not specifically and distinctly raised in the opening brief, including issues raised for the first time in a supplemental brief, are waived. *Devereaux v. Abbey*, 263 F.3d 1070, 1079 (9th Cir. 2001) (en banc). And "[a]s a general rule," the Court "will not consider issues that a party raises for the first time in a petition for rehearing." *Mageno*, 786 F.3d at 775.

2. *Jones* held that a discretionary sentencing procedure is constitutionally sufficient under *Miller*

Miller held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. Its rule harmonized two strands of case law. *Id*. First, cases like *Graham* and *Roper v. Simmons*, 543 U.S. 551 (2005), recognized ways in which children are different, leading to categorical bans on certain types of punishment for juveniles (the death penalty in *Roper* and LWOP for non-homicides in *Graham*). *Id*. at 471-73. Second, cases requiring individualized sentencing in capital cases invalidated mandatory death penalty statutes that precluded consideration of factors like youth. *Id*. at 475-77. Ultimately, *Miller* did "not categorically bar" LWOP for juvenile offenders, and "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id*. at 483.

In 2016, *Montgomery* held that *Miller*'s holding was retroactive to juvenile offenders whose convictions were already final. *Montgomery*, 577 U.S. at 212. In doing so, "the Court flatly stated that '*Miller* did not impose a formal factfinding requirement' and added that 'a finding of fact regarding a child's incorrigibility . . . is not required.'" *Jones*, 141 S. Ct. at 1311 (quoting *Montgomery*, 577 U.S. at 211).

In 2020, the Supreme Court granted certiorari in *Jones* to clarify "how to interpret *Miller* and *Montgomery*." *Id.* at 1313. Jones murdered his grandfather when

he was fifteen and was originally sentenced to mandatory LWOP. *Id.* at 1312. At a post-*Miller* resentencing, Jones's attorney discussed the *Miller* factors extensively, arguing Jones's age at the time of the crime and the hallmark features of youth diminished "the penological justifications for imposing the harshest sentences." *Id*. at 1313. Jones's attorney also elicited testimony from Jones and others regarding Jones's abusive home life as a child, exemplary prison record, and the many ways he had matured after the crime. *See* Joint Appendix at 108-09, 121, 134-35, *Jones v. Mississippi*, Sup. Ct. No. 18-1259 (hereafter "Jones J.A."). Although Jones's resentencing took place before *Montgomery*, his attorney quoted *Miller*'s "capacity for change" language in arguing that "irreparable corruption" and "transient immaturity" were important factors in determining whether LWOP was appropriate. *Id*. at 143. Jones's case, his attorney argued, did not "reflect[] irreparable corruption." *Id*. at 144. The sentencing judge acknowledged his discretion, but determined LWOP "remained the appropriate sentence" after considering "factors 'relevant to the child's culpability.'" *Jones*, 141 S. Ct. at 1313.

Jones argued in the Supreme Court that before imposing LWOP, a sentencing judge must "either (i) make a separate factual finding of permanent incorrigibility, or (ii) at least provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility." *Id*. The Supreme Court disagreed, holding that in cases involving juvenile LWOP defendants, a "discretionary sentencing

system"—where a sentencer can consider the defendant's youth and has discretion to impose a lesser sentence than LWOP—"is both constitutionally necessary and constitutionally sufficient." *Id*.

The Supreme Court cited numerous bases for rejecting Jones's argument that a sentencing judge must make a separate finding of permanent incorrigibility, two of which are most relevant here.

First, the Supreme Court held that "permanent incorrigibility is not an eligibility criterion akin to sanity or a lack of intellectual disability." *Id*. at 1315. *Jones* noted that "*Miller* declined to characterize permanent incorrigibility as such an eligibility criterion." *Id.* "Rather," *Jones* explained, "*Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance," which a sentencer must consider but has "wide discretion" to weigh. *Id*. at 1315-16; *see also id*. at 1319-20 (recognizing that "one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court," determining on "the same facts" that LWOP is appropriate in one case but not another).

Second, the Supreme Court held that "in making [*Miller*] retroactive," *Montgomery* did not "impose new requirements not already imposed by *Miller*." *Id*. at 1317. To the contrary, reading *Miller* and *Montgomery* as requiring more than "just a discretionary sentencing procedure where youth would be considered" is "an incorrect interpretation." *Id*. Indeed, *Jones* emphasized, "the *Montgomery* Court

explicitly stated that 'a finding of fact regarding a child's incorrigibility . . . is not required.'" *Id.* (quoting *Montgomery*, 577 U.S. at 211).

The Supreme Court then rejected Jones's alternative argument that "a sentencer must at least provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility." *Id*. at 1319. *Jones* held that an "on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth." *Id*. To the contrary, "a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth." *Id*. at 1321. The Supreme Court affirmed Jones's sentence.

3. The discretionary sentencing procedure that the district court followed in this case was constitutionally sufficient under *Miller*

There can be no serious debate that Briones was resentenced to LWOP at a discretionary proceeding. The district court acknowledged that the purpose of resentencing would be to allow it to "consider whether a sentence other than mandatory [LWOP] is appropriate." (ER-139.) The government made explicit its "understand[ing] that this court has the discretion to impose any sentence that it believes is appropriate." (1-SER-42.) And Briones himself requested a sentence of 360 months, recognizing the district court's mandate to determine "the appropriate sentence." (ER-222, 237.)

Likewise, the district court plainly considered "youth and its attendant characteristics . . . as sentencing factors" at the hearing. *See Jones*, 141 S. Ct. at

1317-18. The district court said so. (ER-253 ("[I]n mitigation I do consider the history of the abusive father, the defendant's youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs[.]") The court likewise considered Briones's post-sentencing rehabilitation. (ER-253–54 ("he's been a model inmate up to now . . . he has improved himself while he's been in prison").) *Jones* makes clear that in explicitly addressing these items, the district court did more than was required, not less. *Id.* at 1319 (explaining that a sentencer with discretion to consider youth "necessarily *will* consider" it, "especially if defense counsel advances an argument based on the defendant's youth.").[5]

Defense counsel here focused her argument on Briones's youth, discussing the *Miller* factors at length in writing, through witness testimony, and in her sentencing remarks. (ER-152–68, 171–204, 219–32, 237; 1-SER-2–13.) As in *Jones*, it would have been "all but impossible for [the] sentencer to avoid considering" youth given defense counsel's position. 141 S. Ct. at 1319. Indeed, the district court

[5] This sentencing record also defeats any Eighth Amendment claim that the district court "refused as a matter of law to consider [Briones's] youth" or post-conviction rehabilitation. *Jones*, 141 S. Ct. at 1320 n.7. To be sure, the sentencing judge "deem[ed] [Briones's] youth to be outweighed by other factors" or "an insufficient reason to support a lesser sentence." *Id.* But as *Jones* makes clear, that is not the same as "refus[ing] as a matter of law to consider the defendant's youth." *Id.*

here said it had considered that advocacy, and specifically cited several factors counsel raised. (ER-219, 253–54.)

Because the district court had "'the opportunity to consider' the defendant's youth" and the "'discretion to impose a different punishment' than [LWOP]," Briones's resentencing satisfied the Eighth Amendment. *Id*. at 1316 (quoting *Miller*, 567 U.S. at 489). Judge O'Scannlain's dissent, if applying the correct standard, recognized as much. *Briones I*, 890 F.3d at 823 (noting that if *Miller* merely "mandate[d] that sentencing courts must consider certain hallmark characteristics of youth" and "be permitted to impose a sentence less than life," the record here "likely would have complied with its dictates.").

As *Jones* explained, the en banc majority's characterization of *Miller*'s "central inquiry" as "whether the defendant is one of the rare juvenile defendants who is irredeemable, or whether the defendant is capable of change," *Briones II*, 929 F.3d at 1065, is "an incorrect interpretation of *Miller* and *Montgomery*." 141 S. Ct. at 1317. *Jones* makes clear the district court need not "determin[e] whether a defendant is *permanently* incorrigible." *Contra Briones II*, 929 F.3d at 1067 (citing *United States v. Pete*, 819 F.3d 1121, 1133 (9th Cir. 2016)). Such a determination is unnecessary because permanent incorrigibility is not an eligibility criterion, but instead a "sentencing factor akin to a mitigating circumstance." *Jones*, 141 S. Ct. at 1315. As such, "a sentencer must have discretion to consider youth before imposing

a [LWOP] sentence," but no finding of permanent incorrigibility is required. *Id*. at 1316.

For this reason, the majority's prescription that district courts "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," asks too much. *Briones II*, 929 F.3d at 1066. *Jones* allows for diverse sentencing judges to accord varying weights to youth as compared to the crime and a defendant's criminal history, just like any other mitigating factor. *Jones*, 141 S. Ct. at 1319-20. A district court is not required to treat capacity for change as a threshold eligibility question; consideration of youth and the discretion to impose a lesser sentence than LWOP are all the constitution requires.

Jones's sentencing record itself demonstrates this principle. Like Briones, Jones argued the *Miller* factors at resentencing and presented evidence relevant to his capacity for change. Jones J.A. at 25-28, 133 (expressing "regret" for killing his grandfather), 134-35 (discussing Jones's minimal disciplinary history), 143-44 (counsel arguing "nothing in this record . . . would support a finding that the offense reflects irreparable corruption."). Although Jones's sentencer noted that it had "considered each and every factor that is identifiable in [*Miller*]," it never expressly referenced permanent incorrigibility or capacity for change. Jones J.A. at 148-152.

Nevertheless, the Supreme Court affirmed, because the Eighth Amendment does not require that analysis.

Thus, contrary to the majority's implication, the district court did not apply an incorrect legal rule by weighing Briones's post-sentencing rehabilitation alongside other youth-related evidence and the circumstances of the crime. *Briones II*, 929 F.3d at 1065 n.4, 1066. Nor was there any constitutional problem with the district court's description of the youth-related evidence as "mitigation." *Id*. at 1066. To the contrary, *Jones* endorsed *Miller*'s description of "youth as a sentencing factor akin to a mitigating circumstance." *Jones*, 141 S. Ct. at 1315. *Miller*, as *Jones* makes clear, requires only that a sentencer consider youth and have discretion to impose a lesser sentence than LWOP. *Id.* at 1316-17. Those conditions were satisfied here.

4. The Eighth Amendment requires no special sentencing explanation

Applying what it believed to be *Miller*'s rule to the sentencing explanation here, the en banc majority held that it couldn't tell from the district court's "articulated reasoning" whether it "appropriately considered the relevant evidence of youth or the evidence of his post-incarceration efforts at rehabilitation." *Briones II*, 929 F.3d at 1066. Accordingly, it reasoned that "[w]hen a district court sentences a juvenile offender in a case in which an LWOP sentence is possible, *the record must reflect* that the court meaningfully engaged in *Miller*'s central inquiry." *Id.* at 1067 (emphasis added). The majority's LWOP-specific record requirement is inconsistent

with *Jones*, which held "an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth." 141 S. Ct. at 1319.

Jones explained that a youth-oriented sentencing explanation is "not necessary to ensure that a sentencer considers a defendant's youth," "not required by or consistent with *Miller*," "not required by or consistent with this Court's analogous death penalty precedents," and "not dictated by any consistent historical or contemporary sentencing practice in the States." *Id*. Thus, "a sentencing explanation is . . . not necessary to ensure that the sentencer in juvenile [LWOP] cases considers the defendant's youth." *Id*. at 1320.

Briones's argument and the majority's holding to the contrary "rest[ ] on the assumption that meaningful daylight exists between (i) a sentencer's discretion to consider youth, and (ii) the sentencer's actual consideration of youth." *Id*. at 1319. But *Jones* rejected that assumption, explaining that "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth." *Id*. That is "especially" true where, as here, "defense counsel advances an argument based on the defendant's youth." *Id*.

Briones discussed the *Miller* factors at length both before and during his resentencing hearing. (1-SER-2–13; ER-219-34, 237.) He provided extensive detail on *Miller*'s scientific basis and explicitly argued the district court was required to consider his "chronological age and its 'hallmark features'." (1-SER-9.) As the en

banc majority recognized, he then "provided evidence related to a number of the *Miller* factors at the resentencing hearing," including "his abusive upbringing, his extensive exposure to drugs and alcohol beginning when he was only eleven years old, his difficulty finding acceptance at his local high school because of his Native American traditions, and his father's inexplicable insistence that he reject the government's favorable plea offer . . . ." *Briones II*, 929 F.3d at 1066. The district court's sentencing explanation specifically referenced that evidence. (ER-253.) *Jones* makes clear the level of explanation here surpassed the Eighth Amendment's requirements.[6]

The en banc majority thus erred in vacating Briones's sentence on the ground that the district court did not provide an explanation demonstrating it "fully consider[ed] Briones's post-incarceration conduct." *Id.* at 1067. As *Jones* makes clear, *Miller* requires only that the sentencer consider such mitigating evidence and have the discretion to impose a lesser sentence than LWOP. Both conditions were satisfied here. No further "on-the-record sentencing explanation" was required. *Jones*, 141 S. Ct. at 1319.

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[6] *Jones*'s sentencing record and explanation was remarkably similar. Defense counsel had also argued youth extensively there. *See supra* at 17. At the end of the hearing, Jones's judge "acknowledged that he had discretion under *Miller* to impose a sentence less than LWOP," "consider[ed] the factors 'relevant to the child's culpability,'" and "determined that life without parole remained the appropriate sentence." *Jones*, 141 S. Ct. at 1313; Jones J.A. at 148-52. There, as here, the Eighth Amendment did not require more.

4. *Jones* resolved the only non-foreclosed issue Briones squarely raised on appeal

The only issue Briones presented in his opening brief in this case (besides the two issues he acknowledged were foreclosed, *see supra* at n.3) was whether the district court "committed reversible error by failing to assess whether Mr. Briones is one of the rare juvenile offenders who is permanently incorrigible." (Op. Br. at 8.) He doubled down on that argument in his petition for rehearing en banc. (Pet. at 2 ("The sentencer who considers the hallmarks of youth must *still* ascertain whether the child is 'permanently incorrigible.' Nothing in the record suggests that the district court even asked this question, let alone correctly answered it.") (alterations omitted).) *Jones* has squarely resolved the issue Briones asked this Court to consider. Under the "principle of party presentation," this Court should affirm. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

To the extent Briones might now argue the district court's sentencing explanation was deficient under more general § 3553 procedural-error principles, he has waived the claim by failing to raise it in his opening brief. *See Devereaux*, 263 F.3d at 1079 ("As a general matter, we review only issues which are argued specifically and distinctly in a party's opening brief, and an issue will therefore be deemed waived if it is raised for the first time in a supplemental brief.") (internal citations and alterations omitted). Moreover, he affirmatively disavowed any such claim in his oral argument before the three-judge panel. (*See* Video at 0:55-1:48

"The issue here is whether [Briones] got a constitutionally-valid sentencing hearing. . .. [T]his is a constitutional issue.") He also failed to object to the adequacy of the district court's explanation below.[7] At best, then, any non-constitutional procedural error claim would be reviewed for plain error. *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010).

Shorn of a requirement to discuss permanent incorrigibility, the district court's sentencing explanation was not plainly erroneous. Although "the judge might have said more," he was not "require[d] to write more extensively" because "the record makes clear that the sentencing judge considered the evidence and arguments." *Rita v. United States*, 551 U.S. 338, 359 (2007); *see also United States v. Kleinman*, 880 F.3d 1020, 1041 (9th Cir. 2018), *as amended* (finding no plain error where the sentencing court "listen[ed] to the defendant's arguments," "stated that it reviewed the statutory sentencing criteria," and "then simply [found the] circumstances insufficient to warrant" a lower sentence). Arguments to the contrary necessarily rest on according special status to permanent incorrigibility, which *Jones* demonstrates is incorrect. *See Briones I*, 890 F.3d at 826-27 (O'Scannlain, J., dissenting) (declining to find procedural error and suggesting remand instead to determine whether Briones was incorrigible).

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[7] Briones's opening brief likewise failed to raise an as-applied proportionality challenge under the Eighth Amendment. Thus, it is waived. *Devereaux*, 263 F.3d at 1079.

The sentencing statute doesn't require a district court to "tick off each of the § 3553(a) factors to show that it has considered them[,]" let alone demand a discussion of permanent incorrigibility that the Eighth Amendment itself does not require. *See Carty*, 520 F.3d at 992; *Jones*, 141 S. Ct. at 1315. The district court explained that it had considered Briones's youth-based arguments and specifically discussed them. (ER-219, 253–54.) In also stating that "some decisions have lifelong consequences," making findings that necessarily rejected Briones's sentencing testimony, and pointing out that Briones "terrorized the Salt River Reservation community . . . for several years," the district court's explanation shows it found other factors outweighed his youth. *Jones* has now explained that *Miller* allowed that balancing, and the record permits meaningful review. 141 S. Ct. at 1319; *see also id*. at 1320 n.7. Thus, any procedural error was not plain and did not affect Briones's substantial rights.

In light of *Jones*, Briones's LWOP sentence should be affirmed.

VI. CONCLUSION

Jones makes clear that the en banc majority opinion is based on a mistaken premise. As *Jones* explains, and contrary to the majority's holding, permanent incorrigibility and irreparable corruption are not eligibility criteria for LWOP sentences, so a district court is not required to affirmatively analyze them. *Jones*, 141 S. Ct. at 1315. A discretionary sentencing system in which youth is considered—as it was here—is constitutionally sufficient to satisfy *Miller*. This Court should affirm.

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VII. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 16-10150

I certify that: (check appropriate option(s))

☐ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains __ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☒ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☒ This brief complies with a page or size-volume limitation of 7000 words established by separate court order dated May 4, 2021 and is 6,586 words.

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June 25, 2021
Date

s/ Krissa M. Lanham
KRISSA M. LANHAM
Assistant U.S. Attorney

VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2021, I electronically filed the United States' Supplemental Brief on Remand with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Brian Wolfe
BRIAN WOLFE
Legal Assistant