C.A. No. 16-10150
Opinion dated May 16, 2018
Rawlinson, CJ; Ezra, DJ; O'Scannlain, CJ, dissenting

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' RESPONSE TO PETITION FOR REHEARING OR REHEARING *EN BANC*

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A. Relevant Facts.

Three weeks shy of his eighteenth birthday, Riley Briones, Jr.—the founder and leader of the "Eastside Crips Rolling 30's" gang (PSR ¶ 25)[1]—participated in the cold-blooded murder of a Subway restaurant clerk, Brian Lindsay. (PSR ¶¶ 7-8.)

Briones and other Eastside Crips planned to rob and kill Lindsay to obtain money to buy more weapons for the gang. (PSR ¶ 7; SER 1075, 1588-90). Briones drove gang members to the Subway and waited in his car while they ordered food. (PSR ¶ 8.) Arlo Eschief, the shooter, walked outside to confer with Briones. (PSR ¶ 8.) Immediately afterwards, Eschief returned to the restaurant and shot Lindsay in the face. (PSR ¶ 8; SER 1602-03.) Eschief then leaned across the counter and fired five more shots into Lindsay's body. (PSR ¶ 8.) When gang members returned to the car, Briones instructed them to get out a rifle and drove around the parking lot attempting to find and kill a maintenance man whom Briones believed had seen them. (SER 1608-09.)

Briones spent the eve of his eighteenth birthday making Molotov cocktails to firebomb a home associated with a rival gang. (PSR ¶ 13; SER 1614-17.) When that

[1] "CR" refers to the Clerk's Record, followed by the document number(s). "ER" refers to the Excerpts of Record, and "SER" refers to the Supplemental Excerpts of Record, followed by the page number(s). "PSR" refers to the Presentence Report, as amended on March 22, 2016, followed by the paragraph number(s).

firebombing failed to demolish the home, Briones planned a second, this time with fires set beforehand to distract authorities from promptly responding. (PSR ¶ 14.) Briones—by that time nearly 18½—again made Molotov cocktails, provided gasoline for a diversionary fire, and drove gang members to the firebombing site. (PSR ¶¶ 14-17.)

Months after his eighteenth birthday, Briones attempted to kill fellow gang member Norval Antone, who knew of Briones's involvement in the murder. (PSR ¶ 19 and at 23; SER 1140.) Briones broke a beer bottle on Antone's face and pistol-whipped Antone until he was unconscious. (PSR ¶ 19.) While Briones was deciding how to dispose of Antone's body, Antone awoke and escaped. (SER 1146.)

When Deputy Marshals arrested Briones (aged 19½), he grabbed for his leg. Deputies found a pistol in his waistband near where he was reaching. (SER 1369-72.) Prior to arrest, Briones also participated in plans to kill a tribal judge, federal prosecutors, and Salt River investigators: he followed an investigator but didn't shoot because there were too many witnesses, and had gang members practice shooting in surroundings similar to the federal building's. (PSR ¶ 27.)

A jury convicted Briones of all charges, including first degree murder/felony murder. (ER 1-13, 136.) The district court sentenced him to (then-mandatory) life on that count. (ER 111-12.) This Court affirmed. *United States v. Briones*, 165 F.3d 918 (9th Cir. 1998) (unpublished).

1. Post-*Miller* Resentencing.

Based on Briones' uncontested motion pursuant to 28 U.S.C. § 2255, the district court ordered resentencing as a result of *Miller v. Alabama*, 567 U.S. 460 (2012). Briones's motion asked for resentencing to allow him to "present mitigating evidence in support of a sentence less than life without parole." (CR 329 at 14.)

Shortly before the resentencing, the Supreme Court clarified in *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), that *Miller* has both procedural and substantive components. Procedurally, a court must "consider a[n] . . . offender's youth and attendant characteristics" before sentencing a juvenile homicide defendant to life without parole (LWOP). *Id*. Juveniles must be allowed to present "mitigation evidence to justify a less severe sentence," such as their age at the time of the offense, age-linked limited capacity, and potential for rehabilitation. *Id*. at 726. Substantively, *Miller* barred LWOP "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. at 734.

The government filed a sentencing memorandum arguing primarily that the district court should reimpose a life sentence. (SER 40-41.) The government conceded "appropriate occasions for sentencing juveniles to life imprisonment would be uncommon," and stated, "the sentencing court would need to engage in the difficult task of distinguishing between the juvenile offender whose crime reflected unfortunate yet transient immaturity, and the 'rare juvenile offender whose crime

reflects irreparable corruption.'" (SER 36 (quoting *Miller*, 567 U.S. at 479-80).) Although the court was required to consider a lesser sentence, the government argued life was appropriate because Briones was nearly eighteen when the murder took place, led the gang, committed many other offenses post-eighteen, and showed a "murderous, unrepentant and unapologetic attitude" even after his arrest. (SER 40-41.)

Defense counsel informed the court it must consider "youth and its 'hallmark features'" before imposing LWOP and recommended a 360-month sentence based on "evidence in mitigation that will be presented at the sentencing hearing . . . ." (SER 2.) Nevertheless, defense counsel recognized the "cold-blooded nature of a crime may overpower any 'mitigating argument based on youth . . . .'" (SER 6 (quoting *Graham v. Florida*, 560 U.S. 48, 78 (2010).) Defense counsel never argued imposing a life sentence on Briones would be unconstitutional due to his individual characteristics. (SER 7-8.) Instead, she argued a 360-month sentence was appropriate based on the 18 U.S.C. § 3553(a) factors, including the "mitigation . . . of Mr. Briones'[s] family dysfunction" and "post-sentencing rehabilitation." (SER 10-12.)

Briones's resentencing testimony established he had no write-ups in prison, experimented with alcohol and drugs from age 12, and was abused by his father at least once. (ER 184, 189-94.) Briones expressed remorse for his part in the crimes.

(ER 202; ER 239.) However, on cross-examination, he denied or minimized his involvement in several crucial acts the government had proven at trial, including: leading the Eastside Crips (ER 205-06); telling other gang members they needed to find and kill the maintenance man outside Subway (ER 208); and trying to draw his gun when arrested (ER 210). He likewise testified he was "surprised" Arlo Eschief shot Lindsay (ER 207), contravening the trial evidence.

Defense counsel reiterated *Miller*'s mandate that LWOP "for someone who commits a terrible crime . . . should be uncommon." (ER 220-21.) She argued again that the § 3553(a) factors were "the circumstances that the Court needs to look at." (ER 220-36.) Defense counsel argued 360 months was "appropriate" because "under *Miller* life is no longer a presumption, it should be uncommon, and the fact that he was not the shooter, and his rehabilitation, along with the factors from *Miller* that we identified as an impact on his life." (ER 237.)

The prosecutor reiterated, "*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 "this is the most egregious case." (ER 242.) He acknowledged Briones was doing well in prison, but emphasized Briones's failure to "accept[ ] responsibility." (ER 242.) The prosecutor detailed discrepancies between Briones's recent statements and the trial evidence. (ER 242-50.) Based on Briones's age at the time of the murder, the "series of crimes that occurred for a year and a half

thereafter," his actions years later during trial, and his failure to accept responsibility at resentencing, the prosecutor recommended life. (ER 250-52.) The district court's questions showed it read the sentencing memoranda and record closely. (ER 228, 252-53.)

The district judge stated he had considered "the presentence report, . . . the Government's sentencing memorandum, the defendant's sentencing memorandum[,] . . . the transcript of the [original] sentencing[,] . . . the victim questionnaire and the letters on behalf of defendant . . . ." (ER 219.) The court then reimposed a life sentence, stating:

> 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 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, pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that Riley Briones, Jr. is hereby committed to the Bureau of Prisons for a sentence of life.

(ER 253-54.) Briones appealed.

B. Panel Decision.

The panel issued an opinion affirming Briones's life sentence. *United States v. Briones*, 890 F.3d 811 (9th Cir. 2018). Judge O'Scannlain concurred in part and dissented in part.

All panel members agreed on the governing legal standards, and to reject the majority of arguments Briones raised. In particular, they agreed:

- *Miller* and *Montgomery* provide the guiding procedural and substantive legal principles in sentencing a juvenile to LWOP. *Id.* at 818.
- Supreme Court precedent compels rejection of Briones's argument the district court should not have used the sentencing guidelines as a starting point. *Id.* at 816 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)); 890 F.3d at 822 (O'Scannlain, J., concurring in part and dissenting in part).[2]

[2] Briones now seeks to have the Court overturn this unanimous decision en banc. (Pet. at 17-20.) But the district court did not err by following the Supreme Court's

- *Miller* and *Montgomery* foreclosed Briones's arguments that he was ineligible for LWOP because he wasn't the shooter, or because the Eighth Amendment prohibits LWOP for juveniles across-the-board. *Id*. at 821-22; *id*. at 822.

The panel diverged, however, in determining what Briones was raising as his primary claim, and therefore the applicable standard of review and resolution. The majority characterized "the gist" of his argument as attacking the district court's failure to make an explicit incorrigibility finding, and adequately consider *Miller*'s 'hallmarks of youth' or his rehabilitation. *Id*. at 818. Because Briones failed to object to the explanation below, *id*. at 821 n.6, the majority reviewed his procedural claim for plain error and his substantive claim for abuse of discretion. *Id*. at 818 (citing *United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir. 2017) (en banc)).

The majority held the district court's explanation was adequate to support reimposing Briones's life sentence. *Id*. at 820. Pointing to counsel's repeated discussions of the "hallmarks of youth" and the district court's statements that it imposed sentence based on "all the evidence . . . and everything [it] had read," the majority held the explanation met the requirements of *Rita v. United States*, 551 U.S. 338, 358 (2007). *Id*. at 818-20; *see also id*. at 820 ("when the district court has

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repeated mandate that sentencing must begin with a guidelines calculation. *E.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018) ("District courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process."); *Gall*, 552 U.S. at 49.

listened to and considered all the evidence presented," it "is not required to engage in a soliloquy explaining the sentence imposed.") (citing *United States v. Carty*, 520 F.3d 984, 995 (9th Cir. 2008) (en banc)). Record inferences supported the conclusion that Briones demonstrated a lack of acceptance of responsibility, contravening a "basic tenet[ ] of rehabilitation." *Id*. Because the crucial question—as articulated in *Martinez-Lopez*—was whether the imposition of the sentence was "illogical, implausible, or without support in inferences that may be drawn from facts in the record," imposing a life sentence was not plainly erroneous or an abuse of discretion. *Id*. at 821.

Judge O'Scannlain agreed that procedurally, the district court considered the "hallmark features" of youth as required. *Id*. at 823. However, characterizing Briones's argument below as being ineligible for LWOP "because he is not irreparably corrupt or permanently incorrigible," Judge O'Scannlain believed the district court did not provide enough explanation to show it considered the substantive question of whether Briones could change. *Id*. at 823-24, 827. Judge O'Scannlain would have remanded for the limited purpose of allowing the district court to explain the sentence more fully. *Id*. at 827. Judge O'Scannlain faulted the district court's discussion of the *Miller* hallmarks as "mitigation" and failure to explicitly discuss Briones's lack of acceptance of responsibility, finding improper emphasis on the crime. *Id*. at 825-26.

IV. REASONS FOR DENYING THE PETITION

Rehearing is not warranted under the "exceptional importance" prong of FRAP 35(a), the only ground Briones raises.

Although juvenile life sentences may generally be an important topic, the record *in this case* demonstrates why rehearing en banc isn't appropriate. All panel members agreed on the applicable substantive law. They agreed on the outcome of all squarely-raised legal questions. Their disagreement is narrow and record-bound: did the district court say enough, given what Briones raised below? This is not the exceptionally important stuff of en banc rehearing. *See, e.g.*, *Smith v. Baldwin*, 510 F.3d 1127, 1159-60 (9th Cir. 2007) (Reinhardt, J., dissenting) ("We do not go en banc to sort out questions of fact . . . or to create mythical records for hearings that never were."). Further, the issue is unlikely to recur due to this case's unique procedural posture.

A. The Governing Law is Clear, and the Panel Unanimously Rejected All Squarely-Presented Legal Claims.

The thrust of Briones's petition is that the majority mistakenly treated *Miller*'s substantive rule as procedural. (Pet. at 11-12.) He suggests the district court misunderstood the Eighth Amendment inquiry because it referred to "mitigating" factors, improperly focused on the crime, and addressed the § 3553(a) factors without using the words "permanently incorrigible." (Pet. at 12-14.) Substantively,

Briones now argues he's ineligible for LWOP because there is no evidence from which to conclude he is "irreparabl[y] corrupt[]." (Pet. at 14-15.) [3]

The substantive law applicable to Briones's claims is settled, and all panel members agreed on the fundamental principles. *Miller* encompasses both procedural and substantive components. Procedurally, a sentencing court must "consider a[n] . . . offender's youth and attendant characteristics" before imposing LWOP on a juvenile. *Montgomery*, 136 S. Ct. at 734. Substantively, LWOP "is an excessive sentence for children whose crimes reflect transient immaturity." *Id*. at 735. Through a hearing where a sentencing judge considers "youth and its attendant characteristics," *Miller*'s procedure gives effect to its substantive rule. *Id*.

The panel majority appreciated the distinction between *Miller*'s substantive and procedural components. *Briones*, 890 F.3d at 817-18. The majority and the concurrence also agreed that the district court met *Miller*'s procedural component. *Id*. at 818; *id*. at 823. That unanimous holding comports with this Court's precedent. *See Bell v. Uribe*, 748 F.3d 857, 870 (9th Cir. 2014) (where a "sentencing judge . . .

[3] Amici go further, inviting an en banc Court to invalidate Briones's conviction because 18 U.S.C. § 1111 is unconstitutional as applied to juveniles, or because the Sixth Amendment guarantees an explicit statement of incorrigibility. (ECF No. 50-1 at 16-22.) This Court should decline to address issues raised for the first time in a petition for rehearing, as it usually does. *See United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015).

consider[s] both mitigating and aggravating factors under a sentencing scheme that affords discretion and leniency, there is no violation of *Miller*.").

The sole disagreement was whether the district court said enough to show the sentence met *Miller*'s substantive requirement. That divergence was driven by the manner in which Briones raised—or didn't raise—his claim below.

The district court was aware of *Miller*'s substantive prerequisite. The government raised the requirement in its sentencing memorandum (SER 36), and defense counsel reiterated that juvenile LWOP sentences should be uncommon (ER 220-21.) The court explicitly stated it had considered these pleadings; its questions showed it did so carefully. (ER 219; 252-53.) Moreover, this Court assumes "district judges know the law and understand their obligation to consider" relevant sentencing factors. *Carty*, 520 F.3d at 992. This Court may not reverse on substantive reasonableness unless "the sentence was 'illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Martinez-Lopez*, 864 F.3d at 1043-44.

The principle announced en banc in *Martinez-Lopez*, along with the Supreme Court's guiding cases, compelled affirmance here. Because "the record makes clear that the sentencing judge considered the evidence and arguments," the law did not "require[ ] the judge to write more extensively." *Rita*, 551 U.S. at 359. The Supreme Court has made clear this principle applies in the juvenile LWOP context: "*Miller*

did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Montgomery*, 136 S. Ct. at 735. "Inferences that may be drawn from the record"—particularly the prosecutor's argument (ER 242-50), the judge's questions (ER 228), the PSR (PSR ¶ 78 and at 23), and Briones's testimony (ER 205-08, 210)—show the district judge weighed the gravity of the crime and Briones's lack of acceptance of responsibility over evidence of immaturity in determining whether to reimpose LWOP. He was entitled to do so.

The district judge's consideration of the crime did not manifest a disregard for *Miller*'s substantive requirement. *Miller*'s substantive question is not whether a juvenile offender is permanently incorrigible, but rather whether his *crimes* reflect permanent incorrigibility. *Montgomery*, 136 S. Ct. at 734 ("*Miller* did bar life without parole . . . for all but . . . those whose crimes reflect permanent incorrigibility."); *id*. ("*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."); *see also Miller*, 567 U.S. at 479-80.

The district court's emphasis on Briones's crime was therefore consistent with *Miller* and *Montgomery*. *Briones*, 890 F.3d at 826. And in determining whether the *crime* was one that reflected permanent incorrigibility, the judge correctly considered the entire course of criminal conduct, including Briones's leadership "of a gang that terrorized the Salt River Reservation community . . . for several years"

after he turned eighteen. (ER 254) *See Miller*, 567 U.S. at 480 n.8 (requiring sentencer to take into account "differences among defendants and crimes," including relative age of juvenile defendants). Briones's crime occurred three weeks before he turned eighteen, and he committed acts nearly as heinous—attempted murder, and conspiracy to murder investigators, prosecutors, and judges—long afterwards. His crime reflected permanent incorrigibility; it was not error for the district judge to focus on it.

Far from reflecting a misunderstanding of *Miller*, the district judge's use of the word "mitigation" shows he carefully read Briones's pleadings. Briones first introduced the word "mitigation" to describe the required inquiry, and counsel embraced the concept in subsequent pleadings and argument. (CR 329 at 14; SER 2, 11.) The court's use of the word was not error—the Supreme Court described a "mitigating argument based on youth" in *Graham*, as defense counsel recognized (SER 6)—but if it had been, Briones invited it. *See, e.g.*, *United States v. Myers*, 804 F.3d 1246, 1254 (9th Cir. 2015) ("The doctrine of invited error prevents a defendant from complaining of an error that was his own fault.").

More generally, Briones's sentencing strategy makes this a poor case for en banc review. He did not, as Judge O'Scannlain suggested, squarely argue "that he is constitutionally ineligible for a particular sentence under *Miller*." *Briones*, 890 F.3d at 827. He argued a 360-month sentence was more "appropriate" based solely on the

§ 3553(a) factors. (SER 10-12; ER 222.) Such a claim, "rais[ing] § 3553(a) factors" and "arguing that the court should consider various factors in mitigation," invokes substantive reasonableness and abuse-of-discretion review. *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 n.3 (9th Cir. 2010). That's exactly what the panel majority applied to that part of the claim, quoting *Martinez-Lopez*'s substantive reasonableness standard and determining whether inferences from record facts supported the sentence. *Briones*, 890 F.3d at 818, 821 (quoting *Martinez-Lopez*, 864 F.3d at 1043). Because supporting inferences exist—as even Judge O'Scannlain recognized, *id*. at 826—Briones's sentence is substantively reasonable and this Court may not reverse "just because [it] think[s] a different sentence is appropriate." *Carty*, 520 F.3d at 993 (citing *Gall*, 552 U.S. at 51).

The guiding law is clear, the parties cited it below, all panel members agreed on the resolution of the pure legal questions, and Briones himself introduced the concepts he now claims reflect error. En banc review is inappropriate due to the fact-bound nature of the panel's disagreement.

B. <u>The Issue is Unlikely to Recur.</u>

Briones also claims exceptional importance due to the opinion's purported effects on "many other federal inmates" and "dozens of state defendants." (Pet. at 21-22.) This argument fails. His case will affect no other federal inmates. And state defendants, whose cases trigger deferential AEDPA review anyway, come from

jurisdictions perfectly capable of setting—indeed, which have set—their own standards for effectuating *Miller*'s substantive command.

The evidence available and arguments presented to a court conducting the *Miller* analysis in the first instance, closer to the time of the crime, will be different than on resentencing years later. Briones recognized this distinction. *See* Oral Argument Video, No. 16-10150, at 0:19-0:53. The outcome here was driven by the unique resentencing record, as Judge O'Scannlain explained. *See* 890 F.3d at 828 ("Remanding for a new sentencing here would have no bearing on a case in which the defendant does not present a credible argument under *Miller* or one in which the district court explicitly confronted a *Miller* argument. . . ."). Because of those distinctions, this case's holding will not impact initial federal juvenile LWOP sentencings. And based on the government's best information, *Briones* and *Pete*—which was affirmed by memorandum disposition on October 18, *see* 2018 WL 5098201, at *1—are the last *Miller* resentencings pending in this Circuit.[4] Rehearing en banc would make a difference in zero cases beyond Briones's.

[4] The National Association of Criminal Defense Lawyers points to the United States' Brief in *Montgomery* as suggesting, as of that time, 27 persons were serving federal life sentences for juvenile offenses. (ECF No. 50 at 7 n.2 (*citing* United States' *Amicus Curiae* Br. Supporting Pet'r at 1, *Montgomery*, 135 S. Ct. 1546 (No. 14-280).) All Ninth Circuit defendants in that category have been resentenced, with the resulting sentences affirmed on appeal. *See United States v. Pete*, No. 17-10215, 2018 WL 5098201, at *1 (9th Cir. Oct. 18, 2018); *United States v. Bryant*, 609 F. App'x 925 (9th Cir. 2015); *United States v. Orsinger*, 698 F. App'x 527 (9th Cir. 2017).

Perhaps recognizing this fact, Briones turns to state court defendants pressing cases on habeas review as a source of exceptional importance. But, as Briones's own data demonstrates, states within the Ninth Circuit have accepted *Montgomery*'s invitation to remedy *Miller* violations without "relitigat[ing] sentences . . . in every case," 136 S. Ct. at 736, eliminating the utility of guidance from this Court even in states inclined to look at it. *See* Juvenile Sentencing Project, *Juvenile Life Without Parole Sentences in the United States, November 2017 Snapshot*, 3-4, 6, 10, 16 (Nov. 20, 2017) (Alaska, California, Hawaii have 0 juvenile LWOP sentences, while Arizona, Nevada, and Washington enacted various types of post-*Miller* legislative fixes); *see also State v. Bassett*, --- P.3d ----, 2018 WL 5077710, at *10 (Wash. 2018) (holding juvenile LWOP violates Washington Constitution). The United States Supreme Court can resolve state court *Miller*-resentencings-gone-wrong directly, if it so chooses. Further, federal courts must apply deferential AEDPA review to state habeas challenges, *see* 28 U.S.C. § 2254(d)(1), and "the *only* definitive source of clearly established federal law under AEDPA is the holdings . . . of the Supreme Court." *Hedlund v. Ryan*, 854 F.3d 557, 565 (9th Cir. 2017) (alterations omitted). State juvenile LWOP defendants do not make this case exceptionally important.

V. CONCLUSION

Briones seeks en banc review in a case where the legal principles are clear and the record-based holding impacts no one else. The Court should not order rehearing or rehearing *en banc*.

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VI. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

VII. CERTIFICATE OF COMPLIANCE

I certify that the combined response to petitions for rehearing and rehearing *en banc* is:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 4,189 words (petitions and answers must not exceed 4200 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (petition and answers must not exceed 4200 words or 390 lines of text), or is

☐ In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

October 31, 2018
Date

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

VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2018, I electronically filed the United States' Combined Response to Petitions for Rehearing and Rehearing *En Banc* 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/ Tammie R. Holm
TAMMIE R. HOLM
Legal Assistant