No. 19-720

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RILEY BRIONES, JR.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Miller* v. *Alabama*, which "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," 567 U.S. 460, 479 (2012), entitles respondent to invalidation of a discretionary life-without-parole sentence.

RELATED PROCEEDINGS

United States District Court (D. Ariz.):

Briones v. *United States*, No. 99-cv-2094 (Mar. 31, 2003)

Briones v. *United States*, No. 13-cv-1240 (Sept. 26, 2013)

Briones v. *United States*, No. 13-cv-2445 (July 21, 2014)

United States v. *Briones*, No. 96-cr-464 (Mar. 30, 2016)

United States Court of Appeals (9th Cir.):

United States v. *Briones*, No. 97-10371 (Nov. 30, 1998)

United States v. *Briones*, No. 03-16300 (July 24, 2009)

Briones v. *United States*, No. 13-71056 (Nov. 26, 2013)

United States v. *Briones*, No. 16-10150 (July 9, 2019)

Supreme Court of the United States:

Briones v. *United States*, No. 09-1044 (Mar. 29, 2010)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-29a) is reported at 929 F.3d 1057. The opinion of a panel of the court of appeals (App., *infra*, 30a-63a) is reported at 890 F.3d 811.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2019. On September 26, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including November 6, 2019. On October 25, 2019, Justice Gorsuch further extended the

time to and including December 6, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, respondent was convicted on one count of first-degree felony murder, among other charges. C.A. E.R. 136. The district court sentenced him to life imprisonment, to be followed by five years of supervised release. *Ibid.* The court of appeals affirmed. 165 F.3d 918, 1998 WL 863026 (Tbl.). The district court later denied respondent's motion under 28 U.S.C. 2255 to vacate his sentence, but granted a certificate of appealability. D. Ct. Doc. 281 (Mar. 31, 2003); D. Ct. Doc. 287 (July 2, 2003). The court of appeals affirmed the denial of respondent's Section 2255 motion. 03-16300 C.A. Doc. 99-1 (Mar. 12, 2008). In 2013, respondent obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of *Miller* v. *Alabama*, 567 U.S. 460 (2012). 13-71056 C.A. Doc. 13-1 (Nov. 26, 2013). The district court granted the motion and resentenced respondent to life imprisonment, to be followed by five years of supervised release. D. Ct. Doc. 331, at 2 (July 21, 2014); App., *infra*, 66a. The en banc court of appeals vacated that sentence and remanded for resentencing. App., *infra*, 1a-29a.

1. Respondent was a co-founder of a gang called the Eastside Crips Rolling 30's. App., *infra*, 2a. In 1994—when respondent was "only twenty-three days shy of his

eighteenth birthday," *id.* at 27a (Bennett, J., dissenting)—he and other members of his gang decided to rob a Subway restaurant on the Salt River Indian Reservation in Arizona, *id.* at 2a-3a (majority opinion). Respondent drove the other gang members, including one armed with a gun, to the restaurant. *Id.* at 3a. While respondent remained in the car, "the others went inside and ordered food from the lone employee." *Ibid.* "As the food was being prepared, the only armed member of the cohort left the restaurant, spoke to [respondent], then reentered the store and shot [the employee] as he stood at the front counter, killing him." *Ibid.* "The gang members grabbed their food and a bag of money" and fled in respondent's car. *Ibid.*

After committing a series of other violent, gang-related offenses—including the repeated firebombing of a house with a young child inside and the assault of a fellow gang member to prevent him from speaking to police about the Subway murder—respondent was arrested. See App., *infra*, 3a & n.1; *id.* at 18a-19a (Bennett, J., dissenting). A federal grand jury in the District of Arizona returned an indictment charging respondent with one count of first-degree felony murder, in violation of 18 U.S.C. 1111, 1153, 2111, and 2 (1994); two counts of conspiracy to commit arson, in violation of 18 U.S.C. 81, 371, 1153, and 2 (1994); four counts of arson, in violation of 18 U.S.C. 81, 1153, and 2 (1994); one count of possession of an unregistered destructive device, in violation of 26 U.S.C. 5681(d), 5841, and 5871 (1994); one count of assault with a dangerous weapon, in violation of 18 U.S.C. 113(a)(3), 1153, and 2 (1994); and one count of tampering with a witness, in violation of

18 U.S.C. 1512(b)(3) and 2 (1994). C.A. E.R. 1-9. Following a trial, a jury found respondent guilty of all charges. *Id.* at 136.

Applying the then-mandatory Sentencing Guidelines, the district court sentenced respondent to life imprisonment, to be followed by five years of supervised release, on the murder count. C.A. E.R. 136; App., *infra*, 3a. With respect to the remaining counts, the court sentenced respondent to a total of 20 years of imprisonment, to be followed by three years of supervised release. C.A. E.R. 136. The court of appeals affirmed. 165 F.3d 918, 1998 WL 863026 (Tbl.).

In 1999, respondent filed a motion under 28 U.S.C. 2255 to vacate his sentences. D. Ct. Doc. 210 (Nov. 29, 1999). The district court denied the motion—rejecting respondent's ineffective-assistance-of-counsel, due process, and Confrontation Clause claims—but granted a certificate of appealability. D. Ct. Docs. 281, 287. The court of appeals affirmed the denial of respondent's Section 2255 motion. 03-16300 C.A. Doc. 99-1. This Court denied respondent's petition for a writ of certiorari. 559 U.S. 1038 (No. 09-1044).

2. In 2012, this Court in *Miller* v. *Alabama*, *supra*, "h[e]ld that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[]." 567 U.S. at 465. Respondent obtained leave from the court of appeals to file a second Section 2255 motion to challenge, in light of *Miller*, his mandatory life-without-parole sentence for his participation in the murder of the Subway employee shortly before his eighteenth birthday. 13-71056 C.A. Doc. 13-1. The district court granted that second Section 2255 motion, vacated his original mandatory life sentence, and resentenced him in a proceeding in which it recognized

its authority to impose a lower sentence on the murder count. D. Ct. Doc. 331, at 2; App., *infra*, 65a-66a.

At respondent's resentencing hearing, the district court again imposed a sentence of life imprisonment without parole, to be followed by five years of supervised release, this time as a matter of discretion. App., *infra*, 66a. The court informed the parties that it had "consider[ed]" respondent's "youth, immaturity, [and] his adolescent brain at the time" of the murder. *Id.* at 65a. The court acknowledged that respondent "has improved himself while he's been in prison." *Id.* at 65a-66a. The court emphasized, however, that respondent had been "involved in the final decision to kill" the Subway employee, had "encouraged the shooter to pull the trigger," and had more generally been the "leader" of a "violent and cold-blooded" "gang that terrorized the Salt River Reservation community and surrounding area for several years." *Ibid.* Given "all the evidence" it had "heard" and "read," the court determined that a life-without-parole sentence was appropriate. *Id.* at 66a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 30a-63a. The majority rejected respondent's contentions that the district court was required "to make an explicit finding that [respondent] was 'incorrigible,' that the district court failed to adequately consider the 'hallmarks of youth' discussed in *Miller*, and that the district court did not adequately consider [respondent's] rehabilitation." *Id.* at 41a. The majority read *Miller* to "require[]" the sentencing judge "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 44a (quoting *Miller*, 567 U.S. at 480). But the majority determined that the sentencing judge "followed th[at] mandate because he

said so on the record—that he had considered everything he heard and read in conjunction with the sentencing hearing, including counsel's impassioned arguments regarding how the 'hallmarks of youth' particular to [respondent] counseled against imposition of a life sentence." *Id.* at 45a.

Judge O'Scannlain concurred in part and dissented in part. App., *infra*, 50a-63a. In his view, *Miller* and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016)—which held that "*Miller* announced a substantive rule of constitutional law" that applies retroactively on collateral review, *id.* at 734—prohibited a sentence of life without parole unless the district court found respondent to be "permanently incorrigible," and "nothing in the record" indicated that the court had "even considered" that question. App., *infra*, 53a. Judge O'Scannlain acknowledged, however, that if "*Miller* could be understood merely as * * * mandating that sentencing courts must consider certain hallmark characteristics of youth and that they must be permitted to impose a sentence less than life * * * , the district court likely would have complied with its dictates." *Id.* at 52a.

4. The court of appeals granted rehearing en banc, vacated respondent's life-without-parole sentence, and remanded for resentencing. App., *infra*, 1a-29a. In the majority's view, "*Montgomery* made clear that, after *Miller*, juvenile defendants who are not permanently incorrigible or irreparably corrupt are *constitutionally ineligible* for a sentence of life without parole." *Id.* at 9a. The majority thus framed "*Miller*'s central inquiry" as "whether the defendant is one of the rare juvenile offenders who is irredeemable, or whether the defendant is capable of change." *Id.* at 11a-12a. And the majority found the record insufficient to show that the district

court had "meaningfully engaged" in that inquiry. *Id.* at 16a.

Judge Bennett, joined by Judge Ikuta, dissented. App., *infra*, 17a-29a. They would have found that "[t]he district court did not commit any constitutional error in imposing a life sentence," *id.* at 17a, because "the district court did exactly what *Miller* requires—it considered [respondent's] 'youth and attendant characteristics,'" *id.* at 25a (quoting *Miller*, 567 U.S. at 483).

REASONS FOR GRANTING THE PETITION

The en banc court of appeals in this case invalidated respondent's discretionary life-without-parole sentence for a crime he committed 23 days short of his eighteenth birthday. App., *infra*, 2a; see pp. 2-3, *supra*. In rendering that decision, the majority below read this Court's decision in *Miller* v. *Alabama*, 567 U.S. 460 (2012), to apply not only to mandatory life-without-parole sentences, but also to discretionary ones. App., *infra*, 9a. It took the view that, under *Miller*, "[i]t is not enough for sentencing courts to consider a juvenile offender's age before imposing life without parole." *Ibid.* Rather, in its view, "*Miller*'s central inquiry" is "whether the defendant is one of the rare juvenile offenders who is irredeemable, or whether the defendant is capable of change," *id.* at 11a-12a, and a discretionary life-without-parole sentence for a juvenile is constitutionally invalid if a reviewing court believes that the sentencing court did not "meaningfully engage[] in" that inquiry, *id.* at 16a.

The issue of *Miller*'s proper scope is currently before this Court in *Mathena* v. *Malvo*, No. 18-217 (argued Oct. 16, 2019). Like the en banc court of appeals in this case, the Fourth Circuit in *Malvo* read *Miller* to "appl[y] beyond those situations in which a juvenile

homicide offender received a *mandatory* life-without-parole sentence." *Malvo* v. *Mathena*, 893 F.3d 265, 274 (2018), cert. granted, 139 S. Ct. 1317 (2019). And like the en banc court of appeals in this case, the Fourth Circuit in *Malvo* took the view that a sentencing court "violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility' as distinct from 'the transient immaturity of youth.'" *Ibid.* (citation omitted). The parties in *Malvo*, as well as the United States as amicus curiae, dispute whether that view of *Miller* is correct. See, *e.g.*, Pet. Br. at 24-27, *Malvo*, *supra* (No. 18-217); U.S. Amicus Br. at 13-17, *Malvo*, *supra* (No. 18-217); Resp. Br. at 22-30, *Malvo*, *supra* (No. 18-217).[*]

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[*] Because "[l]itigants and lower courts cannot lightly disregard any statements in an opinion of this Court," the government has previously told lower courts, including the court of appeals in this case, that *Montgomery*'s reasoning "implicat[es] the validity of discretionary sentences as well as mandatory ones." U.S. Amicus Br. at 21, *Malvo*, *supra* (No. 18-217); see, *e.g.*, Gov't C.A. Resp. to Pet. for Reh'g 3 (stating that *Miller*, when read in light of *Montgomery*, "barred [life without parole] 'for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility'") (quoting *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 734 (2016)). After this Court granted certiorari in *Malvo*, however, counsel for the government stated at oral argument before the en banc court of appeals that she did not "see a reason not to" hold this case pending this Court's decision in *Malvo*. C.A. Oral Argument at 42:48, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015415. Although counsel for the government also predicted only a "remote possibility" that *Malvo* could affect the disposition of this case, *id.* at 42:27, that statement was made before the parties filed their briefs and this Court heard argument in *Malvo*.

Malvo involves *Miller*'s retroactive application to an original sentencing, whereas this case involves *Miller*'s prospective application to a resentencing. The issue of *Miller*'s proper scope, however, bears on its application both retroactively and prospectively, and thus the Court's decision in *Malvo* may affect the proper resolution of this case. Indeed, the issue of what *Miller* requires "[g]oing forward" was a focus of oral argument in *Malvo*. Oral Argument Tr. at 43, *Malvo*, *supra* (No. 18-217); see *id.* at 9-12, 14-19, 26, 35-46. Because the decision below turned on the en banc court of appeals' view of *Miller*'s scope, and because the proper scope of *Miller* is currently before this Court in *Malvo*, the Court should hold this petition for a writ of certiorari pending its decision in *Malvo* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Mathena* v. *Malvo*, No. 18-217 (argued Oct. 16, 2019), and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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DECEMBER 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-10150
D.C. No. 2:96-cr-00464-DLR-4

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RILEY BRIONES, JR., AKA UNKNOWN SPITZ,
DEFENDANT-APPELLANT

Argued and Submitted En Banc: Mar. 27, 2018
San Francisco, California
Filed: July 9, 2019

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

OPINION

Before: SIDNEY R. THOMAS, Chief Judge, and SUSAN P. GRABER, M. MARGARET MCKEOWN, KIM MCLANE WARDLAW, MARSHA S. BERZON, MILAN D. SMITH, JR., SANDRA S. IKUTA, MORGAN CHRISTEN, JACQUELINE H. NGUYEN, MARK J. BENNETT, and RYAN D. NELSON, Circuit Judges.

Opinion by Judge CHRISTEN;

Dissent by Judge BENNETT

CHRISTEN, Circuit Judge:

In 1997, Riley Briones, Jr. received a mandatory sentence of life without the possibility of parole (LWOP) for his role in a robbery that resulted in murder. Briones was 17 years old at the time of the crime. In 2012, the Supreme Court held that mandatory LWOP sentences for juvenile offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment. *Miller v. Alabama*, 567 U.S. 460, 465 (2012). After the *Miller* decision issued, Briones filed a motion pursuant to 28 U.S.C. § 2255 seeking to have his sentence vacated. The district court granted the motion, held a second sentencing hearing, and reimposed the original sentence. Because the district court's analysis was inconsistent with the constitutional principles the Supreme Court delineated in *Miller* and subsequent case law, we vacate Briones's sentence and remand to the district court.

I. Background

Briones grew up on the Salt River Indian Reservation in Arizona. As a child, Briones endured physical abuse from his father, Riley Briones, Sr., and was introduced to drugs and alcohol at age 11. Briones was a fairly good student and he aspired to attend college. After he and his girlfriend had a child while still in high school, however, he dropped out to take a full-time position in an apprentice program, training to be a heavy equipment operator.

Briones, his father, and his brother Ricardo founded a gang called the Eastside Crips Rolling 30's. While still a teenager, Briones planned and participated in a number of violent, gang-related crimes on the Reservation. The most serious of these crimes was the robbery

of a Subway restaurant in May 1994, when Briones was seventeen years old. Although Ricardo came up with the idea, Briones agreed to the plan and drove four of the gang's members to the restaurant to carry it out. Briones remained in the car as the getaway driver while the others went inside and ordered food from the lone employee, Brian Lindsey. As the food was being prepared, the only armed member of the cohort left the restaurant, spoke to Briones, then reentered the store and shot Lindsey as he stood at the front counter, killing him. The gang members grabbed their food and a bag of money and ran back to Briones's car.

Briones was arrested on December 21, 1995. He was charged with "first degree/felony murder" for the Subway robbery, and also charged with arson, assault, and witness tampering because of other gang-related offenses. Briones's father and brother were among the five co-defendants. The government extended pretrial plea offers of twenty years in prison to all five defendants, but Briones's father was "adamant" that neither he nor either of his sons should accept the deal. Briones rejected the government's offer, went to trial, and was convicted on all charges. For the felony murder conviction, he was sentenced to a mandatory term of life imprisonment without the possibility of parole.[1]

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[1] The Presentence Report (PSR) reflects other very serious criminal conduct. It describes Briones providing Molotov cocktails for gang members to throw at the homes of rival gang members; planting diversionary fires to occupy the authorities; planning a shooting; covering up a separate drive-by shooting; assaulting a gang member who knew about the Subway murder; and discussing plans to blow up the Salt River Police Department and kill a tribal judge, federal prosecutors, and Salt River Police investigators. Briones has

In June of 2012, the Supreme Court issued its decision in *Miller* and held that the Eighth Amendment prohibits sentencing schemes that mandate life in prison without the possibility of parole for juvenile defendants. 567 U.S. at 479. *Miller* explained that sentencing courts must consider the unique social and psychological characteristics of juvenile offenders because "hallmark features" of youth reduce the penological justifications for imposing LWOP sentences on juveniles. *Id.* at 477-80. After *Miller* was decided, Briones filed a motion pursuant to 28 U.S.C. § 2255 seeking to have his sentence vacated. The government conceded that his "mandatory life sentence [was] constitutionally flawed[,]"[2] and the district court granted Briones's motion.

Before Briones was resentenced, the Supreme Court issued *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), establishing that *Miller*'s substantive rule is to be given retroactive effect. *Id.* at 736. *Montgomery* also provided additional guidance about the proper application of *Miller* and specified that a sentence of life without the possibility of parole is constitutionally permissible only for "the rarest of juvenile offenders"—specifically, those whose "crimes reflect permanent incorrigibility" and "irreparable corruption." *Montgomery*, 136 S. Ct. at 734.

By the time the district court resentenced Briones in March 2016, he was almost forty years old and he had served nearly eighteen years in prison without a single infraction of prison rules. In addition to maintaining a perfect disciplinary record, Briones held a job in food

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served all of the prison time imposed for his non-homicide crimes; the only sentence remaining is the LWOP sentence for the Subway robbery.

[2] *Briones v. United States*, No. 13-71056, Dkt. No. 11, at 2.

service; volunteered to speak with young inmates about how to change their lives; completed his GED; and, in 1999 (sixteen years before his resentencing), married Carmelita, the woman he had been dating since high school and with whom he had a daughter. By all accounts, and as even the government conceded, Briones had been a model inmate.

Briones cited *Miller* extensively in the memorandum he filed in anticipation of the resentencing hearing, and he asked the district court to impose a sentence of 360 months in accordance with the factors identified in *Miller* and his extensive history of rehabilitative efforts. In his testimony at the resentencing hearing, Briones expressed "[g]rief, regret, sorrow, pain, sufferings" for his crimes and for Lindsey's death. He described how he was haunted by his actions, and he apologized to his own family and to the victim's family. Briones's counsel argued that a life sentence would be "unconstitutional in violation of *Graham* and *Miller*," and that the presumption in Briones's case should be *against* a life sentence because *Miller* requires that LWOP be the exception rather than the rule. The government contended that Briones had not accepted responsibility because, when he was interviewed in advance of the second sentencing hearing, Briones contested some aspects of the PSR's description of his responsibilities in the gang. But Briones did not dispute the role he played in the Subway robbery and murder, even saying at one point in his testimony that it was "probably [his] fault" that the robbery was not called off.

The district court's sentencing remarks were quite brief; its justification for reimposing LWOP comprised

less than two pages of transcript. The court considered the PSR and letters written on Briones's behalf, the parties' sentencing memoranda, the transcript of the previous sentencing hearing, and the victim questionnaire. The court began with the Sentencing Guidelines calculation—which yielded a life sentence—and then stated: "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." The district court acknowledged that "[a]ll indications are that defendant was bright and articulate" and that "he has improved himself while he's been in prison," but the court described Briones's role in the Subway robbery as "be[ing] the pillar of strength for the people involved to make sure they executed the plan." The court stated that "some decisions have lifelong consequences" and reimposed a life sentence. Because there is no parole in the federal system, the parties agree that Briones's life sentence is effectively LWOP. *See Sentencing Reform Act of 1984*, Pub. L. No. 98473, tit. II, §§ 218(a)(5), 235(a)(1), 98 Stat 1837, 2027, 2031.

II. *Miller* and *Montgomery*

The Supreme Court held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. *Miller* built on the Court's decisions in *Roper v. Simmons*, 543 U.S. 551, 568-69 (2005), and *Graham v. Florida*, 560 U.S. 48, 75 (2010), which established that juvenile offenders are not eligible for capital sentences and that the Eighth Amendment precludes LWOP sentences for juveniles who commit

non-homicide crimes. *Miller*, 567 U.S. at 470. These decisions reflect the understanding that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471.

Miller further develops these constitutional principles, requiring that, even when terribly serious and depraved crimes are at issue, courts "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. *Miller* identified several characteristics of youth: (1) difficulty appreciating risks; (2) inability to escape dysfunctional home environments; (3) susceptibility to familial and peer pressure; (4) inability to deal competently with law enforcement or the justice system; and (5) potential for rehabilitation. *Id.* at 477-78. The Court held that these factors must be considered to determine whether a juvenile offender may be sentenced to LWOP. See *id.* at 480 ("[W]e *require* [the sentencing court] to take into account how children are different. . . . " (emphasis added)).

Miller explains why these factors change the sentencing calculation for juveniles. Youth lack maturity, and their underdeveloped sense of responsibility "lead[s] to recklessness, impulsivity, and heedless risk-taking"; juveniles are particularly vulnerable "'to negative influences and outside pressures,' including from their family and peers"; and youth "is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.'" *Id.* at 471, 476 (quoting *Roper*, 543 U.S. at 569, and *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). The Eighth Amendment also requires consideration of the reality that some juveniles become trapped in particularly "brutal or dysfunctional"

family situations over which they have no control, and that juveniles struggle to competently deal with the criminal justice system. *Id.* at 477-78. By virtue of their youth, juveniles also harbor greater rehabilitative potential. *Id.* at 478; *see also id.* at 471 ("[A] child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." (internal quotation marks and brackets omitted)).

These factors erode the justification for imposing LWOP sentences, even when juveniles commit terrible crimes. *Id.* at 472. The characteristics of youth lessen moral culpability and thereby reduce the rationale for retribution. *Id.* The same characteristics that render juveniles less culpable than adults also make them less likely to be dissuaded by potential punishment, thereby minimizing the potential deterrent effect of a life sentence. *Id.* And permanent incapacitation is less likely to be required to protect society because juvenile offenders are more likely to shed the problematic attributes of youth as a result of ongoing neurological development. *Id.* at 472-73.[3] The characteristics of an individual juvenile offender will determine whether a crime reflects "transient immaturity" (in which case, an LWOP sentence for a juvenile is impermissible) or "*irreparable* corruption" (in which case an LWOP sentence for a juvenile is constitutionally permitted). *Id.* at 479-80 (emphasis added). As a result, the Court cautioned, "appropriate occasions

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[3] The Court reaffirmed in *Miller* what it had previously observed in *Graham*, 560 U.S. at 68: there are physiological differences between adults and juveniles in the regions of the brain related to "impulse control, planning ahead, and risk avoidance[.]" *Miller*, 567 U.S. at 472 n.5 (internal quotation marks omitted).

for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 479.

In *Montgomery*, the Supreme Court held that the rule announced in *Miller* is a substantive constitutional limitation on life sentences for crimes committed by juveniles, as well as a procedural requirement. 136 S. Ct. at 736. *Miller*'s "substantive holding" was that "life without parole is an excessive sentence for children whose crimes reflect transient immaturity," and its procedural component implementing the substantive rule requires "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors" in order to "separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 735 (quoting *Miller*, 567 U.S. at 465). It is not enough for sentencing courts to consider a juvenile offender's age before imposing life without parole. The Eighth Amendment dictates that "sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption. . . . '" *Id.* (quoting *Miller*, 567 U.S. at 479-80). *Montgomery* made clear that, after *Miller*, juvenile defendants who are not permanently incorrigible or irreparably corrupt are *constitutionally ineligible* for a sentence of life without parole. *See id.* ("*Miller* . . . rendered life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth.").

Miller and *Montgomery* are fairly recent decisions, and there is relatively little case law addressing how to evaluate the post-incarceration conduct of juvenile offenders for purposes of *Miller*. Our decision in *United States v. Pete*, 819 F.3d 1121 (9th Cir. 2016), did provide

some guidance, though we recognize it was not issued until after Briones's resentencing. In *Pete*, a juvenile offender who had been sentenced to LWOP was granted resentencing in light of *Miller*. *Id.* at 1126. To prepare for resentencing, the defendant sought funding to obtain a neuropsychological evaluation. *Id.* The district court concluded that the evaluation was unnecessary because the defendant had undergone a psychiatric evaluation ten years earlier, when he was originally sentenced. *Id.* at 1127. We held that the district court abused its discretion by denying the funding request because "the critical question under *Miller* was [the defendant's] capacity to change after he committed the crimes at the age of 16." *Id.* at 1133. A new evaluation may reflect changes in the defendant's maturity or emotional health, and "whether [the defendant] *has* changed in some fundamental way since that time, and in what respects, is surely key evidence." *Id.*

Taken together, *Miller*, *Montgomery*, and *Pete* make clear that a juvenile defendant who is capable of change or rehabilitation is not permanently incorrigible or irreparably corrupt; that a juvenile who is not permanently incorrigible or irreparably corrupt is constitutionally ineligible for an LWOP sentence; and that a juvenile's conduct after being convicted and incarcerated is a critical component of the resentencing court's analysis.

III. Briones's Resentencing

We review the district court's factual findings for clear error, but "review de novo a claim that a sentence violates a defendant's constitutional rights." *United States v. Hunt*, 656 F.3d 906, 911 (9th Cir. 2011) (citing *United States v. Raygosa-Esparza*, 566 F.3d 852,

854 (9th Cir. 2009)). District courts' sentencing decisions are entitled to deference, *see*, *e.g.*, *United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir.) (en banc), *cert. denied*, 138 S. Ct. 523 (2017), but this deference is not absolute.[4]

Here, the district court properly began by calculating Briones's Sentencing Guidelines range, which yielded a sentence of life without parole. District courts must begin with the Guidelines calculation,[5] but they "may not presume that the Guidelines range is reasonable." *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). After calculating the Guidelines range, sentencing courts next turn to the factors and considerations identified in 18 U.S.C. § 3553(a). *Id.* If LWOP is a possible sentence for a juvenile offender, then the totality of the evidence and the § 3553(a) factors inform *Miller*'s central inquiry: whether the defendant is one of the rare juvenile offenders who is irredeemable, or

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[4] *See Martinez-Lopez*, 864 F.3d at 1043 (reversal of sentence is appropriate "if the [district] court applied an incorrect legal rule"); *United States v. Meredith*, 685 F.3d 814, 818, 826-27 (9th Cir. 2012) (partially vacating a sentence because the district court failed to consider evidence presented at sentencing); *United States v. Staten*, 466 F.3d 708, 715-17 (9th Cir. 2006) (remanding for consideration of certain statutory factors and factual elements).

[5] We reject the suggestion advanced by Briones and certain amici that district courts should no longer begin with the Sentencing Guidelines in juvenile cases because doing so creates a presumption (or at least momentum) in favor of LWOP sentences that should be "rare" and "uncommon" after *Miller*. The Supreme Court has long required that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007).

whether the defendant is capable of change. *Montgomery*, 136 S. Ct. at 734-36. We recognize that some tension exists between *Miller*'s mandate and the Sentencing Guidelines,[6] but *Miller* imposes a constitutional requirement. So where *Miller* is applicable, the Guidelines must be applied consistently with *Miller*'s rule.

We agree with the government that the severity of a defendant's crime is indisputably an important consideration in any sentencing decision. The severity of the crime is reflected in the Guidelines sentencing range calculation, which incorporates the nature of the offense, and in § 3553, which expressly includes consideration of the offense characteristics. 18 U.S.C. § 3553(a)(1)-(2). Nothing about *Miller* and *Montgomery*'s Eighth Amendment analysis minimizes the gravity of a juvenile defendant's criminal conduct; indeed, *Miller* and *Montgomery* also involved horrible crimes. *See Miller*, 567 U.S. at 465-68 (one petitioner participated in the murder of a video store clerk, and the other burned a

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[6] Briones's counsel argues that the Guidelines "generally forbid" consideration of several factors that may bear on a *Miller* analysis, such as U.S.S.G. § 5H1.1 (defendant's age), § 5H1.2 (education and vocational skills), § 5H1.3 (mental and emotional conditions), § 5H1.4 (physical condition), § 5H1.5 (employment record), § 5H1.6 (family ties and responsibilities), and § 5H1.10 (race, sex, national origin, creed, religion, and socio-economic status). But with the exception of § 5H1.10—which bars consideration of factors like race, sex, and national origin that are not relevant to *Miller*'s inquiry—the Guidelines actually provide that the factors Briones's counsel identified "may be relevant" or otherwise are simply "not *ordinarily* relevant." U.S.S.G. §§ 5H1.1-1.6 (emphasis added). Thus, the Guidelines are entirely compatible with *Miller*'s directive that courts consider a juvenile offender's youthful characteristics before taking the rare step of imposing an LWOP sentence.

neighbor's trailer with the neighbor inside); *Montgomery*, 136 S. Ct. at 725-26 (petitioner shot and killed a deputy sheriff).

Despite the harm caused by juveniles' criminal acts, *Miller* requires a sentencing analysis that accounts for the characteristics of youth that undermine the penological justification for lifelong punishment. *Miller*, 567 U.S. at 472; *see also Graham*, 560 U.S. at 68. This diminished justification for lifelong punishment is why LWOP sentences are "disproportionate for all but the rarest" juvenile offenders, *Montgomery*, 136 S. Ct. at 726, "even when they commit terrible crimes." *Miller*, 567 U.S. at 472. Accordingly, when courts consider *Miller*'s central inquiry, they must reorient the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant's criminal history.

Based on the district court's articulated reasoning at Briones's resentencing, we cannot tell whether the district court appropriately considered the relevant evidence of Briones's youth or the evidence of his post-incarceration efforts at rehabilitation. The district court described Briones's crime and his history of gang-related violence, identified certain factors it considered "in mitigation," and stated that "some decisions have lifelong consequences." In this way, the district court's sentencing remarks focused on the punishment warranted by the terrible crime Briones participated in, rather than whether Briones was irredeemable. The district court's statement that it considered some factors in "mitigation" suggests that the district court applied the Guidelines and began with a presumption that LWOP

would be appropriate. As we have explained, however, a sentencing court may not presume the propriety of a Guidelines sentence, *see Carty*, 520 F.3d at 991, particularly in juvenile LWOP cases after *Miller*. Rather, the Constitution requires that the court consider a juvenile offender's youthful characteristics before taking the rare step of imposing an LWOP sentence.

Briones provided evidence related to a number of the *Miller* factors at the resentencing hearing, including his abusive upbringing,[7] his extensive exposure to drugs and alcohol beginning when he was only eleven years old,[8] his difficulty finding acceptance at his local high school because of his Native American traditions,[9] and his father's inexplicable insistence that he reject the government's favorable plea offer even though Briones faced a mandatory LWOP sentence if convicted. Briones's lawyer also argued that Briones was somewhat less culpable because he was the getaway driver, not the shooter. *Id.* at 478. Most significant, Briones offered

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[7] Despite his devotion to his father, Briones acknowledged during his resentencing testimony that his father beat him and whipped him when he was a child. On one occasion, he went to school with blood seeping through his shirt because of his father's abuse.

[8] The PSR recounted that Briones was drinking hard liquor on the weekends by the time he was eleven years old. Briones and his wife both testified that he consumed a substantial amount of alcohol on a daily basis as a child, and that even when Briones was young, his parents drank heavily and generally acceded to Briones's own heavy drinking.

[9] Briones's father told him of a distant relative who was "the last man to have his hair long[.]" Briones was moved by that account and let his hair grow long to "express his Native American identity." But when he tried out for the high school football team, the coach told him he could not be on the team unless he cut his hair.

abundant evidence on the critical issue: that he was not irreparably corrupt or irredeemable because he had done what he could to improve himself within the confines of incarceration.

The eighteen years that passed between the original sentencing hearing and the resentencing hearing provide a compelling reason to credit the sincerity of Briones's efforts to rehabilitate himself. Briones was sentenced in 1997; *Miller* was not issued until 2012. Thus, for the first fifteen years of Briones's incarceration, his LWOP sentence left no hope that he would ever be released, so the only plausible motivation for his spotless prison record was improvement for improvement's sake. This is precisely the sort of evidence of capacity for change that is key to determining whether a defendant is *permanently* incorrigible, yet the record does not show that the district court considered it. This alone requires remand. *See Pete*, 819 F.3d at 1133.

The district court may have hesitated to fully consider Briones's post-incarceration conduct because we had not yet issued our decision in *Pete*, and because the government argued that the court had to "make some guesses as to what Judge Broomfield would have done back [at Briones's original sentencing] had Judge Broomfield had the option of something other than a life sentence available to him." On this point, the government's argument missed the mark. *Pete* explained that "whether [the juvenile offender] *has* changed in some fundamental way since [the original sentencing], and in what respects, is surely key evidence." 819 F.3d at 1133. We reaffirm that when a substantial delay occurs between a defendant's initial crime and later sentencing, the defendant's post-incarceration conduct is especially

pertinent to a *Miller* analysis. *See id.*; *see also Montgomery*, 136 S. Ct. at 736 ("The petitioner's submissions [of his reformation while in prison] are relevant . . . as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation."). The key question is whether the defendant is capable of change. *See Pete*, 819 F.3d at 1133. If subsequent events effectively show that the defendant *has* changed or *is* capable of changing, LWOP is not an option.

The district court's heavy emphasis on the nature of Briones's crime, coupled with Briones's evidence that his is not one of those rare and uncommon cases for which LWOP is a constitutionally acceptable sentence, requires remand. We do not suggest the district court erred simply by failing to use any specific words, *see Montgomery*, 136 S. Ct. at 735, but the district court must explain its sentence sufficiently to permit meaningful review. *See Carty*, 520 F.3d at 992 ("Once the sentence is selected, the district court must explain it sufficiently to permit meaningful appellate review. . . . What constitutes a sufficient explanation will necessarily vary depending upon the complexity of the particular case. . . . "). When a district court sentences a juvenile offender in a case in which an LWOP sentence is possible, the record must reflect that the court meaningfully engaged in *Miller*'s central inquiry.

IV. Conclusion

We vacate Briones's sentence and remand for consideration of the entirety of Briones's sentencing evidence.

VACATED and REMANDED.

BENNETT, Circuit Judge, with whom IKUTA, Circuit Judge, joins, dissenting:

I respectfully dissent. The district court did not commit any constitutional error in imposing a life sentence, and I would therefore affirm.

I.

Riley Briones, Jr. was a founder and leader of a vicious gang called the Eastside Crips Rolling 30's. Briones helped plan and carry out a series of violent crimes committed by the gang on the Salt River Indian Reservation in 1994 and 1995. Briones's most serious crime, committed less than one month before his eighteenth birthday, was the planned robbery and murder of a Subway employee.[1]

On May 15, 1994, Briones drove four other gang members, one armed with a gun, to the Subway restaurant and waited in the vehicle while the others entered the restaurant. Prior to the murder, the gunman returned to the car and conferred with Briones, then returned to the restaurant and shot the employee in the face, and then shot him several more times as he lay injured or dying on the floor.[2] The conspirators stole a bank bag containing $100 (plus the food that they had ordered). One testified that after they returned to the car with the proceeds, Briones instructed another to grab a rifle from the backseat and shoot a maintenance

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[1] As the district judge stated at the sentencing at issue in this case: "The murder of the [Subway] clerk was planned. It wasn't an accident, it wasn't unexpected."

[2] The district judge stated at sentencing: "I don't know what other conclusion can be drawn than that the defendant was involved in the final decision and encouraged the shooter to pull the trigger."

worker who had been working in front of the Subway when they arrived. Though they searched for the worker to kill him as Briones had instructed, fortunately they did not find him.

Three weeks later—one day before Briones's eighteenth birthday—he and other gang members conspired to burn down the family residence of a rival gang member. Briones personally constructed the Molotov cocktails that another gang member used to firebomb the house. Luckily, the family inside—including a ten-year-old asleep on a couch—was not harmed.

Briones (now having reached the age of majority) and other gang members again decided to burn down the same rival gang member's home. Concerned that the fire department could thwart their plans, this time they decided to first start diversionary fires to lower the risk that the blaze at the targeted home would be prematurely contained.[3] Briones drove other gang members to two abandoned buildings, where they started the diversionary fires. With the first step of their scheme completed, Briones then drove his co-conspirators to their rival's home, which had survived the first firebombing. Briones personally constructed the five Molotov cocktails that were used to start one of the diversionary fires and to firebomb the home, and he also provided the gasoline used to start the second diversionary

[3] There is no evidence in the record that Briones or his co-conspirators were targeting the many families in nearby houses—their actual target lived in the firebombed home. Neighbors were merely potential collateral damage.

fire. Many people, of course, could have been killed, including two children inside the firebombed home. Again, thankfully, no one was killed.

Attempt two having failed, Briones moved on to attempt three about a month later. Briones helped plan a drive-by shooting of the same home. Though Briones was neither the driver nor the shooter, he and another gang member went to Briones's home to pick up the assault rifle used in the shooting. Afterward, Briones wiped the fingerprints off the assault rifle and directed other gang members to discard the shell casings and drop off the stolen car used in the shooting in an isolated place. Again, those inside the home during the shooting were unharmed, though not due to any lack of trying by Briones.

In 1995, Briones violently assaulted a member of his gang in order to stop him from speaking to law enforcement about the Subway murder. Briones broke a beer bottle on the victim's face and pistol-whipped his head. The victim testified at trial that Briones knocked him unconscious, and when he regained consciousness, he overheard Briones and others discussing "how they [were] going to dispose of [him]." That victim escaped and eventually cooperated.

At trial, the government presented evidence that the gang planned to blow up the Salt River Police Department and kill a tribal judge, federal prosecutors, and Salt River Police investigators. Briones and two others followed one investigator to lunch but did not shoot him because there were too many witnesses. The government also received information that at Briones's direction gang members practiced shooting at objects from a hilltop to simulate shooting from the roofs of

buildings near the federal building. The government received information that while in jail, Briones carved gang graffiti into the door of a jail cell and discussed plans to escape.

Briones was convicted of all charged offenses, including felony murder, arson, assault, and witness tampering. At his original sentencing in July 1997, almost three years after the Subway murder, Briones continued to deny responsibility for his crimes. The district court sentenced Briones to the then-mandatory guidelines sentence of life imprisonment without parole on the felony murder count.[4]

Briones's original sentence was vacated in light of *Miller v. Alabama*, 567 U.S. 460 (2012). During resentencing, Briones argued that the sentencing guidelines, which recommend a life sentence in his case, should be set aside under *Miller*. He also argued that an appropriate sentence would be 360 months "based on the evidence in mitigation" he would present, including relating to the "hallmarks of youth" identified by *Miller*.[5]

The resentencing record before the district court was comprehensive. It included the transcript of Briones's original sentencing, resentencing memoranda submitted by the parties, testimony from Briones and his wife at the resentencing hearing, arguments from coun-

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[4] As noted by the majority, the only issue before us is Briones's sentence for his felony murder conviction. Maj. at 7 n.1.

[5] I question whether Briones appropriately raised the specific argument below that he now raises on appeal—that it would be constitutional error for the court to impose a life without parole sentence because his crimes do not reflect "permanent incorrigibility." I would affirm regardless.

sel during the resentencing hearing, the presentence report (PSR)—which had been revised to include new information since Briones's incarceration—and letters on behalf of Briones and the victim questionnaires that were attached to the PSR. The district court adopted the findings in the PSR, and Briones made no objections to the PSR.

After considering all of the information in the record, the district court determined that a life without parole sentence was appropriate.

> [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. This robbery was planned, maybe not by the defendant but he took over and was all in once the plan was developed. He drove everybody there. He appeared to be the pillar of strength for the people involved to make sure they executed the plan. The murder of the clerk was planned. It wasn't an accident, it wasn't unexpected. Although the defendant did not pull the trigger, he was in the middle of the whole thing. He stayed in the car, apparently, to avoid responsibility.
>
> And circumstantially, at least, it appears that defendant was involved in the final decision to kill the young clerk. Eschief came out to the car and spoke to him and walked right back in and shot him in the head. He spoke to the defendant right before he

> pulled the trigger. I don't know what other conclusion can be drawn than that the defendant was involved in the final decision and encouraged the shooter to pull the trigger.
>
> All indications are that defendant was bright and articulate, he has improved himself while he's been in prison, but he was the leader of a gang that terrorized the Salt River Reservation community and surrounding area for several years. The gang was violent and cold-blooded.
>
> Having considered those things and all the evidence I've heard today and everything I've read, . . . it's the judgment of the Court that [Briones] is hereby committed to the Bureau of Prisons for a sentence of life.

II.

A.

Briones argues that, under *Miller*, the district court committed constitutional error by imposing a life without parole sentence. We normally review "de novo the constitutionality of a sentence." *United States v. Estrada-Plata*, 57 F.3d 757, 762 (9th Cir. 1995).[6] Assuming de novo review applies, I conclude that the district court did not commit any constitutional error and

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[6] If Briones failed to properly raise the specific constitutional argument that he asserts on appeal, we would apply plain error review. *See United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc) (plain error review applies where an individual fails to raise the constitutional error in the district court). "Plain error is '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *Id.* (quoting *United States v. Cotton*, 535 U.S. 625, 631 (2002)). Because the district court did not err at all, it obviously did not plainly err.

imposed a permissible sentence supported by the record.

B.

The district court fully complied with the requirements in *Miller*. The Court in *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. After analyzing its precedent, the Court determined that a sentencer "must have the opportunity *to consider* mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489 (emphasis added). The Court then concluded that "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes . . . violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Id.*

The Court noted, however, that a life sentence without the possibility of parole for juveniles in homicide cases *is* a permissible sentence. *Id.* at 480. And the Court offered explicit guidance on what is required to properly impose life sentences for juveniles: The Court's decision "*mandates only* that a sentencer follow a certain process—*considering* an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 483 (emphases added).

Consequently, *Miller* does not require a sentencer to make any explicit findings before imposing a life sentence on a defendant who was a juvenile at the time of the offense. *Miller* requires a sentencer to "consider,"

"examine," or "take into account how children are different." *Id.* at 480, 483, 489. The Court makes clear throughout its opinion that nothing more is required. *See, e.g.*, *id.* at 478-80 (explaining that "a sentencer *should look* at such facts," "a sentencer *needed to examine* all these circumstances," and "we require [a sentencer] to *take into account* how children are different" (emphases added)).

In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court clarified the requirements under *Miller*. There, the Court determined that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734. The Court ultimately held that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." *Id.* at 732. But *Montgomery* did not bar life without parole sentences in murder cases and did not change what a sentencer must do before imposing such a sentence on a defendant who committed the murder as a juvenile. Indeed, *Montgomery* confirmed that there is no factfinding requirement before imposing such a sentence. *Id.* at 734-35.

In sum, *Miller*, as clarified by *Montgomery*, requires a sentencer "to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence," 136 S. Ct. at 734, and, if life without parole is imposed, it must be proportionate. That is, the circumstances must support that the juvenile offender's "crimes reflect permanent incorrigibility," *id.*, not "transient immaturity," *id.* at 735. Importantly, *Miller* does not require a sen-

tencer to make findings that a juvenile offender is permanently incorrigible before imposing a life sentence without parole.

The district court here complied with *Miller*. First, there is no doubt that the district court was fully aware of *Miller*'s requirements. Indeed, *Miller* was the sole reason Briones was resentenced. The parties' memoranda cited *Miller* throughout. Briones's memorandum explicitly set forth the "hallmarks of youth" that the court must consider before imposing a life without parole sentence, and the government's memorandum, quoting *Miller*, highlighted that the court's task was to consider whether Briones's crimes reflect "unfortunate yet transient immaturity" or "irreparable corruption." And during the resentencing hearing, counsel for both parties focused their arguments on *Miller*'s requirements.

With the correct standards in mind, the district court did exactly what *Miller* requires—it considered Briones's "youth and attendant characteristics." 567 U.S. at 483. We know this because the district court explicitly stated that it considered Briones's "youth, immaturity, [and] adolescent brain at the time," and other evidence attendant to his youth, including "the history of [his] abusive father" and Briones's "constant abuse of alcohol and other drugs." We also know that the district court considered Briones's post-incarceration efforts at rehabilitation because the court expressly stated that Briones has "been a model inmate up to now" and "[Briones] has improved himself while he's been in prison." The district court further stated that it adopted the findings in the PSR, which contained infor-

mation about Briones's youth and post-incarceration rehabilitation efforts. Thus, contrary to the majority's opinion, the district court very clearly considered Briones's youth, youth-related characteristics, and post-incarceration rehabilitation efforts.[7]

The district court therefore was aware of and applied the appropriate standards announced in *Miller*. The record also supports that the district court imposed a permissible sentence. The district court found that

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[7] The majority criticizes the sentencing judge's remarks about Briones's crime and history of gang-related violence and his statement that "some decisions have lifelong consequences." Maj. at 16-17. The majority claims that these remarks demonstrate that the district court "focused on the punishment warranted by the terrible crime . . . rather than whether Briones was irredeemable." Maj. at 17. But the majority's conclusion completely ignores the sentencing judge's express statements that demonstrate he did in fact consider Briones's post-incarceration efforts at rehabilitation. The majority also criticizes the sentencing judge's remarks about factors he considered in mitigation. Maj. at 17. But the remarks made by the district court that the majority criticizes actually demonstrate that the district court considered proper information. *See Miller*, 567 U.S. at 489 ("[A] judge or jury must have the opportunity to consider *mitigating circumstances* before imposing the harshest possible penalty for juveniles.") (emphasis added); 18 U.S.C. § 3553(a) ("The court, in determining the particular sentence to be imposed, shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant[.]"). Further, the district court's statement that "some decisions have lifelong consequences" is entirely consistent with and necessarily follows from *Miller*, as *Miller* recognized that life without parole remains a permissible sentence for some juvenile offenders. 567 U.S. at 480. Thus, some crimes committed by some juveniles *will* have lifelong consequences.

Briones was a founding member and leader of an extraordinarily violent gang.[8] The robbery and murder of the Subway employee was planned and brutal. Although Briones did not pull the trigger, as the district court found, he "was involved in the final decision [to kill the employee] and encouraged the shooter to pull the trigger." Moreover, he was only twenty-three days shy of his eighteenth birthday when he participated in the murder and instructed his subordinates to murder a witness. And the day before his eighteenth birthday he firebombed a home without any regard for the death and damage it might cause. Even after he reached the age of majority, he risked wide-scale death and destruction through another firebombing, a drive-by shooting, and gang leadership. Many could have died from his actions—only one was proven to have.

Though Briones had the opportunity to express remorse at his original sentencing three years after the murder, he continued to deny responsibility for his crimes. During the resentencing hearing, government counsel stated that he had met with Briones *the day before the hearing*—almost twenty-two years after the murder—and even then Briones failed to accept responsibility and minimized his role in the murder and within

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[8] The district court described the gang as "violent and cold-blooded." Several of Briones's co-defendants were convicted of conspiracy to participate in a racketeering enterprise, i.e., the Eastside Crips Rolling 30's gang. The indictment described the gang as a "criminal organization" that "engaged in acts of violence, including murder, attempted murder, assault, arson, robbery, and intimidation of witnesses." Prospective gang members had to "carry out a violent act to prove [their] worth," and there was a group within the gang known as the "Skins Killing Slobs" or "Dark Army," whose job was to "assassinate anyone who posed a risk" to the gang.

the gang. When Briones testified at his resentencing hearing, he still maintained that he was "surprised" when he heard the gunshots that killed the Subway employee, and still denied that he was a leader in the gang. The district court's factual findings to the contrary were not clearly erroneous. When deciding to impose a sentence of life without parole, the district court expressly stated that it considered this information: "Having considered . . . all the evidence I've heard today [during the resentencing hearing] and everything I've read . . . [Briones] is hereby committed to the Bureau of Prisons for a sentence of life." As there is no requirement under *Miller* that the district court make any specific findings before imposing a life without parole sentence, there is no error here—constitutional, plain, or otherwise.

Thus, despite evidence of Briones's rehabilitation, youth when the heinous crimes were committed, and youth-related characteristics, the record supports that Briones's crimes reflect permanent incorrigibility, as opposed to transient immaturity. The district court therefore imposed a permissible sentence. Notably, the majority does not conclude that a life without parole sentence is impermissible in this case. Instead, although the majority claims otherwise, the majority's opinion vacates the district court's sentence because the district court failed to find that Briones was permanently incorrigible. But as discussed above, there is no requirement for the district court to make any specific findings before imposing a life without parole sentence. In short, the majority, citing *Montgomery*, states that it "do[es] not suggest the district court erred simply by failing to use any specific words," Maj. at 19. But in clear contravention of *Montgomery*, that is precisely

why it has reversed. We remand for the district court to do again what it has already done.

Because the district court complied with *Miller*'s requirements and imposed a permissible sentence supported by the record, I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-10150
D.C. No. 2:96-cr-00464-DLR-4

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RILEY BRIONES, JR., AKA UNKNOWN SPITZ,
DEFENDANT-APPELLANT

Argued and Submitted: Aug. 15, 2017
San Francisco, California
Filed: May 16, 2018

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

OPINION

Before: DIARMUID F. O'SCANNLAIN and JOHNNIE B. RAWLINSON, Circuit Judges, and DAVID A. EZRA,* District Judge.

Opinion by Judge RAWLINSON; Partial Concurrence and Partial Dissent by Judge O'SCANNLAIN

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* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

RAWLINSON, Circuit Judge:

We must decide whether the district court appropriately rejected a juvenile offender's argument that he should not receive a sentence of life without parole.

I

A

Riley Briones, Jr. was a founder and leader of a gang styled the "Eastside Crips Rolling 30's." Briones was involved in and helped to plan a series of violent crimes committed by the gang on the Salt River Indian Reservation. As a result of these crimes, on October 23, 1996, Briones and four other members of the gang were indicted on federal charges including felony murder, arson, assault, and witness tampering.

The most serious of the crimes was a murder committed on May 15, 1994, when Briones was seventeen. According to evidence presented at trial, Briones and fellow gang members planned to rob a Subway restaurant knowing that there would be only one employee present. Briones drove four other gang members to the restaurant, including one armed with a gun, and parked his car outside while the other four went in to rob the store. They ordered food from the lone employee, and while it was being prepared, the gunman returned to the car to speak with Briones, then went back into the restaurant, shot the clerk in the face, and then shot him several more times on the floor. With the cash register locked, the gang members were able to steal only a bag with $100 and the food they had ordered. One of the gang members, who eventually cooperated with the government, testified that after they got back in the car, Briones looked for a maintenance man whom

he thought had seen them. According to the cooperating witness, Briones instructed the other gang members to shoot the maintenance man.

Three weeks later, Briones helped plan to firebomb a rival gang member's home and prepared the Molotov cocktails to be used. Although Briones was not the one to throw them, a fellow gang member did, setting fire to a house with a family inside, including an eleven-year-old girl. Fortunately, the child was not harmed. Several months later, the gang decided to try firebombing the same home again. Briones once more provided Molotov cocktails and drove other gang members to a kindergarten and an abandoned trailer house to set diversionary fires. Briones then drove them to the rival gang member's home, which they firebombed. Again, fortunately, the family was unharmed. Another month later, Briones helped plan a drive-by shooting of the same home, although he was neither the driver nor the shooter.

Over the next year, Briones continued to participate in gang-related crimes. He pistol whipped a member of his gang who revealed he knew about the Subway murder. That gang member managed to escape and eventually cooperated with authorities. When other gang members committed another drive-by shooting of a home with a mother and child inside, Briones made sure the culprits disposed of their clothes and accounted for the shell casings. At trial, the government also presented evidence that Briones discussed escaping from custody, that he carved gang graffiti into the door of a jail cell, and that he discussed plans to blow up the Salt River Police Department and to kill a tribal judge, federal prosecutors, and Salt River Police investigators.

Briones was arrested on December 21, 1995. He was one of five co-defendants, each of whom was made a plea offer of twenty years in prison. Briones declined the offer, in part because his father (one of the co-defendants) would not take the deal. Ultimately, Briones was convicted of all charged offenses. At the original sentencing in July, 1997, Briones continued to deny responsibility for the crimes. As part of its sentencing determination, the district court found that Briones was the leader of the gang, and imposed the then-mandatory guidelines sentence of life imprisonment without parole on the felony murder count. Briones was also sentenced to ten and twenty years, respectively, to run concurrently on the non-homicide counts, which he has since served.

B

Fifteen years after Briones's original sentencing, the Supreme Court held in *Miller v. Alabama* that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. 460, 479 (2012) (citation omitted). In light of that holding, a sentencing judge is required "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480 (footnote reference omitted). On the basis of *Miller*, Briones filed a motion under 28 U.S.C. § 2255 to vacate his original mandatory life sentence, which the district court granted in July, 2014.

At his resentencing, Briones requested a sentence of 360 months' imprisonment rather than a life sentence. He argued that the sentencing guidelines, which recommend a life sentence in his case, should be set aside in

light of *Miller*. Invoking the "hallmarks of youth" identified by *Miller*, Briones argued that a life sentence was inappropriate in his case. He argued that his gang participation was a product of youthful immaturity and a desire to have a "feeling of banding together." He pointed to a dysfunctional childhood environment, including parental drug and alcohol abuse, a history of family criminality (both his father and brother were also in the gang and were co-defendants), dropping out of school in the tenth grade, and difficulties as a Native American attending school off the reservation. He said that he was poorly situated to aid in his own defense or to contradict his father when he refused to take a plea deal that would have resulted in a much lower sentence. To mitigate his culpability in the crime, he observed that the robbery scheme was not his idea and that he was not the shooter. Finally, he pointed to evidence of rehabilitation, including that in all his time in prison he had not been written up once for a disciplinary infraction, that he had no gang involvement, that he had been working continuously, and that he married his girlfriend with whom he has a now-adult child, and that he sees his wife regularly.

Both Briones and his wife testified at the resentencing hearing and discussed the difficulties of his childhood. Briones testified that he started drinking around age 12 and as a teenager was regularly drunk in addition to using cocaine and LSD. He wrote a letter to express "[g]rief, regret, sorrow, pain." He stated:

> I don't know how but I know I have to apologize for everything and I apologize all the time to my family because they're there, and my apology goes out to also to the [victim's] family and to all the families, not

> just for what happened but for the other changes that occurred in my life.

Although Briones told the court that he "want[ed] to express remorse" and "want[ed] to express grief," he never actually took responsibility for any of the crimes of which he was convicted.[1]

The government countered that Briones deserved a life sentence. The government acknowledged that under *Miller*, "a life sentence for a juvenile is inappropriate in all but the most egregious cases," but argued that "this is the most egregious case." Despite recognizing that Briones was "really doing well in prison," the government noted that Briones expressed remorse, but failed to accept responsibility, and continued to minimize his role in the murder and in the gang. Specifically, the government contended that it was not credible that Briones was unaware of the gang members' intention to murder the Subway clerk, and circumstantial evidence suggested Briones himself may have ordered the murder, because the gunman shot the clerk immediately upon reentering the restaurant after speaking with Briones outside. The prosecutor described Briones's gang as "the most violent gang that I have ever been involved in prosecuting," including the Hells Angels. Finally, the government pointed out that although Briones was a juvenile, he was only barely—he was over seventeen years and eleven months old when the murder occurred—and he continued to commit violent crimes

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[1] The dissent's statement that Briones "expressed remorse repeatedly and at length," *Dissenting Opinion*, p. 30, is simply not supported by the record.

for another year and a half, stopping only when he was arrested.

After hearing from the parties, and "[u]sing the guidelines as a starting point," the district court calculated a sentencing range of life imprisonment for Briones's felony murder conviction, without objection from counsel. The court noted that, "in addition to the presentence report, I've considered 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 the defendant." The court found that "[a]ll 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." Briones "appeared to be the pillar of strength for the people involved to make sure they executed the plan [to murder the victim]," and he "was involved in the final decision to kill the young clerk." The court expressed that "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."

Ultimately, the district court announced that, "[h]aving considered those things and all the evidence I've heard today and everything I've read . . . it's the judgment of the Court that Riley Briones, Jr. is hereby committed to the Bureau of Prisons for a sentence of life."

Because the federal system does not permit parole or early release from life sentences, *see* 18 U.S.C. § 3624, Briones's sentence is effectively for life without the possibility of parole. *See United States v. Pete*, 819 F.3d 1121, 1126, 1132 (9th Cir. 2016).

Briones timely appealed.

II

The district court's sentencing decision is reviewed for abuse of discretion, and "only a procedurally erroneous or substantively unreasonable sentence will be set aside." *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (citing *Rita v. United States*, 551 U.S. 338, 341 (2007)). The factual findings underlying the sentence are reviewed for clear error. *United States v. Stoterau*, 524 F.3d 988, 997 (9th Cir. 2008). "When a defendant does not raise an objection to his sentence before the district court, we apply plain error review. . . . " *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009) (citation omitted).

A

Briones first contends that the district court erred by calculating and using the sentencing guideline range. He argues that, in light of *Miller*, "a court should no longer start with a life sentence and work down, which is precisely what the district court did here." Instead, says Briones, "a court must start from the presumption that a life sentence should be uncommon" so that using the guidelines as "the starting point was error that entitled Mr. Briones to a new sentencing."

As the Supreme Court has repeatedly held, however, "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range,"

and "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added) (citing *Rita* at 347-48). Although "[t]he Guidelines are not the only consideration," and a sentencing court "may not presume that the Guidelines range is reasonable," the district court's "individualized assessment based on the facts presented" must follow a correct guidelines calculation. *Id.* at 49-50.

Briones can point to no language in *Miller* or subsequent case law that overrules those clear instructions. We therefore see no error in the district court following the sentencing process prescribed by the Supreme Court. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that precedent is controlling unless subsequent authority has "undercut the theory or reasoning underlying the prior . . . precedent in such a way that the cases are clearly irreconcilable.").

B

Briones next argues that the district court erred by failing to "appropriately consider the[] factors" identified in *Miller* for sentencing juvenile offenders. He asserts that the district court "merely recite[d] 'youth' as a mitigating circumstance" when it was in fact required substantively to "consider the mitigating quality of youth." He argues that the court failed to give the evidence of his rehabilitation "the weight *Miller* requires" and instead "focused on the facts of the case." Briones contends that "[t]he critical question should have been whether Mr. Briones had the capacity to change" and

that the district court gave "short shrift" to "the evidence of [his] maturation and change in demeanor." He also points to evidence he presented of his immaturity, dysfunctional family environment, and inability to aid in his own defense, which he says the district court "failed to properly assess" in evaluating "the hallmarks of youth that must be considered before sentencing a juvenile to spend the rest of his life in prison."

In *Miller*, the Supreme Court held unconstitutional mandatory life-without-parole sentences for juvenile offenders and, in so doing, enumerated a series of factors sentencing courts should consider:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects 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. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

567 U.S. at 477-78.

In *Montgomery v. Louisiana*, the Supreme Court elaborated upon the *Miller* holding to clarify that it "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. 718, 734 (2016) (quoting *Miller*, 567 U.S. at 472). Therefore, "[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." *Id.* (citation and internal quotation marks omitted). The Court concluded that "sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects *irreparable corruption*" and that *Miller* "bar[s] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* (citation and internal quotation marks omitted). "*Miller* made clear that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.'" *Id.* at 733-34 (quoting *Miller*, 567 U.S. at 479).

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 on a juvenile offender. We also agree that, as part of its inquiry into whether Briones was a member of the class of permanently incorrigible juvenile offenders, it had to take into account evidence of his rehabilitation. However, we disagree that the district court failed to do so.

We resolve these issues through the lenses of plain error and abuse of discretion review—plain error review

because Briones failed to object at sentencing, and review for abuse of discretion because of the "significant deference" we afford district courts' sentencing determinations. *United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir. 2017) (citation omitted). Nothing in *Miller* or *Montgomery* altered these longstanding principles.

In order for a decision to constitute plain error, the error must be so obvious that a district court judge should be able to avoid the error without the benefit of an objection. *See United States v. Klinger*, 128 F.3d 705, 712 (9th Cir. 1997).

In the sentencing context, a district court judge abuses his discretion "only if the court applied an incorrect legal rule or if the sentence was illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Martinez-Lopez*, 864 F.3d at 1043 (citation omitted). Briones' claim cannot survive this double layer of deferential review.[2]

The gist of Briones's appeal is that the district court failed to make an explicit finding that Briones was "incorrigible," that the district court failed to adequately consider the "hallmarks of youth" discussed in *Miller*, and that the district court did not adequately consider Briones's rehabilitation. We are not persuaded.

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

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[2] Our colleague in dissent criticizes the majority for following this rule. *See Dissenting Opinion*, p. 30 (objecting to the reference to reasonable inferences from the record).

hallmarks, reflected in the following statements from Briones's counsel, and encompassing rehabilitation:

- [If] we look at the *Miller hallmarks of youth*, . . . Briones . . . showed immaturity . . .
- So what we have here is classic immaturity, the feeling of banding together to—with his friends to form a gang is— . . . something that happens to especially young guys when they are 15, 16, 17 years old, and that is a toxic thing when you deal with impetuosity and the failure to appreciate risk and consequences.

  . . .

  This is a *hallmark of youth*, the decision to join a gang, to go along with your buddies . . .
- And what is one of the *hallmarks of* . . . young guys as they start to mature . . . is the finding of your place in the world, and not only that finding, your identity . . . [H]e was already struggling with his identity as a Native American and how that fit beautifully on to the reservation and not so well on to the Mesa school system.
- And so part of this *hallmark of youth* . . . is something that either he—was not explained properly or he didn't understand it, which indicates that—an inability to deal with the case.

  . . .

  So he was making bad choices because he was a teenager who didn't understand the risks and consequences of his behavior.

  . . .

> [F]inally the *Miller hallmark of youth* is that a mandatory life sentence disregards the potential for rehabilitation.
>
> . . .
>
> So in a sense prison has been good to Riley Briones because it has changed him, allowed him to change himself, but he does not need to die in prison, Judge. He has rehabilitated himself.

(Emphases added).

Defense counsel also emphasized to the court that Briones had no write-ups in prison, and had become a family man.

The government acknowledged that Briones was "doing well in prison," but expressed disappointment that Briones had never accepted responsibility. From the government's perspective, Briones minimized both his role in the Subway murder and his role in the gang. The government recounted in detail testimony from co-defendants explaining that Briones was a leader of the gang, and instructed them to find and kill a potential witness to the Subway murder.

The government also pointed out that Briones was only twenty-two days shy of his eighteenth birthday when the Subway murder was committed, that Briones continued his crime spree for another eighteen months, and that Briones scratched gang graffiti into his cell door three years after the Subway murder. According to the government, Briones's actions were "not indicative of an individual who is so immature that he didn't know what he was doing." The government argued that Briones's conduct was not sufficiently mitigating to warrant a change in Briones's sentence.

After hearing from defense counsel and the government, the court demonstrated that it had heard and considered all the information presented and remarks made during the sentencing hearing, 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.[3]

Nevertheless, the judge determined that after considering "all the evidence . . . and everything the judge had read," a life sentence for Briones was warranted.

Admittedly, the district court did not explain at length why consideration of Briones's youth failed to persuade the court to impose a sentence of less than life imprisonment. But he was not required to do so. Nothing in the *Miller* case suggests that the sentencing judge use any particular verbiage or recite any magic phrase. *See Montgomery*, 136 S. Ct. at 735 (noting that *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility). Rather, in the Supreme Court's own words, the sentencing judge is "require[d] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*,

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[3] These detailed arguments definitely rebut the dissent's "suggestion" that the "district court may have misunderstood the nature of the inquiry Briones was asking it to make." *Dissenting Opinion*, p. 29. Our colleague would have preferred different phrasing from the district court, *see id.*, pp. 29-30, but no such requirement can be gleaned from *Miller* or *Montgomery*.

567 U.S. at 480. We can rest assured that the district court judge followed this mandate because he said so on the record—that he had considered everything he heard and read in conjunction with the sentencing hearing, including counsel's impassioned arguments regarding how the "hallmarks of youth" particular to Briones counseled against imposition of a life sentence.[4]

Fairly read, Briones's statements could reasonably be interpreted as not taking responsibility for his prior criminal activity, in contravention of one of the basic tenets of rehabilitation. *See, e.g.*, *In re Arrotta*, 208 Ariz. 509, 515 (2004) (en banc) ("Accepting responsibility for past misdeeds constitutes an important element of rehabilitation. . . . "). As we explained in *United States v. Carty*, 520 F.3d 984, 995 (9th Cir. 2008) (en banc), when the district court has listened to and considered all the evidence presented, the district court is not required to engage in a soliloquy explaining the sentence imposed.

In *Rita*, 551 U.S. at 358, the Supreme Court, also recognized that brevity does not equal error in the sentencing context. Upholding a sentence against a challenge that the judge's statement of reasons was too brief, the Supreme Court observed:

> In the present case the sentencing judge's statement of reasons was brief but legally sufficient. . . .

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[4] Our colleague in dissent would have the district court expound more on its reasoning, to the extent of remanding for the district court to do so. *See Dissenting Opinion*, pp. 31-32. Tellingly, no case authority is cited to support this proposition. Indeed, *Miller* and *Montgomery* stand for the exact opposite premise. *See Montgomery*, 136 S. Ct. at 735 (noting that *Miller* imposed no factfinding requirement).

> The record makes clear that the sentencing judge listened to each argument. The judge considered the supporting evidence [and] simply found these circumstances insufficient to warrant a [lower sentence]. . . . He must have believed that there was not much more to say.

Id.

The Supreme Court "acknowledge[d] that the judge might have said more" but explained that where "the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively." *Id.* at 359.

Reviewing for plain error, we conclude that the sentencing remarks in this case fell well within the contours articulated by the Supreme Court in *Rita*, reflecting the judge's consideration of and reliance upon the record. *See id.* at 358-59; *see also United States v. Kleinman*, 880 F.3d 1020, 1041 (9th Cir. 2018), *as amended* ("A sentencing judges does not abuse its discretion when it listens to the defendant's arguments and then simply finds the circumstances insufficient to warrant a [lower sentence]. The court listened to [defendant's] arguments, stated that it reviewed the statutory sentencing criteria, and imposed a within-Guidelines sentence; failure to do more does not constitute plain error.")[5] (citations and internal quotation marks omitted).

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[5] This authority negates the dissent's argument that the sentencing judge "failed to provide an adequate explanation of its sentence under the same standard that would apply to any sentencing." *Dissenting Opinion*, p. 35. Under the applicable standard, the sentencing judge's remarks were adequate. *See Kleinman*, 880 F.3d at 1041.

On this record, we cannot honestly say that the district court's imposition of a sentence of life imprisonment was "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Martinez-Lopez*, 864 F.3d at 1043 (citation omitted). In other words, no error occurred and without error there can be no plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009) (explaining that "there must be an error" before plain error review is invoked).

Perhaps the outcome of this appeal would be different if we were reviewing *de novo*. But we are not reviewing *de novo*. We are reviewing through the doubly deferential prisms of abuse of discretion and plain error standards of review.[6] With those standards of review firmly in mind, we conclude that the district court's pronouncement of sentence was adequate.[7] *See Rita*, 551 U.S. at 358; *see also Carty*, 520 F.3d at 995; *Kleinman*, 880 F.3d at 1041.

Our colleague in dissent relies upon the unpublished disposition of *United States v. Orsinger*, 698 F.App'x

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[6] Our colleague in dissent seeks to avoid plain error review despite a clear record showing a lack of objection from Briones in the district court to the asserted absence of an adequate statement of incorrigibility from the sentencing judge. *See Dissenting Opinion*, pp. 33-34 & n.2. We are not persuaded. *See Hammons*, 558 F.3d at 1103 (applying plain error review when no objection was raised).

[7] Our colleague in dissent remarks that "we are ill-suited as an appellate court to say that a finding of incorrigibility is the only reasonable one." *Dissenting Opinion*, p. 33. However, it is not our role to say whether the district court's finding was "the only reasonable one." Rather, our sole role is to determine whether the district court's finding was *a* reasonable one. *See Martinez-Lopez*, 864 F. 3d at 1043 (noting that a district court abuses its discretion if it imposes a sentence that is "illogical" or "implausible.")

527 (9th Cir. 2017) to support the argument that the district court should have said more. Not only is this case non-precedential and non-binding, it is not even persuasive. In *Orsinger*, we affirmed a sentence for the same reason we should affirm the sentence in this case—because of the deference we afford sentencing courts under the abuse of discretion standard of review. *See id.* at 527 (referencing the judge's choice between "two permissible views of the evidence"); *see also Gall v. United States*, 522 U.S. 38, 51 (2007) (discussing the deference due to a district court's sentencing decision).

Ultimately, the majority is of the view that affirming the sentence imposed by the district court conforms to our precedent and that of the United States Supreme Court. In the cogent words of our esteemed colleague Judge Farris, "[m]y [colleague] and I differ on what is the appropriate appellate function. He would retry. I am content to review." *Li v. Ashcroft*, 378 F.3d 959, 964 n.1 (9th Cir. 2004).

III

Briones makes two further arguments that he is *categorically* ineligible for a life-without-parole sentence, implying that we should instruct the district court on remand that he may not receive that sentence under any review of the record. First, he argues that a life sentence may not be imposed "on a juvenile offender who did not actually kill," so he may not receive that sentence because he was not the gunman. Second, he argues that the Eighth Amendment prohibits life sentences for juvenile offenders entirely.

Both arguments are foreclosed by *Miller* and *Montgomery*. *Montgomery* specifically observed that "*Miller* . . . did not bar a punishment for all juvenile offenders," and that although life without parole is now limited to "the rare juvenile offender," those rare offenders "can receive that . . . sentence." *Montgomery*, 136 S. Ct. at 734. *Miller* itself involved a defendant who did not fire the bullet that killed" the victim. *Miller*, 567 U.S. at 478. The Supreme Court did not say that he could not be sentenced to life without parole, but only that "a sentencer should look at" mitigating facts of youth "before depriving [the defendant] of any prospect of release from prison." *Id.* Given that *Miller* and *Montgomery* expressly envision that some juveniles may be sentenced to life without parole, including those who did not actually "fire the bullet," the district court could still constitutionally sentence Briones to life in prison.

AFFIRMED.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

As the majority opinion's detailed recitation of the facts makes clear, Riley Briones, Jr., participated in a cold-blooded murder and was a leader in a vicious gang, *see* Majority Op. Part I.A, so it is not difficult to understand why the district court considered a severe sentence appropriate. Notwithstanding the grievous nature of the crimes, however, the court was required to follow the Supreme Court's holding that the Eighth Amendment bars life-without-parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (citing *Miller v. Alabama*, 567 U.S. 460 (2012)).

I agree with the majority that nothing in *Montgomery* or *Miller* indicates that Briones is categorically ineligible for a life sentence simply because he is a juvenile who did not pull the trigger, *see* Majority Op. Part III, and I agree that the district court was correct to begin its sentencing process by calculating the Sentencing Guidelines range, *see id.* Part II.A. I cannot agree, however, with the majority's holding that the district court sufficiently considered Briones's claim that he was not in that class of rare juvenile individuals constitutionally eligible for a life-without-parole sentence. *See id.* Part II.B.

The majority reads too much into the district court's cursory explanation of its sentence, and it divines that the district court must have adopted the rationale for its sentence suggested by the government on appeal. Although a sentencing court need not pedantically recite

every fact and legal conclusion supporting its sentence, it must provide enough explanation for a court of appeals to evaluate whether or not the decision to reject a defendant's argument is consistent with law. The sparse reasoning of the district court in this case gives me no such assurance.

I respectfully dissent from Part II.B of the opinion and would remand for the limited purpose of permitting the district court properly to perform the analysis required by *Miller* and *Montgomery*.

I

The difficult question raised in this case is whether Briones is in fact one of those "rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734. Without any evident ruling on that question, the district court imposed a life sentence on Briones. As the majority indicates, because there is no parole in the federal system, that "sentence is effectively for life without the possibility of parole." Majority Op. at 10.

A

The majority is comfortable deferring to the district court's sentence because the court considered some of the "hallmark features" of youth identified by the Supreme Court in *Miller*. 567 U.S. at 477; *see* Majority Op. at 13-15. I agree that the court did so, which we know because it expressly said it considered "the defendant's youth, immaturity, [and] his adolescent brain at the time [of the crime]."

But 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*.

In *Miller*, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," explaining that a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 479-80. Left at that, *Miller* could be understood merely as a procedural requirement, mandating that sentencing courts must consider certain hallmark characteristics of youth and that they must be permitted to impose a sentence less than life. If that were all *Miller* meant, the district court likely would have complied with its dictates.

But the Supreme Court made clear in *Montgomery* that *Miller* stood for more. Beyond procedural boxes to check, *Miller* recognized a substantive limitation on who could receive a life sentence:

> *Miller* . . . 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. *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 (emphasis added) (internal quotation marks and citation omitted). In light of *Montgomery*, we know that "sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects *irreparable corruption*" and that *Miller* "bar[s] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes

reflect *permanent incorrigibility*." *Id.* (emphasis added) (internal quotation marks omitted).[1]

The heart of Briones's argument before the district court was that he could not be sentenced to life because he is not irreparably corrupt or permanently incorrigible. The "critical question" before the district court, then, was whether Briones had the "capacity to change after he committed the crimes." *United States v. Pete*, 819 F.3d 1121, 1133 (9th Cir. 2016).

B

Unfortunately, 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.

A sentencing court must, "at the time of sentencing, . . . state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). In elaborating on that statutory command, the Supreme Court has explained that "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). "[W]here the defendant or prosecutor presents nonfrivolous reasons for imposing a [non-Guidelines]

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[1] *Montgomery* was decided only two months before the district court resentenced Briones, and so Briones's arguments were framed in terms of *Miller*. That said, *Montgomery* was raised indirectly by Briones's counsel at sentencing, and Briones's interpretation of *Miller* as a substantive prohibition on life imprisonment for most juvenile offenders is the one that *Montgomery* confirmed to be correct.

sentence, . . . the judge will normally . . . explain why he has rejected those arguments." *Id.* at 357; *see also United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) ("A within-Guidelines sentence ordinarily needs little explanation *unless* a party has . . . argued that a different sentence is otherwise warranted." (emphasis added)).

1

Unlike the majority, I am not satisfied that the district court "set forth enough to satisfy the appellate court that he has considered the parties' arguments." *Rita*, 551 U.S. at 356. If anything, the record suggests that the district court misunderstood the applicable legal rule of *Miller*.

In explaining its decision to impose a life sentence, the district court indicated that it had "consider[ed] the history of [Briones's] abusive father, [Briones'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 that he's been a model inmate up to now." The court seemingly found those facts —which it considered to be "mitigation"—outweighed by the awfulness of the murder, Briones's role in it, and his leadership in a "violent and cold-blooded" gang. "Having considered those things," the district court imposed a "sentence of life."

All of those considerations are indeed relevant to selecting a proper sentence based on the sentencing factors of 18 U.S.C. § 3553(a). But they are not directly responsive to Briones's argument arising out of *Miller* that he is not within the class of the rare juvenile offend-

ers who are permanently incorrigible and hence constitutionally eligible for a life sentence. The 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," *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479-80), which requires a prospective analysis of whether Briones has the "capacity to change after he committed the crimes," *Pete*, 819 F.3d at 1133.

Nothing in the district court's explanation of its sentence bears directly on the question of whether Briones is irreparably corrupt. If anything, the sentencing transcript reveals factual findings that suggest Briones has demonstrated a capacity to change. The district court observed that Briones has "been a model inmate" and that he "has improved himself while he's been in prison." Perhaps, despite that promising behavior, the district court could have determined that countervailing evidence indicated that Briones is permanently incorrigible. But the transcript does not indicate that the district court made such determination.

More troubling, the transcript suggests that the district court may have misunderstood the nature of the inquiry Briones was asking it to make. *Miller* "rendered life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth," which the Supreme Court has instructed includes "the vast majority of juvenile offenders." *Montgomery*, 136 S. Ct. at 734. Yet the district court only considered the *Miller* hallmarks of youth as "mitigation," 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. If the district court fully grappled with *Miller*'s rule, one would think it would have spoken of "aggravating" evidence rather than "mitigation." Moreover, in explaining that Briones's crime justified a life sentence because "some decisions have lifelong consequences," the district court suggested it misunderstood *Miller* entirely. The point of *Miller* is that "juveniles have diminished culpability and greater prospects for reform." 567 U.S. at 471. That is why the sentencing analysis must be forward-looking and address the "capacity to change," *Pete*, 819 F.3d at 1133, not the static characteristics of the juvenile defendant at the moment of his criminal decisions. In fact, there are no forward-looking statements at all from the district court in its sentencing colloquy; the stated basis for the sentence was entirely retrospective.

2

To cure the deficiencies in the district court's explanation of the sentence imposed, the government asks us to infer that the district court must have found Briones incorrigible based on a lack of candor when he testified at the resentencing hearing. The majority jumps at this invitation, adopting the government's position to observe that "Briones' statements *could* reasonably be interpreted as not taking responsibility for his prior criminal activity, in contravention of one of the basic tenets of rehabilitation." Majority Op. at 19 (emphasis added).

The equivocal nature of the majority's statement is telling. Perhaps the district court *could* have thought that Briones failed to take responsibility for his actions, but nowhere in the district's court's statement of reasons for the sentence did it say as much. Although the

government and the majority offer one plausible interpretation of Briones's testimony, it is hardly the only one. In fact, when I read the transcript, I see much that could support a contrary finding that Briones expressed remorse repeatedly and at length.

Briones expressed regret for his actions. He admitted the key facts of the murder and subsequent crimes and admitted that "it's probably my fault when I thought about it." He explained that he regularly asks himself "why didn't I do something at that time, why . . . didn't I stop myself way before that, why didn't I do something at the court?" He explained that "the thing that haunted me so much about just living in prison was that" the murder victim was "a young Christian man," and that it "haunts me to have that on my hands." And he said, "I want to express remorse, I want to express grief."

Briones also expressed sympathy for those he had harmed. For instance, he explained that he did not believe the victim's family could ever forgive him because he was responsible for "a great offense that . . . is unrepaired." He explained that "now that I'm older . . . I witness not just in my own life people murdered and their killers get to go home," and he can "see[] people in pain when they've gone through their loss, [and] all of this had made me not only sympathize but to empathize with all of it." He said, "I know I have to apologize for everything and I apologize all the time to my family . . . , and my apology goes out . . . to the [victim's] family."

I do acknowledge that there are portions of the transcript from which one could infer a lack of candor. It is

true that Briones's testimony was not crisp and eloquent. And it is true that he continued to say that he "didn't think myself a leader" in the gang and that he continued to deny that the plan from the beginning was to murder the Subway clerk.

Perhaps, hearing all the testimony and weighing the countervailing inferences, the district judge could have concluded that Briones was insufficiently honest or that he failed to take responsibility for his crimes. Perhaps those findings could be evidence of incorrigibility.

But the district court never said any of that. All the reasons that it *did* give for the sentence were about the nature of the crime, not the subsequent lack of remorse or acceptance of responsibility. Reading a cold transcript, the majority is willing to conclude that Briones "never actually took responsibility for any of the crimes of which he was convicted." Majority Op. at 8. I am not willing to reach such a critical factual conclusion based on an ambiguous transcript, especially when the district court made no such factual finding.

The majority accuses me of retrying Briones's case rather than reviewing it as an appellate court should. *See* Majority Op. at 22. But it is the majority that has invented a basis for the sentence which cannot be found in the record. The reason courts of appeals accord great deference to a district court's sentencing decision is that "[t]he sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than . . . the appeals court." *Rita*, 551 U.S. at 357-58. Unlike the majority, I would take advantage of that expertise by remanding for an actual determination of Briones's incorrigibility rather

than attempting to divine one by reading a transcript through squinted eyes.

C

Another aspect of this case that gives me pause is that it is not obvious whether or not Briones fits within the class of juvenile offenders constitutionally eligible for a life sentence. If the only plausible reading of the record were that Briones is incorrigible, I could more easily assure myself that the district court reached that conclusion even though it did not specifically respond to the *Miller* argument. Looking at the record holistically, however, I cannot say that it *necessarily* betrays permanent corruption.

After *Graham v. Florida*, 560 U.S. 48 (2010), the only juvenile offenders eligible for a life sentence are those who committed a homicide. Criminal homicides will invariably be odious crimes, but the Supreme Court nonetheless instructed that only "the rarest of juvenile offenders" may receive a life sentence under the Eighth Amendment. *Montgomery*, 136 S. Ct. at 734. Here, we have a juvenile felony murder offender who helped to plan a robbery-murder, who drove the getaway car, and who then was a leader in a series of subsequent violent crimes. But like one of the defendants in *Miller* itself, Briones "did not fire the bullet that killed" the victim; and like the other defendant in *Miller*, although he was involved in "a vicious murder," Briones had a difficult upbringing replete with substance abuse. 567 U.S. at 478-79. Moreover, in this instance, we have a defendant whom even the district court called a "model inmate," which surely goes to the question of "whether [the defendant] *has* changed in some fundamental way since" the crime. *Pete*, 819 F.3d at 1133. The evidence

on incorrigibility is therefore mixed, and we are ill-suited as an appellate court to say that a finding of incorrigibility is the only reasonable one.

D

As a secondary basis for affirming, the majority leans heavily on the highly deferential plain error standard of review. *See* Majority Op. at 20. In arguing that such review should apply to this case, the majority analogizes to cases involving defendants making purely procedural arguments on appeal that district courts insufficiently explained otherwise permissible sentences.[2]

But here, 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*, a claim he *did* squarely argue before the district court, at length. The court's failure properly to explain its sentence requires remand *not* because it was procedural error, but rather because such failure prevents us from being able properly to review Briones's

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[2] Even if Briones were making a purely procedural objection based on the sufficiency of the district court's explanation of how it weighed the 18 U.S.C. § 3553(a) sentencing factors, our case law is not clear regarding what the proper standard of review would be. As the majority contends, in some of those cases, we have reviewed for plain error. *See, e.g.*, *United States v. Kleinman*, 880 F.3d 1020, 1040-41 (9th Cir. 2017); *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010). As happens too often, however, our court has not been consistent. *See, e.g.*, *United States v. Trujillo*, 713 F.3d 1003, 1008-11 & n.3 (not applying plain error review in a case where "[t]he district court did not address" the defendant's sentencing arguments). Because these cases are not relevant to considering Briones's substantive claim, however, we need not resolve this potential intra-circuit split.

substantive claim. As the majority acknowledges, a district court's sentence is invalid "if the court applied an incorrect legal rule." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir. 2017) (en banc); *see* Majority Op. at 14. Because the record does not allow us to determine whether the court did apply the correct legal rule, we should remand for that limited purpose.

II

A

I share the majority's concern that we ought not to conjure procedural sentencing hurdles unsupported by law. I am especially cognizant of this concern because other courts have read *Miller* and *Montgomery* to impose special procedural requirements well beyond what those opinions actually require. *E.g.*, *Commonwealth v. Batts*, 163 A.3d 410, 415-16 (Pa. 2017) ("recogniz[ing] a presumption against the imposition of a sentence of life without parole for a juvenile offender" that may be rebutted only if the government proves, "beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation").

But the district court's explanation of the sentence may be faulty without requiring that it utter any "magic phrase" to justify its sentence, Majority Op. at 18, and we need impose no special procedures simply because Briones was a juvenile when he committed the murder. Instead, I would simply enforce the requirements of 18 U.S.C. § 3553(c) so that we may properly evaluate Briones's *Miller* claim on appeal.

The error here was not that the district court failed to apply some procedure special to juvenile offenders.

Rather, the court failed to provide an adequate explanation of its sentence under the same standard that would apply to any sentencing. It erred because Briones argued that he could not constitutionally be given a life sentence, his arguments were "not frivolous," and the court did not squarely "address any of them, even to dismiss them in shorthand." *United States v. Trujillo*, 713 F.3d 1003, 1010 (9th Cir. 2013). 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 about the defendant's incorrigibility.

B

Comparing this case to another illustrates that we can reasonably expect more of the district court at sentencing without our being overly pedantic. In another case raising a *Miller* claim, submitted to our panel the same day that Briones's case was argued, the defendant-appellant had committed four murders as a juvenile—including two while facing trial—and in the process had disfigured or dismembered and then buried the victims' bodies. *See United States v. Orsinger*, 698 F. App'x 527, 527 (9th Cir. 2017) (unpublished). Two of the victims were a 63-year-old grandmother and her nine-year-old granddaughter, and the defendant had killed the little girl by hand, crushing her head with rocks. We affirmed the life sentence because the district court made clear it had grappled with the *Miller* claim. *See id.*

The fact that another defendant committed even more monstrous crimes than did Briones does not ameliorate the tragedy of an innocent clerk's death or the terror that Briones's gang inflicted on his community.

But in that second case with four gruesome murders, and where the defendant had continued to exhibit violence while incarcerated, the sentencing judge nevertheless properly evaluated the objection to a life sentence under *Miller*. That judge "recognize[d] that *Miller* permits life sentences for juvenile offenders only in 'uncommon' cases" and "made a finding that [the defendant] did indeed fit within that 'uncommon' class of juvenile offenders" to justify imposition of a life sentence. *Id.* (quoting *Miller*, 567 U.S. at 479).

That is not to suggest that the district judge in Briones's case could not justifiably impose the same sentence. It only demonstrates that—even in a case that much more obviously compels a conclusion that the defendant is incorrigible—a district judge can properly address a *Miller* claim without invoking any magic phrase. I would require the same of the district court in this case.

III

Although I concur in Parts I, II.A, and III of the majority opinion, I must respectfully dissent from Part II.B and the ultimate judgment. I would vacate the judgment of the district court and remand for resentencing.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 96-464-4-PHX-DLR

UNITED STATES OF AMERICA, PLAINTIFF

v.

RILEY BRIONES, JR., DEFENDANT

Phoenix, Arizona
Mar. 29, 2016
9:16 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Re-Sentencing)

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANTS:

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[105]

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Miss Liles, did you have anything else?

MS. LILES: No, Your Honor.

THE COURT: 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 [106] the plan. The murder of the clerk was planned. It wasn't an accident, it wasn't unexpected. Although the defendant did not pull the trigger, he was in the middle of the whole thing. He stayed in the car, apparently, to avoid responsibility.

And circumstantially, at least, it appears that defendant was involved in the final decision to kill the young clerk. Eschief came out to the car and spoke to him and walked right back in and shot him in the head. He spoke to the defendant right before he pulled the trigger. I don't know what other conclusion can be drawn than that the defendant was involved in the final decision and encouraged the shooter to pull the trigger.

All indications are that defendant was bright and articulate, he has improved himself while he's been in

prison, but he was the leader of a gang that terrorized the Salt River Reservation community and surrounding area for several years. The gang was violent and cold-blooded.

Having considered those things and all the evidence I've heard today and everything I've read, 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.

Upon release from imprisonment, the defendant shall be placed on supervised release for five years. While on supervised release, the defendant shall comply with the [107] standard conditions of supervision adopted by this Court in General Order 12-13. Of particular importance, the defendant shall not commit another federal, state or local crime during the term of supervision.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he's released.

Defendant shall comply with the following additional condition:

You shall participate as instructed by the probation officer in a program of substance abuse treatment.

You shall not contact the following victims. No contact. The family of Brian Patrick Lindsay and the Gutierrez family, and any probation officer will verify compliance.

You shall not be involved in gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

You shall submit your person, property, house, residence, vehicle, papers or office to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release.

The Court finds 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). The Court finds the sentence to [108] be reasonable pursuant to that statute considering the nature and circumstances of the offense, the history and characteristics of the defendant, and the need to reflect the seriousness of the offense, promote respect for the law, provide a just punishment, afford adequate deterrence, protect the public from further crimes of the defendant, and avoid unwarranted sentencing disparities.

The Court adopts the facts as set forth in the presentence report in support of the guideline calculations and the reasons for the sentence.

Mr. Briones, do you understand the sentence?

THE DEFENDANT: Yes. Yes.

THE COURT: Sir, you have the right to appeal. If you want to appeal, you must file your notice of appeal within 14 days from today's date. If you want to appeal, you have the right to have counsel represent you at no cost to you if you could not afford counsel.

You understand?

THE DEFENDANT: Yeah, I understand.

THE COURT: Counsel, is there anything else to cover at this time?

MR. SCHNEIDER: No, Your Honor.

MS. LILES: Not from us, Judge.

THE COURT: Counsel, the special assessment, I assume that's been resolved by now. Has he paid that by now?

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MR. SCHNEIDER: I don't know the answer to that, Judge.

THE COURT: Let me—there's a special assessment of $50. It's due immediately. Let me just—while incarcerated, payment of the criminal monetary penalties will be due at a rate of not less than $25 per quarter and payment shall be made through the Bureau of Prisons Inmate Financial Responsibility Program. Criminal monetary payments shall be played to the Clerk, U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC-1, Phoenix, Arizona, 85003-2118.

The Court hereby waives the imposition of interest and penalties on any unpaid balance, and the Court finds defendant does not have the ability to pay and orders the fines waived.

We'll stand in recess.

(Proceedings recessed at 12:25 p.m.)