No. 19-720

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RILEY BRIONES, JR.

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

REPLY BRIEF FOR THE PETITIONER

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In its petition for a writ of certiorari in this case, the government asked that the petition be held pending this Court's decision in *Mathena* v. *Malvo*, No. 18-217, a case concerning the scope of *Miller* v. *Alabama*, 567 U.S. 460 (2012), which "h[e]ld that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[]." *Id.* at 465. After the filing of the petition in this case, the Court dismissed the petition for a writ of certiorari in *Malvo*, but granted the petition for a writ of certiorari in *Jones* v. *Mississippi*, No. 18-1259 (Mar. 9, 2020), a case that likewise concerns the scope of *Miller*, see U.S. Supp. Letter 1. The specific question presented in *Jones* bears even more directly on this case than the question presented in *Malvo* did. Indeed, the petition for a writ of certiorari in *Jones* specifically cited the then-precedential three-judge panel's decision in this case as evidence of

a conflict of authority on the question that *Jones* presents. 18-1259 Pet. at 13-14. The correctness of the court of appeals' subsequent en banc decision in this case, which addressed the same issue as the panel's decision but came out the opposite way, is thus squarely implicated by this Court's consideration of *Jones*. Accordingly, the petition in this case should now be held pending this Court's decision in *Jones* and then be disposed of as appropriate in light of that decision.

1. Following this Court's decision in *Miller*, the district court in this case resentenced respondent, as a matter of discretion, to life imprisonment without parole for a murder that he had committed as a juvenile. Pet. App. 65a-67a. In doing so, the district court stated that it had "consider[ed]" respondent's "youth, immaturity, [and] adolescent brain at the time," as well as his record as "a model inmate up to now." *Id.* at 65a. The court also acknowledged that respondent had "improved himself while he's been in prison." *Id.* at 65a-66a. The court determined, however, that a life-without-parole sentence was nevertheless appropriate. *Ibid.*

The en banc court of appeals vacated respondent's discretionary sentence. Pet. App. 1a-16a. The court took the view that, under *Miller*, "[i]t is not enough for sentencing courts to consider a juvenile offender's age before imposing life without parole." *Id.* at 9a. Rather, in its view, *Miller* requires a sentencing court to "determin[e] whether a defendant is permanently incorrigible," *id.* at 15a (emphasis omitted), and "the record must reflect that the court meaningfully engaged in [that] inquiry," *id.* at 16a. The en banc court of appeals concluded that the record did not reflect that the district court had "meaningfully engaged" in that inquiry here. *Ibid.*

2. The issue of what the record must reflect for a juvenile life-without-parole sentence to comport with *Miller* is precisely the issue that is before this Court in *Jones*. The trial court in *Jones* sentenced the petitioner there to life without parole for a murder that he had committed as a juvenile. 18-1259 Pet. App. at 32a. Similar to the district court in this case, the trial court in *Jones* stated that it had "considered each and every factor that is identifiable in the *Miller* case." *Id.* at 70a. The Mississippi Court of Appeals affirmed, rejecting the contention that *Miller* required the sentencing court to "make a specific 'finding' that [the offender] is irretrievably depraved, irreparably corrupt, or permanently incorrigible." *Id.* at 41a. The Mississippi Court of Appeals explained that, although the sentencing court had "not specifically discuss[ed] on the record each and every factor mentioned in" *Miller*, the sentencing court had "expressly stated that [it] had 'considered each of the *Miller* factors,'" and its "ruling was sufficient to explain the reasons for the sentence." *Id.* at 47a.

The question presented in *Jones* is "[w]hether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole." 18-1259 Pet. at i. The petitioner in *Jones* contends that the answer is yes. See, *e.g.*, *id.* at 2. The State, in contrast, contends that *Miller* requires only that the sentencing court "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 18-1259 Br. in Opp. at 8 (quoting *Miller*, 567 U.S. at 480). The State maintains that because the sentencing

court in *Jones* "considered the *Miller* factors," the petitioner received the hearing *Miller* requires. *Id.* at 7.

If this Court agrees with the State in *Jones*, then the en banc court of appeals in this case erred in vacating respondent's sentence. Like the sentencing court in *Jones*, the district court in this case did not make an explicit finding that respondent is permanently incorrigible. It did, however, state that it had "consider[ed]," among other factors, respondent's "youth," "immaturity," "adolescent brain at the time," and post-conviction record as "a model inmate up to now." Pet. App. 65a. If this Court holds that the record in *Jones* is sufficient to satisfy *Miller*, then it would necessarily follow that the record here is as well, and that the en banc court of appeals' contrary conclusion was wrong. At a minimum, a decision in favor of the State in *Jones* would provide a basis for the court of appeals to reconsider its resolution of this case. See *Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996) (per curiam) (discussing Court's practice of remanding cases for reconsideration in light of intervening decisions). Accordingly, this Court should hold the petition for a writ of certiorari in this case pending its decision in *Jones* and then dispose of the petition as appropriate in light of that decision.

3. Respondent nonetheless urges (Br. in Opp. 7-14) this Court simply to deny certiorari and pretermit further review or reconsideration of the decision below in light of *Jones*. Neither of the reasons he proffers for doing so is sound.

a. First, respondent contends (Br. in Opp. 1) that, regardless of the outcome in *Jones*, the decision below will stand because, in respondent's view, it rested on a determination that "the district court failed to even

consider evidence of [respondent's] post-conviction conduct." The district court, however, did consider such evidence. Pet. App. 65a-66a. As respondent acknowledges, "the district court expressly noted that [respondent] 'has improved himself while he's been in prison.'" Br. in Opp. 9-10 (quoting Pet. App. 6a). The court also stated that it had "consider[ed]" that respondent has "been a model inmate up to now." Pet. App. 65a.

In the en banc court of appeals' view, the problem was not that the district court had failed to even consider evidence of respondent's post-conviction conduct, but rather that the record did not reveal "whether the district court [had] *appropriately* considered [such] evidence" under *Miller*. Pet. App. 13a (emphasis added). The en banc court of appeals thus emphasized that "[i]t is not enough for sentencing courts to consider a juvenile offender's age before imposing life without parole." *Id.* at 9a. Rather, the en banc court stated, "the record must reflect that the court meaningfully engaged in *Miller*'s central inquiry." *Id.* at 16a.

Respondent's contrary reading of the decision below rests on a single sentence, taken out of context. See Br. in Opp. 8. In that sentence, the en banc court of appeals stated that respondent's "spotless" post-conviction prison record "is precisely the sort of evidence of capacity for change that is key to determining whether a defendant is permanently incorrigible, yet the record does not show that the district court considered it." Pet. App. 15a (emphasis omitted). Context makes clear, however, that what the en banc court meant was that the record did not show that the district court had "fully" considered such evidence in the way that it viewed *Miller* to require. *Ibid.*; see, *e.g.*, *id.* at 16a (describing purported

error as district court's failure to "meaningfully engage[] in *Miller*'s central inquiry"). Indeed, that is how the en banc court described the district court's purported error just two sentences later: as the failure "to fully consider [respondent's] post-incarceration conduct." *Id.* at 15a.

Thus, the decision below rested not on a determination that the district court failed to consider evidence of respondent's post-conviction conduct at all—which would have been contrary to the record, see Pet. App. 6a, 65a-66a—but instead on a determination that the record failed to show that the court had "appropriately considered" such evidence under *Miller*. *Id.* at 13a. To the extent that any ambiguity exists on the precise reasoning of the en banc court of appeals' decision, and how it would be affected by a decision in favor of the State in *Jones*, that ambiguity would be best addressed by the court of appeals itself following a remand.

The petitioner in *Jones* himself expressly views the issue in this case, which was the same at the panel stage as at the en banc stage, to be on all fours with the question presented in his case. See 18-1259 Pet. at 13-14. He even quotes the reasoning of the judge who dissented from the panel opinion in this case as articulating the rule that he wants this Court to adopt. See *id.* at 18 (quoting Pet. App. 58a (O'Scannlain, J., concurring in part and dissenting in part)). And as even that judge recognized, if *Miller* requires only that "sentencing courts must consider certain hallmark characteristics of youth and that they must be permitted to impose a sentence less than life"—as the State contends in *Jones*—then "the district court" in this case "likely would have complied with [*Miller*'s] dictates." Pet. App. 52a (O'Scannlain, J., concurring in part and dissenting in part).

b. Second, respondent contends (Br. in Opp. 11-12) that the petition for a writ of certiorari in this case should not be held for *Jones* because the government took the position below that "*Miller* applied to discretionary sentences." As the petition explains, however, that position was based on statements in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), that lower courts and the litigants before them "cannot lightly disregard." Pet. 8 n.* (citation omitted). "This Court, however, is not so constrained," and it may "clarify the limits of *Miller* and *Montgomery*" in *Jones*. 18-217 U.S. Amicus Br. at 22.

In any event, respondent reads the question presented in the petition for a writ of certiorari in this case too narrowly. That question asks whether *Miller* "entitles respondent to invalidation of a discretionary life-without-parole sentence." Pet. I. One reason the answer might be no is if *Miller* does not apply to "discretionary" life-without-parole sentences at all. But that is not the only possible reason. The answer also might be no if, for instance, *Miller* does apply to "discretionary" life-without-parole sentences, but requires only an opportunity for the sentencing court to consider the juvenile offender's youth and attendant characteristics. Thus, even assuming that the government might have "waived" the specific contention that *Miller* does not apply to discretionary life-without-parole sentences at all, Br. in Opp. 14, it has not waived the argument that *Miller* does not entitle respondent to invalidation of his discretionary life-without-parole sentence. Holding this petition for *Jones* is therefore appropriate.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari and the government's supplemental letter of March 10, 2020, the petition should be held pending this Court's decision in *Jones* v. *Mississippi*, cert. granted, No. 18-1259 (Mar. 9, 2020), and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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