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

PETITION FOR REHEARING OR REHEARING EN BANC

Vikki M. Liles
CJA Appointed Counsel of Record
THE LAW OFFICE OF VIKKI M. LILES, P.L.C.
335 E. Palm Lane
Phoenix, AZ 85004
(602) 252-2110

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

Melanie L. Bostwick
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400

Counsel for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND RULE 35 STATEMENT

Riley Briones, Jr., was sentenced to die in prison for a crime he committed as a juvenile. The Supreme Court has made clear that such a punishment violates the Eighth Amendment for all but those "rarest of juvenile offenders" who "exhibit[] such irretrievable depravity that rehabilitation is impossible." *Montgomery v. Louisiana*, 136 S. Ct. 718, 733-34 (2016). Neither the district court that resentenced Briones after *Montgomery* nor the two-judge panel majority that upheld that sentence even assessed whether Briones fell into that tiny class of juvenile offenders. As Judge O'Scannlain explained in dissent, "[u]nfortunately, we cannot know whether the district court answered that question because there is nothing in the record that allows us to confirm that the court even considered it." Dissent 27. For that reason—and because the majority's errors affect dozens of other defendants facing the harshest penalty possible for juveniles—this case should be reheard en banc.

The panel majority erred in two respects, each of which has dire consequences for defendants sentenced to life for crimes they committed as children.

First, the panel upheld Briones's life sentence on the ground that the sentencing judge "consider[ed] the 'hallmark features' of youth." Maj. Op. 13-14. But as Judge O'Scannlain put it, that reasoning ignores the Supreme Court's command that, "[b]eyond procedural boxes to check," the Eighth Amendment imposes "a substantive limitation on who c[an] receive a life sentence." Dissent 26. "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, 136 S. Ct. at 734. The sentencer who considers the hallmarks of youth must *still* ascertain whether the child is "permanent[ly] incorrigib[le]." *Id.* Nothing in the record suggests that the district court even asked this question, let alone correctly answered it. The majority's opinion is even more egregious because it invoked plain-error review, setting up a standard at odds with the nature of the question at hand; as Judge O'Scannlain pointed out, "Briones is not objecting merely to a deficient explanation," an objection he might have raised during the resentencing, but instead "that he is constitutionally

ineligible for a particular sentence," a claim he "squarely argue[d] before the district court, at length." Dissent 34.

Second, the district court erred in treating this case like an ordinary Sentencing Guidelines case when the Eighth Amendment requires a different analysis. The Constitution creates a strong presumption against a life sentence for juvenile offenders. The Guidelines, by contrast, create a strong presumption in favor of a within-Guidelines sentence—here, a sentence of life. Absent any evidence that the district court broke free of the influence of the Guidelines calculation, the sentence cannot stand.[1]

Correcting these errors warrants rehearing en banc. The panel majority's opinion contravenes the twin admonitions at the core of the Supreme Court's decision in *Montgomery v. Louisiana*, that the Eighth Amendment protects a substantive right and that there is a presumption against a life sentence. As the Supreme Court has

[1] Briones's sentence cannot stand for two additional reasons. First, life without parole is unconstitutional for any juvenile offender, including one who commits a homicide offense. *See Miller v. Alabama*, 567 U.S. 460, 479 (2012). Second, life without parole is unconstitutional for a juvenile offender who did not actually kill. *See id.*, 491-93 (Breyer, J., concurring). Briones continues to preserve those questions for future review.

acknowledged, sentencing a child to die in prison is closer to capital punishment than any other penalty; even one unlawful life sentence is worthy of rehearing. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 69-70 (2010). And the panel majority's decision will affect not only Briones but dozens of juvenile offenders serving life sentences in this Circuit and the many children who will continue to receive life sentences under state and federal laws that still allow the punishment. *See* Juvenile Sentencing Project, *Juvenile Life Without Parole Sentences in the United States, November 2017 Snapshot* 3-16 (Nov. 20, 2017), https://tinyurl.com/yahusa7d; Associated Press, *A State-by-State Look at Juvenile Life Without Parole* (July 31, 2017), https://tinyurl.com/y7t7xw26.

Briones has grown up to be a model inmate, hard worker, and loving husband who regrets his youthful actions. ER 238, 253. Rehearing en banc is necessary to ensure that he and others like him do not have to die in prison.

STATEMENT OF THE CASE

Riley Briones, Jr.,'s childhood was marked by abuse, violence, and deprivation. His father routinely beat him until he bled. ER 192-94. Following his parents' lead, he was drinking daily by age 12 and using LSD by age 13. ER 189-92. And when Briones's father joined the Eastside Crips gang, Briones, then 17, did so as well. SER 296-98, 301.

In 1994, when Briones was still a child, he and other gang members committed a series of crimes. As relevant here, Briones drove three gang members to a Subway franchise they planned to rob. Briones waited in the car. SER 1590-91, 1597-98. One of the three passengers came out to talk with Briones shortly before shooting and killing the Subway clerk. SER 1602-04. Briones was subsequently arrested. After turning down a plea offer because his father—a co-defendant—would not take it, Briones was convicted of several offenses, including first-degree murder under 18 U.S.C. § 1111. ER 109-11, 185-86. The statute allowed only for sentences of death or life without parole; Briones was sentenced to life without parole. ER 186.

In the decades following Briones's sentence, the legal framework for imposing criminal sentences on children underwent a sea change.

In light of children's lesser culpability and greater capacity for change, the Supreme Court recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Their inability to appreciate consequences leads to recklessness; they are "more vulnerable to negative influences" from family, peers, and environment; their characters are "not as 'well-formed'"; and they are less likely to be able to meaningfully participate in their own defense. *Id.* As a result, in 2005, the Supreme Court held that the Eighth Amendment bars capital punishment for children. *Roper v. Simmons*, 543 U.S. 551, 570 (2005). Five years later, the Court held that the Eighth Amendment also bars a life sentence for any juvenile who does not commit a homicide offense. *Graham*, 560 U.S. at 75. And in *Miller v. Alabama*, decided in 2012, the Supreme Court invalidated a statute that (like the one under which Briones was sentenced[2]) subjected juveniles to mandatory life without parole

[2] The Fourth Circuit has held that a juvenile cannot be convicted under a statute that, like 18 U.S.C. § 1111, only gives a sentencer the option of life without parole or the death penalty. *See United States v. Under Seal*, 819 F.3d 715, 722 (4th Cir. 2016). Such a penalty scheme is unconstitutional as applied to juveniles, because both possible sentences are unconstitutional punishments. And because the statute

sentences for homicide offenses. In striking down the statute, the Court explained that "appropriate occasions for sentencing juveniles"—even those who commit homicide offenses—"to this harshest possible penalty will be uncommon." *Miller*, 567 U.S. at 479.

In *Montgomery*, the Supreme Court held that *Miller* applied retroactively and, in the process, clarified *Miller*'s holding. *Miller*, it explained, "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth." 136 S. Ct. at 734. It made a life sentence unconstitutional except for a narrow class of juvenile offenders: those who exhibit "such irretrievable depravity that rehabilitation is impossible." *Id.* at 733.

---

does not supply a constitutional penalty for a juvenile offender, the Fourth Circuit held that no juvenile may be convicted under the statute, either. As Judge Agee wrote for that court, because "[a]rticulating a crime and providing a penalty for its commission are indelibly linked," an unconstitutional penalty provision cannot be severed from the rest of a statute. *Id.* In the Fourth Circuit, then, Briones's conviction would be void, not only his sentence. This case thus also presents an opportunity for the Court to consider whether a juvenile can constitutionally be convicted under 18 U.S.C. § 1111.

Meanwhile, Briones, too, had changed. He grew out of any anger toward his father. ER 192-93. He married the mother of his child. ER 152. And, as the district court found, he became a "model inmate"; in 20 years of incarceration, he did not receive a single write-up, not even for such minor infractions as failing to make his bed or having a pen when he wasn't supposed to. ER 184-85, 253.

Following *Miller*, Briones filed a successful petition under 28 U.S.C. § 2255. On March 29, 2016, nearly 20 years after he was convicted, Briones appeared before the district court for resentencing. In both his sentencing memorandum and in court, he argued that a life sentence was constitutionally forbidden and that the Guidelines were an inappropriate starting point. ER 218, 220-37; SER 6-8, 10-12. He told the court that he "want[ed] to express remorse" to the victim's family. ER 202, 238-40 ("Grief, regret, sorrow, pain, sufferings…. I don't know how, but I know I have to apologize for everything."). He affirmed that he regretted his "part in everything for which [he was] accused in the indictment and convicted." ER 202. And he reflected on the changes he'd undergone since conviction. ER 203 ("[S]eeing people in pain when they've gone through their loss, all of this had made me

not only sympathize but to empathize with all of it.... [T]aking three packages of sugar. I won't even feel right doing that, you know, so that has—my mind has changed concerning that.").

The district court began by calculating the Guidelines. ER 218, 222. After hearing from both lawyers, the sentencing judge then explained as follows:

> 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.

ER 253-54. The district court resentenced Briones to life in prison without parole.

In a 2-1 opinion written by Judge Rawlinson, the panel affirmed. The majority rejected Briones's argument that the district court failed to perform the appropriate analysis under *Montgomery*. "In light of *Miller* and *Montgomery*, we agree with Briones that the district court had to consider the 'hallmark features' of youth before imposing a sentence of life without parole," the majority wrote. Maj. Op. 13. "However, we disagree that the district court failed to do so." *Id.* at 14. The majority also rejected Briones's claim that the Guidelines were an

inappropriate baseline for his sentence because they created a presumption in favor of life without parole; it reasoned that the Supreme Court has held that all sentencing proceedings should begin with the Guidelines. *Id.* at 10-11.

Dissenting, Judge O'Scannlain wrote that although it was "not difficult to understand" why the district court "considered a severe sentence appropriate," he did not believe that an affirmance was warranted as to "[t]he difficult question … whether Briones is in fact one of those 'rarest of juvenile offenders whose crimes reflect permanent incorrigibility.'" Dissent 23, 25. Though the majority upheld Briones's sentence because the district court considered some of the hallmark features of youth, "to leave the analysis at that is to misunderstand the nature of Briones's challenge to a life sentence and the importance of *Montgomery*'s clarification of *Miller*." Dissent 25. "Briones is not objecting merely to a deficient explanation. Rather, his claim is substantive: that he is constitutionally ineligible for a particular sentence under *Miller*." Dissent 34-35. Judge O'Scannlain would have vacated the judgment of the district court and remanded for resentencing.

REASONS FOR GRANTING THE PETITION

I. The Panel Opinion Treats *Montgomery*'s As A Procedural, Rather Than A Substantive, Rule.

As *Montgomery* explained, the Eighth Amendment creates a substantive rule: life without parole is unconstitutional for the vast majority of juvenile offenders. *Montgomery*, 136 S. Ct. at 733-34. Only the rarest juvenile offender—one whose crime reflects "permanent incorrigibility," who is "irretrievabl[y] deprav[ed]" and "irreparabl[y] corrupt[]"—may be sentenced to life without parole. *Id.* at 733-34. Though the Court's cases had a "procedural component," namely a hearing at which a sentencer must consider the defendant's youth, that "hearing does not replace, but rather gives effect to," the substantive rule. *Id.* at 734-35.

But the majority here treated that rule as entirely procedural, upholding Briones's sentence merely because the district court followed the requisite process: "There is no doubt that the 'hallmarks of youth,' as they related to Briones, were considered by the court because the record is replete with references to those hallmarks." Maj. Op. 15; *see also id.* at 13-14, 18. In so doing, the panel majority ignored the Supreme Court's charge that "*[e]ven if a court considers a child's age*

before sentencing him or her to a lifetime in prison, that sentence *still violates* the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, 136 S. Ct. at 734 (emphases added). In other words, 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.

1. As Judge O'Scannlain explained, the record makes clear that the district court misunderstood the Eighth Amendment inquiry. Dissent 28. First, the district court listed Briones's youth as a mitigating factor, "suggesting that it started from the inverted assumption that most juvenile offenders are eligible for life sentences and that Briones's evidence could only mitigate from that." Dissent 29. If the district court were asking the correct question, "one would think it would have spoken of 'aggravating' evidence rather than 'mitigation.'" *Id.*

Second, the district court's explanation of its decision to sentence Briones to die in prison was entirely retrospective, focusing on Briones's past, not his future. But "[t]he question is not merely whether Briones's

crime was heinous, nor whether his difficult upbringing mitigated his culpability. It is whether Briones has demonstrated 'irreparable corruption,' which requires a prospective analysis of whether Briones has the 'capacity to change after he committed the crimes.'" Dissent 28-29 (citing *United States v. Pete*, 819 F.3d 1121, 1133 (9th Cir. 2016)) (internal citations omitted). "[T]here are no forward-looking statements at all from the district court in its sentencing colloquy; the stated basis for the sentence was entirely retrospective." *Id.* at 30.

Third, when the district court memorialized the questions it took itself to be answering, it did not include the relevant constitutional question—whether Briones was permanently incorrigible. Instead, the district court summarized that it found "the sentence to be sufficient but not greater than necessary to comply with the purposes set forth in 18 U.S.C. Section 3553(a)" and "the sentence to be reasonable pursuant to that statute," considering each of the required factors. ER 255-56. The district court's summation contained no mention of the Eighth Amendment question it should have been answering.

And fourth, the district court explained Briones's life sentence by saying that "some decisions have lifelong consequences"—suggesting

that it "misunderstood *Miller* entirely," Dissent 30, and focused on Briones's "decision" to commit a crime rather than on his capacity to change.

2. Even if the district court *had* asked the correct question, this Court would still have to satisfy itself that the district court got the right answer. It cannot do so, because—even drawing all inferences in favor of the Government—there is simply no evidence from which a sentencer could conclude that Briones was one of the rare "irreparabl[y] corrupt[]" juvenile offenders.

The district court made a factual finding that Briones had been a "model inmate" and "has improved himself while he's been in prison." ER 253-54. As Judge Berzon explained in *United States v. Pete*, 819 F.3d 1121, 1132 (9th Cir. 2016), that finding is key to assessing "whether the youthful characteristics that contributed to [the] crime had dissipated with time." Because Briones may only be sentenced to life without parole if he "exhibits such irretrievable depravity that rehabilitation is impossible," the fact of Briones's rehabilitation is virtually dispositive. *Montgomery*, 136 S. Ct. at 733; *see also id.* at 736 (citing petitioner's "evolution from a troubled, misguided youth to a

model member of the prison community" as evidence against a finding of incorrigibility). And the district court did not—and could not—point to any "countervailing evidence" in the record that might have "indicated that Briones is permanently incorrigible" notwithstanding his rehabilitation. *See* Dissent 29.

The panel majority speculated that "[f]airly read, Briones's statements could reasonably be interpreted as not taking responsibility for his prior criminal activity." Maj. Op. 19. But Briones repeatedly explained that he "want[ed] to express remorse," ER 202, 240-41, and the district court never suggested that it believed Briones was evading responsibility. Nor did the district court say that any ambiguity in Briones's repeated apologies would outweigh the substantial evidence suggesting that Briones was not, in fact, permanently incorrigible, including that he had been a "model inmate" for 20 years. Absent any reason to believe that the district court was correct to impose a life sentence, this Court cannot affirm Briones's sentence.

3. The majority's invocation of plain error to prop up its conclusion will cause yet further confusion in this Circuit. Briones's complaint is *not* the procedural one that the district court did not say

enough about youth—something to which he might have objected at sentencing. Rather, as Judge O'Scannlain explained in dissent, Briones's claim is substantive: that he "is constitutionally ineligible for a particular sentence under *Miller*, a claim he *did* squarely argue before the district court, at length." Dissent 34. Allowing plain-error review for a claim that Briones not only briefed fully, but also discussed at sentencing, not only reinforces the entirely wrong notion that *Miller* created a mere procedural right but will also create grave uncertainty for criminal defendants about how to preserve a substantive argument.

Because the panel opinion failed to obey *Montgomery*'s exhortation that a juvenile who is not irretrievably depraved cannot be sentenced to life without parole, regardless of the procedures used, rehearing en banc is warranted.

II. The Panel Opinion Contravenes *Montgomery*'s Admonition That Life Sentences For Juvenile Offenders Should Be Uncommon.

Montgomery establishes a presumption against imposing life without parole on children; that sentence is reserved for the "rarest of juvenile offenders." 136 S. Ct. at 734. However, by calculating the Guidelines sentence for Briones—life without parole—the district court effectively established a presumption in *favor* of life because of the Guidelines' well-documented anchoring effect. Rehearing en banc is necessary to clarify that such a presumption is unconstitutional.

The Supreme Court has made clear that there is a heavy, near-irrebuttable presumption against sentencing a juvenile offender to die in prison. Life without parole is barred "for all but the rarest of juvenile offenders"; juvenile offenders who "exhibit[] such irretrievable depravity that rehabilitation is impossible … will be uncommon," and for the "vast majority of juvenile offenders," the sentence of life without parole will be disproportionate. *Montgomery*, 136 S. Ct. at 726, 733-34.

But a district court's calculation of a Guidelines sentence for murder creates its own presumption—one in *favor* of a life sentence. The Guidelines calculation "is intended to, and usually does, exert

controlling influence on the sentence that the court will impose." *Peugh v. United States*, 569 U.S. 530, 543, 545 (2013). "Common sense" makes clear that the Guidelines are the "framework for sentencing" and "anchor … the district court's discretion." *Id.* at 548-49.

Empirical evidence confirms that the Guidelines put a heavy thumb on the scale in favor of a within-Guidelines sentence. In 80% of cases, district courts impose within-Guidelines sentences absent a government motion to the contrary, and the Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it. *See Peugh*, 569 U.S. at 543-44 (citing U.S. Sentencing Commission, *Final Quarterly Data Report, FY 2012*, p. 32 (Figure C)). The Guidelines' "intended effect of influencing the sentences imposed," *Peugh*, 569 U.S. at 543, is even more pronounced for a murder sentence. *See* U.S. Sentencing Commission, *Annual Report and Sourcebook of Federal Sentencing Statistics* (21st ed. 2016) (Tables N & 27A) (district courts depart below Guidelines without a government motion in just 8.2% of murder cases, compared to 21% of cases overall).

Thus, "in most cases, when a district court adopts an incorrect Guidelines range"—and for the vast majority of juvenile offenders, a life sentence will be not only "incorrect," but unconstitutional—"there is a reasonable probability that the defendant's sentence would be different absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016). Unless the district court makes clear that it is disregarding the Guidelines sentence as a starting point, there is a "reasonable probability" that it will get a juvenile offender's sentence unconstitutionally wrong.

In this case, there is no indication that the district court broke free from the Guidelines' "controlling influence." *See Peugh*, 569 U.S. at 545. Where a judge "discards" the Guidelines range or makes clear that the life sentence she has imposed was "irrespective" of the Guidelines, it may be that the Guidelines' presumption is neutralized. *See Hughes v. United States*, 138 S. Ct. 1765, 1776 (2018). But there was no such indication here. The district judge calculated the Guidelines sentence, gave the parties "a chance to argue if we should vary from the Guidelines," and then chose a within-Guidelines sentence, all with no hint that he understood that the Guidelines sentence of life without

parole should *not*, in fact, be a presumptive starting point. ER 217-19, 253-54.

The panel majority was thus wrong to hold constitutional a sentence coming on the heels of a Guidelines calculation that created a presumption in favor of life without parole. Even assuming that the district court is required by statute to calculate the Guidelines sentence—though the statute is powerless to require as much if the Eighth Amendment forbids it—an appellate court must demand some indication that the sentencing judge was not tethered to an unconstitutional anchor. Here, there was no such indication.

III. The Question Presented Is Exceptionally Important.

Whether the Eighth Amendment is satisfied by the mere consideration of a defendant's youth and whether calculating a Guidelines sentence creates an unconstitutional presumption are important and recurring questions that merit en banc consideration.

First, the panel majority's opinion conflicts with the twin admonitions of *Montgomery*, that a juvenile may not be sentenced to life without parole, no matter how much process he is afforded, if he is not irretrievably depraved, and that there is a strong presumption against

life without parole for juvenile offenders. This is only the second published opinion in this Circuit to apply *Montgomery*'s rule and the first to consider whether a sentence substantively complies with the Eighth Amendment. *Pete*, 819 F.3d at 1133. Allowing the panel's errors to stand will muddy the waters for courts throughout this Circuit, who are only beginning to grapple with the ripple effects of *Montgomery*.

Second, the opinion will affect the many other federal inmates who have been sentenced to life without parole for crimes they committed as children. In addition, dozens of state defendants within the Ninth Circuit will eventually seek review before this Court. *See* Juvenile Sentencing Project, *supra*, at 3-16. If an opinion upholding Briones's *federal* sentence is allowed to stand, this Court will be forced to rubber stamp any *state* life sentences reviewed under the more deferential AEDPA standard. And both the federal code and at least four states within this Circuit continue to sentence juveniles to life without parole. *Id.* Absent rehearing en banc, state and district courts will be effectively authorized to impose life sentences on juvenile offenders without identifying the worst of the worst.

Finally, rehearing en banc is warranted because of the severity of the sentence imposed on Briones and similar defendants. "[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham*, 560 U.S. at 69. "This 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.'" *Id.* at 70 (quoting *Naovarath v. State*, 105 Nev. 525, 526 (1989)).

As with a death sentence, then, even a single life without parole sentence warrants the closest scrutiny. An opinion that not only consigns Briones to die in prison but also encourages future sentencers to ignore *Montgomery*'s dictates cannot stand.

CONCLUSION

For the foregoing reasons, this Court should grant Briones's petition for rehearing en banc.

Respectfully submitted,

/s/ Easha Anand

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

Melanie L. Bostwick
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400

Vikki M. Liles
CJA Appointed Counsel of Record
THE LAW OFFICE OF VIKKI M. LILES, P.L.C.
335 E. Palm Lane
Phoenix, AZ 85004
(602) 252-2110

Counsel for Defendant-Appellant

July 9, 2018

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-4 and 40-1, the foregoing Petition for Rehearing or Rehearing En Banc contains 4,178 words and is prepared in a format, type face, and type style that comply with Fed. R. App. 32(a)(4)-(6).

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/Easha Anand
Easha Anand
Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 9, 2018

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/Easha Anand
Easha Anand
Counsel for Defendant-Appellant

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

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ET AL. IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

Robin Wechkin
SIDLEY AUSTIN LLP
701 5th Ave., Ste. 4200
Seattle, WA 98104

Ronald Sullivan
Fair Punishment Project
1557 Mass. Ave.
Cambridge, MA 02138

John R. Mills
Counsel of Record
Scott P. Wallace
PHILLIPS BLACK, INC.
836 Harrison St.
San Francisco, CA 94107
(888) 532-0897
j.mills@phillipsblack.org

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *Amici Curiae* state that no subsidiaries or any corporation and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICI*[1]

The **National Association of Criminal Defense Lawyers** (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands, and up to 40,000 attorneys including affiliates' members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper and efficient administration of justice and files numerous *amicus* briefs each year in federal and state courts addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. Based on its criminal law expertise, NACDL seeks to assist the Court in deciding the serious issues presented in the case regarding the constitutionality of Briones' conviction and sentence.

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *Amici* and their counsel contributed money that was intended to fund the preparing or submitting of the brief. *Amici* files this brief with the consent of both parties under Ninth Circuit Rule 29-2(a).

The **ACLU** is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding nearly 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including cases implicating the constitutional rights of juvenile offenders, such as *Roper v. Simmons*, 543 U.S. 551 (2005) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), as well as cases involving the application of new sentencing rules, such as *Dorsey v. United States*, 132 S.Ct. 2321 (2013).

The **Fair Punishment Project** (FPP) is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School, whose mission is to address the ways in which our laws and criminal justice system contribute to excessive punishment for offenders. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still affirming the inherent dignity that all people possess. To that end, FPP conducts research and advocacy and works with stakeholders to seek meaningful,

consensus-driven criminal justice reform. As part of its advocacy mission, FPP has submitted briefs as *amicus curiae* to courts across the nation, providing its perspective on emerging issues in criminal law and procedure.

Juvenile Law Center (JLC), founded in 1975, is the oldest public interest law firm for children in the United States. JLC advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, JLC works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Roderick and Solange MacArthur Justice Center** is a non-profit, public interest law firm with offices in Chicago, Illinois (based at the Northwestern Pritzker School of Law's Bluhm Legal Clinic); Oxford, Mississippi (based at the University of Mississippi School of Law); St. Louis, Missouri; New Orleans, Louisiana and

Washington, D.C. It was founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation and has led myriad battles against injustices in the criminal system, including litigation of cases about juvenile justice, the death penalty, unfair parole revocations, police misconduct, abusive prison conditions, and the incarceration of the poor.

Each of the NACDL affiliates within this Circuit has joined this brief:

The Alaska Association of Criminal Defense Lawyers (AKACDL) is an Alaska non-profit professional organization of criminal defense lawyers and other professionals dedicated to the goal of fighting for fundamental rights of all of Alaska's Citizens.

Arizona Attorneys for Criminal Justice (AACJ) was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused.

California Attorneys for Criminal Justice (CACJ) is a statewide organization of criminal defense lawyers, and of persons from affiliated professions, in the State of California. CACJ is one of the two largest statewide organizations of criminal defense lawyers affiliated

with the National Association of Criminal Defense Lawyers. CACJ has as part of its bylaws "the defense of the rights of persons as guaranteed by the United States Constitution." CACJ has appeared as an *amicus curiae* in this Court on several occasions on matters of importance to its membership. CACJ members have been involved in the litigation of matters directly connected with the subject matter of this case before a number of Federal and State courts.

The **Hawaii Association of Criminal Defense Lawyers** is dedicated to advancing the interests of the criminal defense bar and the equitable administration of justice in the state.

The **Idaho Association of Criminal Defense Lawyers (IDACDL)** protects individual rights and improves criminal law by promoting study and research in the field of criminal law, the proper administration of justice, the integrity and independence of the judicial system, and the expertise of the defense lawyer.

The Montana Association of Criminal Defense Lawyers (MTACDL) was established in 1997 to provide training and other resources to private practitioners, full time public defenders, court appointed attorneys, and tribal court advocates.

Nevada Attorneys for Criminal Justice (NACJ) is a nonprofit voluntary professional bar association that works on behalf of Nevada's criminal defense lawyers to ensure equal justice and due process for citizens accused of a crime.

The members of the **Oregon Criminal Defense Lawyer's Association** (OCDLA) are lawyers, investigators and other professionals committed to representing adults and juveniles accused of crimes in state and federal courts. OCDLA members represent clients in trials, appeals and post-conviction proceedings.

The **Washington Association of Criminal Defense Lawyers** (WACDL) is a statewide, nonprofit organization formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 800 members—private criminal defense lawyers, public defenders, and related professionals—committed to preserving fairness and promoting a rational and humane criminal justice system.

INTRODUCTION

The Eighth Amendment prohibits the sentence of life without the possibility of parole for all but the rarest of juvenile offenders. That is, "*Miller* [*v. Alabama*, 567 U.S. 460 (2012)] drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016). Thus, *Miller* provided a categorical rule: only those who are irreparably corrupt may be lawfully sentenced to life without the possibility of parole. In a decision that may affect scores of inmates serving life without the possibility of parole for juvenile offenses,[2] the majority affirmed a sentence imposed without assessing Briones' categorical eligibility for such a punishment.

---

[2] The most recently available information indicates that 61 state inmates are serving such a sentence within the geographic scope of the court: 34 in Arizona, 13 in Washington, 5 in Oregon, 4 in Idaho, 4 in Nevada, 1 in Montana. Juvenile Sentencing Project, *Juvenile Life Without Parole Sentences in the United States* (Nov. 20, 2017) available at https://juvenilelwop.org/map/. Additionally, approximately 27 persons were serving federal life sentences for juvenile offenses when *Montgomery* was decided. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 1, *Montgomery*, 135 S.Ct. 1546 (No. 14-280). In addition to the number of inmates potentially affected by the Court's decision, the seriousness of the sentence imposed—the harshest possible penalty for a juvenile—weighs in favor of review.

Properly making that assessment should have included, at a minimum, an explicit finding of categorical eligibility. Holding otherwise risks rendering *Miller*'s primary protection meaningless. *See Hall v. Florida*, 134 S.Ct. 1986, 1999 (2014). Moreover, because only those juveniles who are irreparably corrupt are eligible for life without the possibility of parole, it is the state's burden to prove as much to a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 491-92 (2000). The panel's contrary decision allows Briones' improper sentence to stand.

Briones' *conviction* is also unconstitutional. For juveniles, the statute authorizing his sentence provides only for mandatory life without the possibility of parole. Because Congress has not authorized a valid punishment for the charged crime, his conviction is also unconstitutional. *See United States v. Evans*, 333 U.S. 483, 486 (1948). In light of each of these substantial infirmities in the proceedings, *Amici* urge the Court to grant rehearing en banc.

ARGUMENT

I. *MILLER* PROVIDES CATEGORICAL PROTECTION, NOT MERELY A PROCEDURAL REQUIREMENT TO CONSIDER YOUTH.

Because juveniles cannot be sentenced to death, *see Roper v. Simmons*, 543 U.S. 551, 578 (2005), a life without parole sentence is the "most severe penalty permitted by law" for juveniles: "[It] means denial of hope; . . . 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 v. Florida*, 560 U.S. 48, 69-70 (2010) (internal punctuation omitted). As Judge O'Scannlain explained in dissent, life without the possibility of parole is accordingly limited to "those 'rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility.'" Dissent at 25. This limitation poses a categorical question: is the juvenile offender eligible for life without the possibility of parole? The District Court failed to "make any evident ruling on that question" and instead considered the "'hallmark features' of youth identified by the Supreme Court in *Miller*" solely as *mitigating* factors, thereby fundamentally misunderstanding the "importance of *Montgomery*'s clarification of *Miller*." Dissent at 25.

A. The District Court Erroneously Considered Juvenile Status As Mitigating Factor Rather Than A Categorical Protection.

Before the Supreme Court issued its decision in *Montgomery*, there was confusion about *Miller*. Some courts interpreted *Miller* as providing both a categorical exclusion from punishment and procedural protections designed to enforce it. Other courts, by contrast, believed that *Miller*'s emphasis on the problems with mandatory life without the possibility of parole sentences may have suggested a procedural rule only. *See Montgomery*, 136 S.Ct. at 725 (noting split of authority).

"But," as the Supreme Court of Georgia has put it, "then came *Montgomery*." *Veal v. State*, 784 S.E.2d 403 (Ga. 2016). Although *Montgomery* acknowledges that *Miller* has an important procedural component, the critical question for both cases is whether a juvenile "'belongs to the protected class.'" *Id.* at 411 (quoting *Montgomery*, 136 S.Ct. at 734-35). To make that determination, the sentencer must take into account "the family and home environment," the "circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him," and juveniles' diminished ability to protect

their own interests in the criminal justice system. *Miller*, 567 U.S. at 477-78.

The process has a purpose: to ensure accurate assessment of who is eligible for the sentence. In this sense, the law as established by *Miller* is analogous to that governing one of the death penalty's categorical exclusions, intellectual disability. *See Atkins v. Virginia*, 536 U.S. 304 (2002). Where a person under sentence of death makes a colorable claim of intellectual disability, that person is entitled to an evidentiary hearing, *Brumfield v. Cain*, 135 S.Ct. 2269, 2273 (2015), and factfinders must consider current medical definitions in assessing such a claim. *See Moore v. Texas*, 134 S.Ct. 1986, 1990 (2014). These requirements provide process, but it is a process aimed at a categorical protection: the intellectually disabled are not eligible for execution.

Clearly, a sentencer would not have satisfied these procedural requirements simply by considering the features of the defendant's intellectual disability in mitigation before handing a sentence down. Likewise, in the present case, the District Court did not satisfy *Miller*'s requirements by considering youth as a mitigating factor. The District Court failed to address the constitutional question that *Miller* and

Montgomery require a sentencer to adjudicate: whether a defendant is a member of the exceptionally narrow class of irreparably corrupt juveniles for whom life without the possibility of parole is permissible under the Eighth Amendment.

The District Court's failure to perform the required analysis creates a serious risk that *Miller* "could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 134 S.Ct. at 1999 (describing risk of under-enforcement of *Atkins*). Addressing categorical eligibility is required by the Court's holdings in *Miller* and *Montgomery* that life without the possibility of parole sentences for juveniles must be exceedingly rare. *Montgomery*, 136 S.Ct. at 726 ("lifetime in prison is a disproportionate sentence for all but the rarest of children . . . ." (citing *Miller*, 567 U.S. at 479-80)).

The District Court failed to address the critical question of whether Briones falls into the exceptionally narrow category of juveniles eligible for a sentence of life without the possibility of parole. In affirming the District Court's sentence, the panel has endorsed a rule that would create an "unacceptable risk" that juveniles ineligible for that sentence would be sentenced to the harshest penalty under law.

B. The District Court Further Misapplied *Miller* By Overlooking The Central Role Of Rehabilitation In Juvenile Sentencing.

The panel affirmed Briones' sentence based on the following statement by the District Court:

> [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, and he's been a model inmate up to now. However, some decisions have lifelong consequences.

Majority at 9.

As just discussed, this statement shows that the District Court entirely misconstrued *Miller*'s categorical protection: Youth is far more than a "mitigating" factor. The District Court also failed to reckon with the powerful evidence of Briones' actual rehabilitation. In doing so, the District Court failed to apply the Eighth Amendment's prohibition of nonparolable life sentences for all juvenile offenders save those who have "exhibit[ed] such irretrievable depravity that rehabilitation is **impossible**." *Montgomery*, 136 S.Ct. at 733 (citing *Miller*, 567 U.S. at 479–80) (emphasis added). And in invoking the "lifelong consequences" of Briones' decision, the District Court again failed to adhere to the

procedural protections in *Miller*. The court engaged in a purely retrospective sentencing analysis and erroneously minimized the evidence of both capacity for rehabilitation and Briones' actual rehabilitation. *Montgomery*, 136 S.Ct. at 736 (noting similar behavior is "one kind of evidence that prisoners might use to demonstrate rehabilitation.").

But the District Court's central failing was not simply in how it weighed the evidence. It was its failure to address whether Briones is eligible for the sentence it imposed. Nowhere in the record below does the District Court address the critical question the Eighth Amendment requires it to decide: Whether Briones was or is one of "those children whose crimes reflect transient immaturity [or one] . . . whose crimes reflect irreparable corruption." *Montgomery*, 136 S.Ct. at 734. Because the District Court failed to address this critical question, the Court should grant the petition.

II. CONGRESS HAS NOT PROVIDED A LEGAL PUNISHMENT FOR THE CRIME OF CONVICTION.

Briones' conviction, in addition to his sentence, should be reversed because he is being punished for a conviction for which Congress has authorized no valid punishment. It is the exclusive province of the

Congress to provide for criminal sentences for the prohibited conduct. *Evans*, 333 U.S. at 486. "[A] criminal statute is not operative without articulating a punishment for the proscribed conduct." *United States v. Under Seal*, 819 F.3d 715, 723 (4th Cir. 2016). For that reason, the penalty provision of a criminal statute is among its "defining characteristic[s]," and it is "indelibly linked" to the crime punished. *Id.* at 722. Without a valid sentencing provision for the statute of conviction, subjecting Briones to punishment was an *ultra vires* violation of Briones' constitutional rights.

A. No Legal, Authorized Punishment Exists For Juveniles Charged Under 18 U.S.C. §1111.

Separation of powers principles provide that the Congress prescribes punishments for federal crimes. "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions." *Evans*, 333 U.S. at 486. A criminal statute with no legal punishment is unconstitutional. *See Under Seal*, 819 F.3d at 725.

Briones was charged with an offense that had only two available punishments: death and life without the possibility of parole. 18 U.S.C.

§1111(b).[3] In 2005, *Roper* foreclosed death as a viable sentence for juveniles, leaving a mandatory life sentence without the possibility of parole as the only permissible punishment for juveniles convicted under §1111. In 2012, *Miller* foreclosed mandatory life without the possibility of parole sentences for juveniles, leaving in place *no* authorized punishment for juveniles convicted under §1111.

B. Briones Was Convicted Under A Statute That Is Unconstitutional As Applied To Juveniles.

Because Briones' statute of conviction had no authorized punishment, his conviction, as well as his sentence, is unconstitutional. In the six years since *Miller* was decided, Congress has "provided for no other penalty" for juveniles convicted under §1111. *See Under Seal*, 819 F.3d at 726.[4] Precisely the same situation—Congressional failure to act

---

[3] Briones was indicted under 18 U.S.C. §1153, which confers federal jurisdiction to prosecute certain crimes occurring in Indian country. The substantive offense and related punishment are provided in 18 U.S.C. §1111. That statute provides for "life," but because the federal government has abolished parole, a sentence of "life" is the same as life without possibility of parole. *See United States v. Pete*, 819 F.3d 1121, 1126, 1132 (9th Cir. 2016).

[4] This legislative inaction is particularly notable in light of the federal government's position, prior to *Montgomery*, that *Miller* was retroactive. *See, e.g.*, Judgment, *Wright v. United States*, No. 13-1638

with the result that a criminal statute carries only unconstitutional punishments when applied to juveniles—led the Fourth Circuit to conclude that juveniles may simply not be tried or convicted under the statute at issue. *Under Seal*, 819 F.3d at 722 (addressing 18 U.S.C. §1959(a), murder in aid of racketeering, which, like §1111, provides for only death and mandatory life sentences). The same constitutional infirmity is present here.

Because Briones' statute of conviction suffers the same structural defect when applied to juveniles as the statute at issue in *Under Seal*, Briones' conviction should be held unconstitutional. And because this constitutional infirmity flows directly from the structure of the statute, without regard to any particular factual applications, this Court can and should fully and fairly adjudicate the issue on appeal. *See Parks Sch. Of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (permitting "consideration of the issue [if it] would not prejudice [the opposing party's] ability to present relevant facts that could affect [the]

---

at 3 (8th Cir. Feb. 5, 2014) (Colloton, J., dissenting) (noting federal government's position).

decision."). Briones' was convicted of a crime with no valid punishment for juveniles, and this Court should accordingly grant the petition and hold that the District Court lacked the authority to impose the challenged sentence.

III. SIXTH AMENDMENT PROTECTIONS EXTEND TO WHETHER A DEFENDANT IS IRREPARABLY CORRUPT.

Even if this Court concludes that life without the possibility of parole is an authorized sentence for Briones, it should reverse the sentence because its imposition violated the Sixth Amendment's guarantee to defendants that a jury must determine beyond a reasonable doubt any factual finding, other than the fact of a prior conviction, which would increase their potential sentence. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Apprendi*, 530 U.S. at 490; *Cunningham v. California*, 549 U.S. 270 (2007); *Alleyne v. United States*, 133 S.Ct. 2151 (2013); *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016). *Miller* and *Montgomery* make clear that the Eighth Amendment limits life without parole eligibility to juveniles who are irreparably corrupt. *See supra* §I. Because juveniles are not eligible for that sentence absent such a finding, a jury must therefore make this determination beyond a reasonable doubt.

This Sixth Amendment's guarantee of a jury finding turns on the question of whether or not the fact-finding in question exposes the defendant to a harsher punishment. *See Apprendi*, 530 U.S. at 476; *see also Alleyne*, 133 S.Ct. at 2162 ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact . . . must be submitted to the jury."). In Briones' case, the mandate that he will spend the rest of his life—and ultimately die—in prison is the most aggravated constitutionally permissible sentence that he could have received as a juvenile offender (assuming *arguendo* such a sentence is permissible and authorized). Because the fact-finding in Briones' sentencing proceeding in no way complied with these demands of the Sixth Amendment, the Court should grant the petition and reverse.

A. A Finding Of Irreparable Corruption Increases A Juvenile Defendant's Potential Sentence And Is Similar To Other Factual Findings That Receive Sixth Amendment Protections.

It is clear that a finding of irreparable corruption increases a juvenile defendant's potential sentence. As with aggravating factors in the death penalty context—which must be found by a jury beyond a reasonable doubt—without such a finding, a juvenile defendant is otherwise categorically ineligible for a sentence of life without the

possibility of parole. *Montgomery*, 136 S.Ct. at 734; *Ring,* 536 U.S. at 609. Given the foundational presumption that "all but the rarest juvenile offender" shall be ineligible for the sentence, there can be no question that a finding of irreparable corruption increases a defendant's potential sentence.

The finding that a defendant is irreparably corrupt is similar to other factual findings that receive Sixth Amendment protections. In *Hurst v. Florida*, the Supreme Court reviewed a Florida statute adopting "aggravating circumstances" that, when present, operated to make a defendant eligible for the death penalty. 136 S.Ct. at 620. One such circumstance was that a murder was especially heinous. Fla. Stat. § 921.141(5)(h) (2012). The Supreme Court held that only a jury could find that such circumstances existed, given that the existence of those circumstances increased the potential sentencing exposure. 136 S.Ct. at 621-22.

Significantly, the Sixth Amendment jury fact-finding guarantee is not limited to aggravating factors enumerated by sentencing law or other statute. It applies to any factual criteria—including criteria developed by decisional law—that a court may consider dispositive to a

sentence that is aggravated beyond the default. *Cunningham*, 549 U.S. at 278-81. In *Cunningham*, the Court considered a California rule permitting judges, when deciding whether to depart from the "middle term" sentence, to consider a "nonexhaustive list of aggravating circumstances," including any "criteria related to the decision being made." *Id.* at 278-79. Absent a finding in aggravation, departure from the middle term was not permitted. Because the departure relied on a finding of fact, the Court held that the Sixth Amendment entitles a defendant to have a jury find that fact beyond a reasonable doubt. *Id.* at 293-94. It was of no moment that the "fact" in question was a category developed at the discretion of the judge.

A juvenile is ineligible for a sentence of life without parole absent a finding of irreparable corruption. Because, as in *Hurst* and *Cunningham*, that finding operates to increase a defendant's sentencing exposure and because it is a factual finding, a sentence of life without the possibility of parole for a juvenile offense cannot be constitutionally imposed without a jury finding it beyond a reasonable doubt. As in *Cunningham*, it is of no moment that the required finding was

announced by a court—in this case the Supreme Court—rather than the legislature.

B. Briones Did Not Receive The Required Sixth Amendment Protections.

To the extent the District Court *did* address whether Briones was irreparably corrupt, it is indisputable that there was no jury finding of irreparable corruption beyond a reasonable doubt. "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). Because a finding of irreparable corruption is necessary for a juvenile offender to be eligible for a sentence of life without parole, the process below violated Briones' Sixth Amendment rights.

CONCLUSION

Amici urge the Court to grant rehearing en banc.

Respectfully submitted,

/s/John R. Mills

John R. Mills
Scott P. Wallace
PHILLIPS BLACK INC.
836 Harrison Street
San Francisco, CA 94107
(888) 532-0897

Counsel for Amici Curiae

July 18, 2018

CERTIFICATE OF COMPLIANCE

I certify that the foregoing *Amicus* Brief in Support of Petition for Rehearing En Banc complies with the length limits permitted by Circuit Rule 29-2(c)(2). The brief is 4,143 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

PHILLIPS BLACK INC.

/s/John R. Mills
John R. Mills
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 18, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

PHILLIPS BLACK INC.

/s/John R. Mills
John R. Mills
Counsel for Amici Curiae

16-10150

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee

v.

RILEY BRIONES, JR.,

Defendant/Appellant

Appeal from the United States District Court for the District of Arizona in *United States v. Briones*, CR-96-00464-PHX-DLR

BRIEF *AMICUS CURIAE* OF PROFESSORS DOUGLAS A. BERMAN, WILLIAM W. BERRY, JENNY E. CARROLL, CARA H. DRINAN, ALISON FLAUM, SHOBHA L. MAHADEV, SARAH FRENCH RUSSELL, AND KIMBERLY THOMAS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

William H. Milliken
Michael E. Joffre
Sterne Kessler Goldstein & Fox PLLC
1100 New York Avenue, NW
Washington, DC 20005
202.371.2600
wmilliken@sternekessler.com

Counsel for Amici Curiae

Dated: July 19, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are criminal-sentencing scholars who believe that any routine application of the U.S. Sentencing Guidelines, which were written for application to adult offenders, to juvenile offenders without any distinct and distinctive consideration of a juvenile's lessened culpability and greater capacity for change is fundamentally inconsistent with the requirements of the Eighth Amendment and Supreme Court jurisprudence. A listing of each amicus's name and affiliation is provided in Appendix A.

All parties have consented to the filing of this brief.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amici and their counsel state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money intended to fund preparing or submitting the brief; and that no person other than amici or their counsel contributed money intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

The Supreme Court's Eighth Amendment jurisprudence has long stressed that youth must matter in sentencing. Nearly four decades ago, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Supreme Court, explaining why an offender's age and maturity is critical to any assessment of just punishment, stressed that "youth is more than a chronological fact" and that "minors often lack the experience, perspective, and judgment expected of adults." *Id.* at 115–16. More recently, in a line of cases beginning with *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment forbids execution of juvenile offenders), and extending now through *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (holding that the Eighth Amendment forbids sentencing a juvenile offender to life without parole unless his crime reflects irreparable corruption), the Court has developed substantive and procedural rules to operationalize the Eighth Amendment mandate that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 733 (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012)); *accord Graham v. Florida*, 560 U.S. 48, 68 (2010). This constitutional principle flows from the reality that children, compared to adults, are less mature, more susceptible to negative influences, and more capable of reform—and so any penological justifications for the harshest adult punishments "collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 136 S. Ct. at 733–34 (quoting

Miller, 567 U.S. at 472). Thus, both sound sentencing policy and settled constitutional doctrine forbid a sentencing court from treating a juvenile as though he were an adult.

Yet that is precisely what the U.S. Sentencing Guidelines encourage sentencing courts to do. Problematically, the Guidelines have no provisions that readily permit consideration of "the distinctive attributes of youth." The Guidelines—designed with adult offenders in mind—give no attention to any youth-related consideration in standard offense-level calculations, and they discourage consideration of age "in determining whether a departure is warranted" except in "unusual" cases. U.S.S.G. § 5H1.1. Given that the Guidelines impart to sentencing courts a strong "anchoring" effect—as the Supreme Court has recognized, *see Peugh v. United States*, 569 U.S. 530, 541–42 (2013)—and that in a majority of cases judges do not deviate from the Guidelines range absent a government motion to do so, routine application of the Guidelines to juvenile offenders is fundamentally inconsistent with the Supreme Court's Eighth Amendment jurisprudence.

The highly deferential standard of review that appellate courts apply to within-Guidelines sentences only exacerbates the tensions between standard Guideline-sentencing procedures and constitutional requirements. Absent searching substantive review of Guidelines sentences, an appellate court risks

endorsing a sentencing system that unconstitutionally discourages consideration of an offender's youth and its attendant characteristics. The Guidelines, if applied in their standard manner to a juvenile offender, thus result in a federal sentencing regime that is fundamentally inconsistent with the Eighth Amendment requirements articulated in *Roper*, *Graham*, *Miller*, and *Montgomery*.

The present case brings this inconsistency into stark relief. Under *Miller* and *Montgomery*, the district court was constitutionally *required* to consider Riley Briones Jr.'s youth and its attendant characteristics before sentencing him to life without parole. *Miller*, 567 U.S. at 480 (courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"). And the district court was constitutionally *forbidden* from imposing that extreme adult sentence if Briones's crime reflected the "transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734. But the standard application of the adult-oriented Sentencing Guidelines flipped these constitutional sentencing commands on their head; the Guidelines led the sentencing court to explicitly consider only those offense factors set forth in the Guidelines and discouraged it from following *Miller*'s constitutional command to view and evaluate "an offender's age and the wealth of characteristics and circumstances attendant to it." 567 U.S. at 476. And the panel's exceedingly deferential review of Briones's sentence, *see* Maj. Op. 14, not only sanctioned the

district court's reliance on constitutionally problematic procedures, but also compounded the violation of "*Graham*'s (and also *Roper*'s) foundational principle: that imposition of [the] most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474.

This is intolerable. Given the tension between the realities of the Sentencing Guidelines regime and the mandates of the Eighth Amendment, the former must give way. It is unreasonable—and unconstitutional—for a court to routinely apply the Sentencing Guidelines when a defendant is subject to a Guideline sentencing range of life without parole for a crime committed as a juvenile. This Court should grant Briones's petition for rehearing *en banc*.

ARGUMENT

The sentencing system established by the U.S. Sentencing Guidelines—written for application to adult offenders—cannot be routinely applied to juvenile offenders in light of the Supreme Court's recent Eighth Amendment jurisprudence. The Constitution requires something that the Guidelines both explicitly and implicitly discourage—namely, careful and reasoned consideration of a juvenile offender's youth and its attendant characteristics in sentencing.

As *Miller* recognized, "a sentencer misses too much if he treats every child as an adult," including considerations such as the offender's "immaturity, impetuosity, and failure to appreciate risks and consequences[,] … the family and

home environment that surrounds him[, and] … the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." 567 U.S. at 477. But the Guidelines leave out all of these factors because they were written for adult offenders. Their standard application thus necessarily produces fundamental inconsistencies with the modern demands of the Eighth Amendment.

The present case is a paradigmatic example of that inconsistency. The district court gave its Guideline calculations far more consideration and weight than "the distinctive attributes of youth" and sentenced Briones to life imprisonment without finding that he was permanently incorrigible (and despite ample evidence that he was not). The panel majority then accorded near-total deference to the district court's decision. This constitutionally inadequate sentencing process resulted in a constitutionally infirm sentence.

I. A Sentencing Court Must Consider a Juvenile's Youth and Potential for Rehabilitation and May Not Impose a Sentence of Life Without Parole Absent a Determination That He Is Permanently Incorrigible.

When a juvenile offender is facing the most serious penalties, the sentencing court is constitutionally required to consider "youth as a mitigating factor." *Roper*, 543 U.S. at 570 (citation omitted); *see also Miller*, 567 U.S. at 473 ("[Y]outh matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole."). As the Supreme Court has explained, "children are

constitutionally different from adults for purposes of sentencing" for three reasons: (i) they are less mature and more impulsive; (ii) they are more susceptible to negative influences and "lack the ability to extricate themselves from horrific, crime-producing settings"; and (iii) they are more capable of reform—meaning their actions are "less likely to be evidence of irretrievable depravity." *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 471). These "distinctive attributes of youth" serve to "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. In the vast majority of cases involving juvenile defendants, neither retribution, nor deterrence, nor incapacitation, nor rehabilitation suffices as a rationale for a life-without-parole sentence. *See Montgomery*, 136 S. Ct. at 733.

The Supreme Court's conclusions regarding the "distinctive attributes of youth" and their relevance to punishment are amply supported by recent findings in sociology, psychology, and neurology. Those conclusions merit brief review here.

First, "[c]onsiderable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices." Scott & Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Children 15, 20 (2008). Adolescents

are less likely to perceive potential risks, *id.* at 21; less able to exercise self-control, *id.* at 21–22; and less capable of thinking realistically about future events, *see* Cauffman & Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*, 18 Behav. Sci. & L. 741, 759 (2000). *See generally* Brief of Amici Curiae Juvenile Law Center *et al.* Supporting Petitioner at 14–17, *Howell v. Tennessee*, No. 17-1417 (U.S. Apr. 24, 2018) [hereinafter "JLC Br."]. These characteristics make juveniles both less deserving of harsh punishment and less likely to be deterred by the prospect of harsh punishment. *See Montgomery*, 136 S. Ct. at 733.

Second, the literature confirms that adolescents are more susceptible to peer pressure than adults. Often, an adolescent's decision to participate in a crime—even a serious one—is driven primarily by a fear of "social ostracism" rather than by rational thinking. Burton, *A Commonsense Conclusion: Creating a Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 52 Harv. C.R.-C.L. L. Rev. 169, 186–87 (2017). It is thus not surprising that "[a]dolescents are far more likely than adults to participate in group crime." *Id.* at 187 (citing Zimring, *American Youth Violence* 29 (1998)). And this tendency is exacerbated by the reality that juveniles "lack the freedom that adults have to extricate themselves from a crimogenic setting." Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death*

Penalty, 58 Am. Psychol. 1009, 1014 (2003). This "reality … means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570.

Third, neuroscientific research shows that the areas of the brain responsible for "higher-order cognitive functions … such as planning ahead, weighing risks and rewards, and making complicated decisions" continue developing throughout adolescence and young adulthood. Steinberg, *The Science of Adolescent Brain Development and Its Implications for Adolescent Rights and Responsibilities*, in Human Rights and Adolescence 64 (Jacqueline Bhabha ed., 2014); *see also* JLC Br. 21–24. This research confirms that juveniles' crimes are less likely to reflect an "irretrievably depraved character" because "[t]he personality traits of juveniles are more transitory, less fixed." *Roper*, 543 U.S. at 570 (citing Erikson, *Identity: Youth and Crisis* (1968)); *see also* Steinberg & Scott, 58 Am. Psychol. at 1014 ("Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.").

Based on well-supported findings that the unique developmental attributes of youth counsel against application of our justice system's harshest sentences, *Miller* held that the Eighth Amendment forbids the mandatory imposition of life without parole on juvenile offenders. Such a sentencing regime "precludes consideration

of [the juvenile's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"—and thus presents too great a risk that a juvenile whose crimes reflect merely "'transient immaturity,'" as opposed to "'irreparable corruption,'" will be subjected to a constitutionally disproportionate punishment. *Miller*, 567 U.S. at 477, 479–80 (quoting *Roper*, 543 U.S. at 573). *Montgomery*, in turn, clarified that life without parole is a categorically "excessive sentence for children whose crimes reflect transient immaturity." 136 S. Ct. at 734–35. *Montgomery* also made clear that courts must "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence," and that courts may not impose that sentence on a juvenile who is not irreparably corrupt. *Id.* at 734.

Miller and *Montgomery* establish that the Eighth Amendment affords both procedural and substantive protections to juveniles like Briones. Procedurally, these precedents require that juveniles receive an individualized sentencing hearing at which their youth and potential for rehabilitation are carefully examined and taken meaningfully into account. *Id.* at 733. And substantively, these precedents make life-without-parole sentences categorically unavailable for all juveniles except those rare individuals for whom "rehabilitation is impossible." *Id.* at 733–34 ("Even if a court considers a child's age before sentencing him or her to a

lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.") (citation and quotation marks omitted). In other words, "[i]n light of what th[e] Court has said … about how children are constitutionally different from adults in their level of culpability," juveniles facing life-without-parole sentences "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736–37.

II. The U.S. Sentencing Guidelines Are Inconsistent With the Eighth Amendment When Routinely Applied to Juveniles Because They Discourage Consideration of Youth and Its Attendant Characteristics.

The routine application of the U.S. Sentencing Guidelines fails to accord with the constitutional requirements of the Eighth Amendment because the Guidelines explicitly and implicitly discourage sentencing courts from properly considering "a juvenile offender's youth and its attendant characteristics." The Guidelines create an impermissibly high risk that a juvenile facing a life-without-parole sentence will be subjected to a constitutionally disproportionate punishment.

A. The Guidelines recommend a baseline range of punishment (generally expressed in months of imprisonment) based on a combination of the offender's "offense level" (i.e., the severity of his crime) and criminal history. District courts have the authority to depart from the recommended range, but they are discouraged from doing so based on considerations of the defendant's age. Age is explicitly

referred to as a "Discouraged Ground[] for Departures" from the baseline. Office of Gen. Counsel, U.S. Sentencing Comm'n, Departures and Variances Primer 33 (2018). The Guidelines provide that "[a]ge (including youth) *may* be relevant in determining whether a departure is warranted," but *only* "if considerations based on age … are present *to an unusual degree* and distinguish the case from the typical cases covered by the guidelines." U.S.S.G. § 5H1.1 (emphases added). And the Guidelines further indicate that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted." *Id.* § 5H1.12; *see also Rita v. United States*, 551 U.S. 338, 364–65 (2007) (Stevens, J., concurring) (noting that "[m]atters such as age … are not ordinarily considered under the Guidelines"); Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 Harv. L. Rev. 994, 997 n.25 (2017) [hereinafter "*Consideration of Juvenile Status*"] ("the Commission determined that age was not a relevant consideration [in sentencing] as age is not accounted for in the Guidelines tables").

B. Even setting aside the Guidelines' explicit instruction that age is a disfavored ground for departures from the baseline range, the existence of the baseline itself discourages judges from deviating from it. It is a well-known psychological phenomenon that, when individuals make an estimate "by starting

from an initial value that is adjusted to yield the final answer," "adjustments [from the baseline] are typically insufficient." Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1128 (1974). This is called the "anchoring bias." *Id.* Critically, the bias persists even when the decisionmaker knows the initial value is incomplete, inaccurate, or even random; even when the decisionmaker is told to ignore the anchoring effect; and even in decisionmakers who are "professionals with specialized expertise"—including judges. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 497, 503–11, 529 (2014) (describing studies demonstrating that judicial decisions are influenced by anchors—even "clearly irrelevant" ones); *see also* Note, *Baseline Framing in Sentencing*, 121 Yale L.J. 426, 439–41 (2011) [hereinafter "*Baseline Framing*"] (same).

Though the Guidelines are officially advisory rather than mandatory after *United States v. Booker*, 543 U.S. 220 (2005), they "still act as a hulking anchor for most judges." Bennett, *supra*, at 523; *see also United States v. Turner*, 548 F.3d 1094, 1099–1100 (D.C. Cir. 2008) ("Practically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences judges impose."); *accord United States v. Navarro*, 817 F.3d 494, 501–02 (7th Cir. 2015); *United States v. Parral-Dominguez*, 794 F.3d

440, 448 & n.9 (4th Cir. 2015); *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013). Federal district judges themselves have recognized that the initial Guidelines calculation "creates a kind of psychological presumption from which most judges are hesitant to deviate too far." Rakoff,[2] *Why The Federal Sentencing Guidelines Should Be Scrapped*, 26 Fed. Sent. Rep. 6, 8 (2013); *accord* Bennett,[3] *supra*, at 523; Gertner,[4] *What Yogi Berra Teaches About Post*-Booker *Sentencing*, 115 Yale L.J. Pocket Part 137, 138 (2006). Anchored to calculated ranges, judges typically will not use discretionary factors—such as age—"to any meaningful extent to reduce sentences." Bennett, *supra*, at 526; *see* Gertner, *supra*, at 140 ("Advisory or not, 'compliance' with the Guidelines is high."); *Consideration of Juvenile Status*, *supra*, at 1013–14 (noting the "influence of 'rules of thumb' and the role of anchoring" and arguing that the Guidelines "impermissibly anchor judges to sentences that may not be appropriately applied to juvenile offenders").[5]

---

[2] Hon. Jed S. Rakoff, District Judge, Southern District of New York.

[3] Hon. Mark W. Bennett, District Judge, Northern District of Iowa.

[4] Hon. Nancy Gertner, District Judge (Ret.), District of Massachusetts.

[5] Judges' adherence to the Guidelines may also reflect "omission bias"—the psychological phenomenon that "decisionmakers overvalue the negatives of taking an action compared to the positives." *Baseline Framing*, *supra*, at 444. "In the context of sentencing, the omission bias may cause judges to inadequately adjust sentences from the baseline, because judges may prefer the harms caused by passively applying the default sentence over the harms caused by actively altering it." *Id.* at 445.

C. The Supreme Court has explicitly noted—indeed, it has essentially endorsed—the Guidelines' anchoring effect. The baseline range, the Court has explained, "is intended to, and usually does, exert *controlling influence* on the sentence that the court will impose." *Peugh*, 569 U.S. at 545 (emphasis added). The Court has instructed district courts to use the Guidelines as "the starting point and the initial benchmark" and to give "respectful consideration" to the baseline range. *Id.* at 536–37 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007); *Kimbrough v. United States*, 552 U.S. 85, 101, 108 (2007)). And the Court has established "procedural hurdles that, in practice, make the imposition of a non-Guidelines sentence less likely." *Id.* at 542.

One such "procedural hurdle" is the highly deferential standard of appellate review applied to within-Guidelines sentences. Appellate courts review sentencing decisions only for "reasonableness," and they may "presum[e]" that within-Guidelines sentences are reasonable. *Rita*, 551 U.S. at 350–51. This Court has "recognize[d] that a Guidelines sentence 'will usually be reasonable.'" *United States v. Carty*, 520 F.3d 984, 994 (9th Cir. 2008) (en banc) (quoting *Rita*, 551 U.S. at 351). If a district court imposes an outside-Guidelines sentence, in contrast, the burden on the district court—and the potential for reversal—is much greater: the court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," and

then must "adequately explain the chosen sentence to allow for meaningful appellate review." *Gall*, 552 U.S. at 50; *see Carty*, 520 F.3d at 992 ("A within-Guidelines sentence ordinarily needs little explanation …. But the judge must explain why he imposes a sentence outside the Guidelines."). As (now-retired) Judge Gertner explained:

> [T]he Guidelines are the easy default. 'Do the numbers,' as the NPR program on the stock market suggests. You will appear efficient and you will surely avoid criticism. Do the opposite and you have to hold hearings, even write opinions, and encourage appellate review (even if rarely successful).

Gertner, *Judicial Discretion in Federal Sentencing—Real or Imagined?*, 28 Fed. Sent. Rep. 165, 165 (2016).

"Common sense indicates that, in general, this system will steer district courts to more within-Guidelines sentences." *Peugh*, 569 U.S. at 543; *see also id.* at 547 ("procedural rules and standards for appellate review" established after *Booker* "encourage[] district courts to sentence within the [G]uidelines"). And so it has: "district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion." *Id.* at 543–44.

D. The result of all this "is that while the Guidelines and the Commission's policy statements no longer have the force of law, the Guidelines remain a vital—and required—starting point for all federal sentencing."

Consideration of Juvenile Status, *supra*, at 999–1000. And in light of (i) the anchoring effect of that "starting point," (ii) the Guidelines' explicit discouragement from viewing age as a mitigating factor, and (iii) the applicable standards of appellate review, routine application of the Guidelines results in a constitutionally inadequate sentencing process. *Miller* stressed that a mandatory system that makes "youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence … poses too great a risk of disproportionate punishment." 567 U.S. at 479. Though the Guidelines are not mandatory, their structure and operation functionally treat youth and all that accompanies it as irrelevant to sentencing and thus likewise "pose[] too great a risk of disproportionate punishment." And deferential appellate review of standard Guideline-sentencing decision-making, in turn, is unlikely to provide an adequate check against Eighth Amendment violations. In short, routine application of the adult Guidelines to juvenile offenders in effect "remove[s] youth from the balance" and thus impermissibly prevents a "sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 474. "That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of [the] most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.*

Given the competing legal realities—on one hand, the statutory rule that district courts must use the Guidelines as their benchmark and starting point, and on the other, the constitutional rule that district courts must afford distinct and meaningful individualized consideration to juvenile offenders—the constitutional command must take precedence. It is unreasonable, and inconsistent with the Eighth Amendment, for a district (or appellate) court to rely on the Guidelines to justify a life-without-parole sentence for a juvenile offender. Yet, as discussed below, that is exactly what happened in this case.

III. The District Court's Application of the Guidelines to Impose a Life Sentence on Briones Violated the Eighth Amendment.

Briones presented a wealth of evidence that his crime reflected merely "unfortunate yet transient immaturity" and that he had displayed ample capacity for rehabilitation through his exemplary behavior since being incarcerated. Maj. Op. at 15–17.

The district court merely paid lip service to that evidence—no more. The court first calculated the baseline Guidelines range: life imprisonment. *Id.* at 9. The court then mentioned Briones's youth as a mitigating circumstance, but it nonetheless adhered to the Guidelines' recommendation. *Id.* And the court offered virtually no explanation for doing so, save the observations that Briones's crimes were "violent and cold blooded" and "some decisions have lifelong consequences." *See id.* at 8–9, 17–18. The district court did *not* find that Briones

was irreparably corrupt or incapable of rehabilitation; in fact, the record arguably would not have supported such a finding, *see* Dissenting Op. at 29. But the court, applying the Guidelines, imposed a life sentence anyway. And the panel majority, applying a "double layer of deferential review," Maj. Op. at 14, affirmed, concluding that the sentence was not "illogical" or "implausible." *Id.* at 21.

The Constitution does not countenance this result. Contrary to what the district court thought—and to what the Guidelines recommend for adult offenders—"for the vast majority of *juvenile* offenders," even terrible crimes should *not* result in a death-in-prison sentence. *Montgomery*, 136 S. Ct. at 736 (emphasis added). Juveniles whose crimes do not reflect "irreparable corruption" are constitutionally entitled to a "hope for some years of life outside prison walls." *Id.* at 736–37. The district court's application of the Guidelines to sentence Briones to life in prison disregarded this constitutional command. That sentence should not stand.

CONCLUSION AND RELIEF SOUGHT

Amici respectfully request that the Court grant the petition for rehearing *en banc*.

Dated: July 19, 2018

Respectfully submitted,

/s/ *William H. Milliken*

William H. Milliken
Michael E. Joffre
Sterne Kessler Goldstein & Fox PLLC
1100 New York Ave., N.W.
Washington, DC 20005
202.371.2600

Counsel for Amici Curiae

APPENDIX A

Douglas A. Berman is the Newton D. Baker-Baker & Hostetler Chair in Law at The Ohio State University Moritz College of Law. His teaching and research focus on criminal sentencing. Professor Berman has published over twenty articles regarding criminal sentencing, and he is the coauthor of *Sentencing Law and Policy: Cases, Statutes and Guidelines* (Aspen 1st, 2d, 3d & 4th eds.). He has submitted numerous amicus briefs in cases involving sentencing issues, including a brief in support of the petitioners in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Miller v. Alabama*, 567 U.S. 460 (2012). His criminal sentencing blog—Sentencing Law & Policy (http://sentencing.typepad.com/)—has been cited in nearly fifty judicial opinions. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 277 n.4 (2005) (Stevens, J., dissenting).

William W. Berry is an Associate Professor of Law at the University of Mississippi.

Jenny E. Carroll is the Wiggins, Childs, Quinn & Pantazis Professor of Law at the University of Alabama School of Law.

Cara H. Drinan is Professor of Law at The Catholic University of America. She teaches criminal law, criminal procedure and related constitutional law seminars. Her research focuses on criminal justice reform, with a particular emphasis on juvenile sentencing. Widely published in law reviews, she recently

published her first book regarding juvenile sentencing, *The War on Kids: How American Juvenile Justice Lost Its Way* (Oxford Univ. Press 2017).

Alison Flaum is a Clinical Associate Professor of Law at the Northwestern Pritzker School of Law and the Legal Director of the Bluhm Legal Clinic's Children and Family Justice Center. She is a member of the Illinois Coalition for the Fair Sentencing of Children and has represented children who are being prosecuted in the adult criminal system for nearly 20 years. She is also the author of a number of works focusing on adult prosecution and sentencing of children.

Shobha L. Mahadev is a Clinical Assistant Professor of Law at the Children and Family Justice Center (CFJC) at Northwestern Pritzker School of Law, where she represents children and adults in trial, on appeal and in post-conviction proceedings, focusing on individuals whose offenses occurred in their youth. Shobha also serves as the project director for the Illinois Coalition for the Fair Sentencing of Children, overseeing policy and litigation strategy with respect to advocating for fair sentencing laws for children. She has co-authored numerous amicus briefs, including in the United States Supreme Court in support of the petitioners in *Graham v. Florida*, 560 U.S. 48 (2010), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Sarah French Russell is a Professor of Law at Quinnipiac University School of Law. Her scholarship and teaching focuses on sentencing policy and

juvenile justice. At Quinnipiac, Russell leads the Legal Clinic's Juvenile Sentencing Project, which researches and analyzes responses by courts and legislatures nationwide to *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*, and produces reports and memoranda for use by policymakers, courts, scholars, and advocates. Russell has authored multiple law review articles relating to Eighth Amendment limits on sentences for children. Russell serves on the Connecticut Sentencing Commission.

Kimberly Thomas is a Clinical Professor of Law at the University of Michigan Law School and co-director of the University of Michigan Law School's Juvenile Justice Clinic.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief *Amicus Curiae* of Professors Douglas A. Berman, William W. Berry, Jenny E. Carroll, Cara H. Drinan, Alison Flaum, Shobha L. Mahadev, Sarah French Russell, and Kimberly Thomas In Support of Appellant's Petition For Rehearing En Banc complies with the length limits permitted by Circuit Rule 29-2(c)(2). The brief is 4,177 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ *William H. Milliken*
William H. Milliken

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 19, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *William H. Milliken*
William H. Milliken

No. 16-10150

Opinion filed: May 16, 2018
Panel: O'Scannlain & Rawlinson, CJJ; Ezra, DJ (Haw.)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,

vs.

RILEY BRIONES, JR., Defendant - Appellant.

Appeal from the United States District Court
for the District of Arizona
Hon. Douglas L. Rayes, District Judge, Presiding
D.C. No. 2:96-cr-464-PHX-DLR-4

BRIEF OF AMICI CURIAE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS IN SUPPORT OF GRANTING REHEARING EN BANC

JON M. SANDS
Federal Public Defender

KEITH J. HILZENDEGER
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700 voice
(602) 382-2800 facsimile
keith_hilzendeger@fd.org
Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Sentencing Guidelines

Constitutional Provisions

IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to 18 U.S.C. § 3006A, the Ninth Circuit Federal Public and Community Defenders[*] regularly represent indigent persons accused of federal crimes, including juveniles charged as adults. The defenders thus have an interest in the sound development of the law involving the sentencing of juveniles in a manner consistent with the requirements of both the Eighth Amendment and the sentencing law that has evolved under the advisory Sentencing Guidelines regime.

STATEMENT REQUIRED BY FED. R. APP. P. 29(a)(4)(E)

All parties have consented to the filing of this amicus brief. No party or party's counsel authored this brief, either in whole or in part. No party, no party's counsel, and no other person contributed money that was intended to fund the preparation or submission of this brief, either in whole or in part.

ARGUMENT

Riley Briones, Jr., was convicted of first-degree murder based on a killing that he participated in when he was 17 years old. In 1997, he received the mandatory life-without-parole sentence for that crime. *See* 18 U.S.C. §§ 1111(b); 3591(a) (juveniles are statutorily ineligible for a death sentence). In the wake of *Miller v. Alabama*, 567 U.S. 460 (2012), the district court set aside that sentence under 28 U.S.C. § 2255 and held a new sentencing hearing.

[*] All of the appointed Federal Public Defenders in this Circuit and all the Executive Directors of the Community Defender Organizations in this Circuit have consented to the filing of this brief.

In advance of the new sentencing hearing, Mr. Briones's counsel filed a sentencing memorandum in which she explained how the constitutional limitation articulated in *Miller* on imposing a life-without-parole sentence on a juvenile homicide offender should adjust how the Guidelines sentencing procedure operates. Her presentation at the sentencing hearing, including her oral advocacy and Mr. Briones's own testimony, built on her *Miller*-based argument that Mr. Briones was not constitutionally eligible for a life-without-parole sentence because his crime reflected "unfortunate yet transient immaturity." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Miller*, 567 U.S. at 479). The judge nevertheless reimposed the same life-without-parole sentence. A divided panel of this Court affirmed the sentence on plain-error review, holding that counsel's failure to object to the judge's explanation—notwithstanding her written sentencing advocacy—did not adequately preserve for appeal any claim that the judge did not apply *Miller* correctly.

1. The Court should rehear this case en banc in order to explain how a district judge's statutory obligation to explain the basis for the sentence applies to a categorical exclusion from punishment.

This case stands at the intersection of two lines of recent Supreme Court precedent. The first line involves the constitutional rules that apply to juvenile sentencing under the Eighth Amendment. Youth is "more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). It is a "condition of life when a person may be most susceptible to influence and psychological damage." *Id.* These "signature qualities of youth are transient; as individuals mature, the

impetuousness and recklessness that may dominate in younger years can subside." *Johnson v. Texas*, 509 U.S. 350, 368 (1993). Because of this reality, in the past 13 years the Supreme Court has articulated three substantive limitations on juvenile sentencing under the Eighth Amendment: juveniles cannot be sentenced to death, *Roper v. Simmons*, 543 U.S. 551 (2005); they cannot be sentenced to die in prison if they do not commit homicide, *Graham v. Florida*, 560 U.S. 48 (2010); and they cannot be sentenced to die in prison for homicide if that crime does not "reflect[] irreparable corruption" but instead reflects "unfortunate yet transient immaturity," *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479–80).

The second line involves the advisory Guidelines sentencing system created 13 years ago in *United States v. Booker*, 543 U.S. 220 (2005). Under the Sentencing Reform Act of 1984, a district judge must consider seven statutory factors when imposing a criminal sentence, including the sentencing range recommended by the U.S. Sentencing Guidelines. *See* 18 U.S.C. § 3553(a)(4). And the sentencing judge must "state in open court the reasons for [imposing] the particular sentence." 18 U.S.C. § 3553(c). The Supreme Court has said that the extent of the required explanation depends on whether the sentence imposed is consistent with what the Guidelines recommend. *See Rita v. United States*, 551 U.S. 338, 356–57 (2007). While the Guidelines are the "starting point and the initial benchmark" of the sentencing process, the statutory factors guide both the parties' arguments in favor of a particular sentence and the judge's explanation for the chosen sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007). "After settling on the appropriate sentence,"

the judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* at 50.

So while the Guidelines are not mandatory, they nevertheless inform every aspect of the sentencing process. A federal sentencing judge "*must* begin the[] analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh v. United States*, 569 U.S. 530, 541 (2013) (quoting *Gall*, 552 U.S. at 50 n.6). "Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence." *Id.* at 542 (quoting *Freeman v. United States*, 564 U.S. 522, 535 (2011)). Because of the anchoring effect that the Guidelines have on the federal sentencing process, "in most cases, a defendant's sentence will be based on his Guidelines range." *Hughes v. United States*, 138 S. Ct. 1765, 1776 (2018) (quoting 18 U.S.C. § 3582(c)(2)).

In this case, the requirements of the Eighth Amendment and the anchoring effect of the Guidelines operate at cross purposes. On the one hand, *Miller* "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734. Only the latter kind of juvenile homicide offender may receive a life sentence. On the other hand, the Guidelines recommend a life sentence for Mr. Briones. *See* U.S.S.G. § 2A1.1 (base offense level for first-degree murder is 43). The Guidelines thus recommend a sentence that the Supreme Court has said should be

categorically unavailable to the vast majority of juvenile defendants. At the same time, the Supreme Court has allowed sentencing judges to articulate minimal reasons for imposing a sentence recommended by the Guidelines, if the judge believes that the case is typical of those the Sentencing Commission envisions. *See Chavez-Meza v. United States*, 138 S. Ct. 1959, 1964 (2018) (quoting *Rita*, 551 U.S. at 357). The Eighth Amendment imposes a specific obligation on a federal judge in cases like this one to explain whether the juvenile defendant who is being sentenced is the kind of juvenile defendant for whom a life-without-parole sentence is constitutionally permissible. So when the Constitution requires more, the statutory sentencing scheme under the advisory Guidelines must yield.

Even though this constitutional dilemma was the lynchpin of Mr. Briones's sentencing advocacy before both the district court and before this Court, the panel majority entirely failed to address it. The panel majority read *Miller* and *Montgomery* to impose "no factfinding requirement" whatsoever on a federal sentencing judge. *United States v. Briones*, 890 F.3d 811, 820 n.4 (9th Cir. 2018). As a result, the panel majority said that nothing in either line of cases altered the general rule that, under the advisory Guidelines scheme, the life sentence that the Guidelines recommended here must be the starting point, initial benchmark, and weighty anchor for the entire sentencing process. *See id.* at 816 (explaining that nothing in *Miller* "overrules" the "clear instructions" of the advisory-sentencing line of cases). Even when sentencing a juvenile homicide offender, the panel majority thus held, a sentencing judge may explain the sentence by expressly relying on the Guidelines' recommendation when he believes that the case before

him is typical of the murder cases that the Sentencing Commission had in mind when it set life without parole as the recommended sentence in first-degree-murder cases. *See Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (stating that "in the ordinary case, the Commission's recommendation of a sentencing range will reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives") (quoting *Rita*, 551 U.S. at 350).

In essence, the panel majority's reasoning allows a district judge to handle the sentencing of a juvenile murder defendant no differently than that of any other adult murder defendant, sentence him based on the Guidelines' recommendation without further articulation, and see that sentence survive appellate review. The majority's reasoning thus "contravenes" the "foundational principle" of juvenile sentencing—"that imposition of [the] most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474. The Eighth Amendment required the sentencing judge in this case to explain whether Mr. Briones's crime reflected either transient immaturity or permanent incorrigibility, and hence whether he was constitutionally eligible for a life-without-parole sentence. Granting rehearing en banc would allow this Court to explain to district judges throughout this circuit what kind of explanation for imposing a life sentence on a juvenile homicide offender is consistent with the two lines of caselaw that this case implicates.

2. The Court should rehear this case en banc in order to explain why Mr. Briones properly preserved his *Miller* claim for appeal and that this Court is not reviewing any aspect of it for plain error.

Given that Mr. Briones consistently argued to the sentencing judge that he was required to articulate some reason why Mr. Briones was one of the rare, permanently-incorrigible juvenile offenders for whom life without parole was constitutionally permissible, it follows that this Court should not review any component of his *Miller* claim for plain error. The primary theme of Mr. Briones's written sentencing memorandum was the judge's constitutional obligation to determine on which side of the *Miller* line he fell—whether his crime "reflects unfortunate yet transient immaturity" or instead "irreparable corruption." *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479–80). The need to take into account the "hallmarks of youth" was also a theme of the defense presentation at the resentencing hearing itself. *See Briones*, 890 F.3d at 818–19. There can be no doubt that Mr. Briones satisfied his obligation to apprise the sentencing judge of the basis for his requested sentence—that the Eighth Amendment did not permit a sentence of life without parole for Mr. Briones.

The rules of criminal procedure clearly instruct parties how to preserve a claim of error for review. In order to properly preserve a claim of error for review, the party should inform the court "of the action the party wishes the court to take… and the grounds" for doing so "when the court ruling or order is made or sought." Fed. R. Crim. P. 51(b); *see also Puckett v. United States*, 556 U.S. 129, 135 (2009) ("In federal criminal cases, Rule 51(b) tells parties how to preserve claims

of error."). With respect to criminal sentencing, then, a defendant may comply with the preservation rules by arguing that the Eighth Amendment imposes a substantive limit on that sentence, and that the judge must make a particular legal determination before imposing a sentence outside that substantive limit, *before* the sentence is imposed. Mr. Briones did that here, making *Miller* the unbending focus of his written and oral sentencing advocacy. Because he complied with Rule 51(b), he need not rely on the "limited exception" of plain-error review, *Puckett*, 556 U.S. at 135, in order for this Court to review the merits of his *Miller* claim.

Yet despite the depth of Mr. Briones's written and oral sentencing advocacy, the panel majority reviewed his *Miller* claim for plain error because in its view he did not object to the sentencing judge's failure to give an "adequate statement of fact of incorrigibility" once he imposed the sentence. *Briones*, 890 F.3d at 821 n.6. The majority reviewed his *Miller* claim for plain error even as it also said that "*Miller* imposed no factfinding requirement" at all on the sentencing judge. *Id.* at 820 n.4 (citing *Montgomery*, 136 S. Ct. at 735). The panel majority's reasoning about the extent of a criminal defendant's obligation to apprise a sentencing judge about the constitutional limitations on the sentence he imposes is internally inconsistent. If *Miller* truly did not impose any factfinding requirement on a sentencing judge, then Mr. Briones had no obligation to object to the lack of such a factual finding.

In any event, *Miller* and *Montgomery* make clear that the determination whether a juvenile homicide offender may receive a life sentence is not a mere

determination of fact for a sentencing judge. It is a substantive *legal* limitation on punishment imposed by the Eighth Amendment. *Miller* "rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)). "As a result, *Miller* announced a substantive rule of constitutional law." *Id.* Plain-error review would have been appropriate here if Mr. Briones had failed to ask for a sentence other than life without parole on Eighth Amendment grounds. Instead, this record is replete with his reliance on the Eighth Amendment, as articulated in *Miller*, as a basis for a sentence other than life without parole. The panel majority acknowledged as much. *See Briones*, 890 F.3d at 818–19 (noting that *Miller* required the sentencing judge to consider the "hallmark features of youth" and then listing the places during the sentencing hearing where Mr. Briones's counsel based her argument on the hallmarks of youth).

Moreover, once the district judge, fully apprised by Mr. Briones's counsel of the need to make the substantive constitutional determination that *Miller* required him to make, imposed a life sentence, he had ruled on the *Miller* issue. It was at this point that the panel majority expected to see an objection from Mr. Briones's counsel. And seeing no such objection, the majority reviewed his *Miller* claim for plain error. But "a party does not *object* to a court's ruling; rather, when a party tries to inform the court that a ruling it has already made is erroneous, it is taking an *exception* to the ruling." *United States v. Mancinas-Flores*, 588 F.3d 677, 686 (9th

Cir. 2009) (quoting *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009)) (words in quotation marks in source material reproduced here in italics). And the rules do not require a defendant to take exception to a court's ruling. *See id.* (citing Fed. R. Crim. P. 51(a)). Once the judge ruled on Mr. Briones's *Miller* claim, he "did not have to ask the court to reconsider its decision or point out possible errors in the decision." *Id.* The Court should grant rehearing en banc to correct the panel majority's misapprehension of these well-established rules for preserving claims.

Although the dissenting judge focused on the sentencing judge's failure to rule on the substantive limitation on punishment imposed by *Miller*, *see Briones*, 890 F.3d at 822–23 (O'Scannlain, J., dissenting), he also saw some inconsistency in this Court's caselaw regarding the scope of appellate review when a criminal defendant fails to lodge an objection to "the sufficiency of the district court's explanation" for the sentence, *id.* at 827 n.2. The leading case in this circuit on this issue is *United States v. Valencia-Barragan*, 608 F.3d 1103 (9th Cir. 2010). In that case, the defendant tied his request for a particular sentence to the statutory sentencing factors, and the sentencing judge "listened to" the defendant's arguments and then stated on the record that he had "reviewed" the statutory sentencing factors before imposing a sentence within the Guidelines range. *Id.* at 1108 & n.3. The defendant did not further complain about the adequacy of this explanation, and this Court reviewed the adequacy of the explanation for plain error. *See id.* at 1108. By contrast, in *United States v. Trujillo*, 713 F.3d 1003 (9th Cir. 2013), the defendant specifically argued before the district court that "favorable treatment was justified by various factors under 18 U.S.C. § 3553(a),

including his family ties, his lack of other criminal history, his post-sentencing rehabilitation, and the need to avoid unwarranted sentencing disparities." *Id.* at 1005. The court in *Trujillo* described the defendant's advocacy before the sentencing judge as "present[ing] fairly extensive arguments and evidence" and pointing to specific caselaw in support of his sentencing position. *Id.* at 1009. The court held that his presentation to the district court was adequate to avoid plain-error review on appeal without a discrete objection to the judge's decision about the sentence once it issued. *See id.* at 1008 n.3 (stating that review on appeal was for abuse of discretion).

The Court should also rehear this case en banc to clear up what the dissenting judge said was a "potential intra-circuit split" between *Valencia-Barragan* and *Trujillo* on this point. *See Briones*, 890 F.3d at 827 n.2. In this case Mr. Briones's sentencing advocacy was at least as sharply focused as the advocacy in *Trujillo*, and thus the panel majority was arguably bound by circuit precedent not to review his *Miller* claim for plain error. *See Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002) (stating that "we have no discretion to depart from precedential aspects of" a published decision of a prior three-judge panel "under the general law-of-the-circuit rule") (citing *Ross Island Sand & Gravel v. Matson*, 226 F.3d 1015, 1018 (9th Cir. 2000)). This Court should grant rehearing in order to explain the difference between *Valencia-Barragan* and *Trujillo* on the issue of the defendant's obligation to alert a sentencing judge to the need to address a particular factor or legal rule in the course of explaining the basis for a sentence. Doing so

would assist both practitioners and judges in fashioning appropriate sentences for individual defendants in all criminal cases in the circuit.

CONCLUSION

Amici thus respectfully urge this Court to rehear this case en banc.

Respectfully submitted: July 30, 2018.

JON M. SANDS
Federal Public Defender

s/Keith J. Hilzendeger
KEITH J. HILZENDEGER
Assistant Federal Public Defender
Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the length limits permitted by 9th Cir. R. 32-1 because it contains 3,063 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface (Equity, designed by Matthew Butterick and published by MB Type) using Microsoft Word 2016.

s/Keith J. Hilzendeger
KEITH J. HILZENDEGER
Assistant Federal Public Defender
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on July 30, 2018, I caused the foregoing brief to be filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Appellate CM/ECF system. I further certify that all case participants are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

s/Keith J. Hilzendeger
KEITH J. HILZENDEGER
Assistant Federal Public Defender
Attorney for Amici Curiae

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*

ELIZABETH A. STRANGE
First Assistant U.S. Attorney
District of Arizona

KRISSA M. LANHAM
Assistant U.S. Attorney
Two Renaissance Square
40 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500
Attorneys for Appellee

Date Submitted via ECF: October 31, 2018

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CASES

STATUTES

RULES

III. BACKGROUND

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

---

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*.

ELIZABETH A. STRANGE
First Assistant United States Attorney
District of Arizona

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

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