16-10150

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee

v.

RILEY BRIONES, JR.,

Defendant/Appellant

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

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

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INTEREST OF *AMICI CURIAE*[1]

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

All parties have consented to the filing of this brief.

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION AND RELIEF SOUGHT

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

Dated: July 19, 2018

Respectfully submitted,

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APPENDIX A

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

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

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

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

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

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

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

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

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

CERTIFICATE OF COMPLIANCE

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

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

CERTIFICATE OF SERVICE

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

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

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