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

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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

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[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.

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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,

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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).

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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.

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