No._____

IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON PETE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

May the sentence of a juvenile convicted as an adult of a non-premeditated homicide constitutionally start from a guideline of life-without-parole under Offense Level 43 and then be compelled to shoulder the burden to demonstrate that he is not one of the "rarest of cases" described in *Miller v. Alabama, 567 U.S. 460 (2012) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016)*?

II.

Must the Sentencing commission be required to rewrite offense level 43 as it pertains to a juvenile since a life-without-parole sentence it is no longer consistent with the pertinent provision of title 18 as that title pertains to a juvenile after *Miller v. Alabama, supra, and Montgomery v. Alabama, supra?*

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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STATUTES **PAGE**

Petitioner Brandon Pete requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 18, 2018.

OPINION BELOW

The court of appeals' Memorandum (App."A") is designated "Not for Publication," but is available at 740 Fed.Appx. 151 (2018). It follows the precedent established in the similar cases of *United States v. Briones, 890 F.3d 811 (9th Cir. 2018)* (App."B") and *United States v. Orsinger, 698 F.App'x 527 (9th Cir.2017)*. (App."D").

The district court's ruling is unreported.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over Branden Pete pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 18, 2018. (App. "A").

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Brief Nature of the Case:

When he was a troubled adolescent on the Navajo Reservation, petitioner incurred a series of juvenile offenses treated as delinquencies. In May of 2002, he fell in with three older Navajo males who picked up and then sexually assaulted a female hitchhiker. In order to conceal the sex offense, they murdered the lady. All four were tried and convicted in district court. All four members of the group were sentenced to life terms without possibility of parole under the mandatory provision of 18 USC § 1111(a). Petitioner was a sixteen- year old juvenile at the time of the crime. He was ordered to stand trial as an adult under the same procedures and guidelines as an adult. A jury acquitted petitioner of premeditated murder but convicted him on counts of second-degree and felony murder as well as conspiracy to murder. He was sentenced to life-without-parole in 2006 same as the adults.1

Six years after he was sentenced, this Court ruled in *Miller v. Alabama, 567 U.S. 460 (2012)* that the Eighth Amendment prohibits such a sentence for a juvenile. Four years thereafter, the *Miller* decision was held to be retroactive in

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1 Since the Sentence Reform Act of 1987 eliminated parole in the federal system, all federal sentences are without possibility of post-sentence release on parole. *United States v. Briones*, 890 F.3d 811, 816 (9th Cir. 2018); *United States v. Brandon Pete, 819 F.3d 1121, 1132 (9th Cir. 2016).*

Montgomery v. Louisiana, 136 S.Ct. 718 (2016). Pete's 28 U.S.C. ¶2255(f) petition resulted in a resentencing which started his sentence at the same life-with-out-parole at guideline offense level 43. The district court, however, considered other factors and reduced the sentence from life-without-parole to 708 months. Prior to that resentencing, appellant was denied the requested services of a court appointed expert to assist him in presentation of the factors unique to a juvenile which had transpired during the intervening twelve-year period, based on *Miller and Montgomery*. That decision of the trial court was reversed as being an abuse of discretion in *United States v. Brandon Pete, 819 F.3d 1121 (9th Cir. 2016).*

In his second resentencing, appellant objected to an updated Presentence Report which again started his guideline sentence at life-without-parole under USSG §2A1.1. That guideline provides "that an offense involving felony murder has a base level of 43". (PSR ¶44,p.10). Later, the sentencing judge varied downward based on the factors in 18 USC § 3553 and *Miller-Montgomery* to impose a new sentence of 648 months.

The Ninth Circuit Court of Appeals affirmed the district judge's decision to overrule petitioner's objection to starting his sentence calculation at level 43 based principally on the recent similar cases of other juvenile homicide offenders in *United States v. Briones, 890 F.3d 811 (9th Cir. 2018)*(App"C") and *United States*

v. Orsinger, 698 F.App'x 527 (9th Cir.2017). (App."D"). This petition concerns the Ninth Circuit review of that second resentencing.

B. Statement of Facts:

The detailed facts of the crime and the procedural history of this matter are described in detail in *United States v. Brandon Pete, 819 F.3d 1121 (9th Cir. 2016)*. (App."C"). The core facts are that Petitioner BRANDON PETE was sixteen (16) years old when on the fateful day of May 18, 2002, he was "cruising" in a vehicle with three older persons. They had been drinking heavily and drove on the Navajo Reservation without apparent purpose. The driver, Hoskie James, picked up a 38-year-old hitchhiker later identified as Charlotte Brown. She accepted the ride and also accepted a few alcoholic drinks with the boys. Although details of the events that transpired are somewhat blurred, the group of four forcibly removed the clothing of the lady and then all four in turn had forcible sex with her. When she indicated that she was going "to tell the cops", the group "argued about what to do with the victim". In fear that the victim would tell law enforcement about the rape, and/or vengeance from family members, they decided to kill her in a remote location and hide the body. (PSR ¶¶23-26,p.7).

They dragged the victim away from the vehicle, forced her to the ground, held her arms and legs, and found a large rock which they threw onto the victim's face. The group stoned her until she was dead. When dead, they dragged her body to a ditch and covered her with rocks, burned her clothing, and then burned their own clothes and shoes to avoid detection. Petitioner revealed his then antisocial attitude when told an interviewer: "we all left and went home and got drunk". (PSR¶¶26-28,p.7-8). He stated: "it just happened ... I just killed her ...I just hit her with a rock, I just don't care". (PSR ¶¶27,28,p.7-8).

Months later, the government filed a Transfer Petition pursuant to 18 U.S.C. § 5032. Petitioner was referred for psychological evaluation in order to determine whether he suffers from a psychiatric condition and to test his potential for being rehabilitated in the juvenile justice system. The evaluator was Dr. Herschel D. Rosenzweig, MD, of Independent Behavioral Health Associates in Tucson. He reported that the months spent in juvenile custody had a positive effect on petitioner. His report presents a changing attitude and a generally favorable portrait of the defendant-juvenile. The doctor's description related the following:

DESCRIPTION and MENTAL STATUS VALUATION

> ... Brandon was cordial, polite and cooperative throughout the interview. He was wholly responsive to all inquiries to the best of his ability. He was friendly and indicated that he enjoyed having someone to talk to about

> his problems. ... in the structured environment of the Juvenile Detention Center he has been a model prisoner, obeying all the rules and not provoking a single incident report in two months, and rising to the highest privileged level in that amount of time.
>
> Brandon does not have a history of sexual offenses ... despite his record of as a juvenile delinquent. Brandon does not have a history of violent behavior directed toward others.
>
> (petitioner) is a very salvageable young man and with adequate structure and support appropriate ... and abstinence from substance abuse, he has the potential of becoming a responsible and productive citizen ... the prognosis for him can be quite good if he is provided with the resources needed during his period of incarceration as a juvenile. (pp.15-17 of Psych Eval attached to 2006 PSR).

Notwithstanding the doctor's favorable recommendation, the district court rejected the conclusions and ordered trial as an adult which was affirmed in *United States v. Brandon Pete, 387 F.3d 969 (9th Cir. 2004).*

After a five-day jury trial, appellant was acquitted of premeditated First-Degree Murder but was found guilty on other counts (second degree murder, felony murder, and conspiracy to murder). He was sentenced to concurrent terms of life-without-parole on all four counts along with the three other adults. His direct appeal resulted in affirmance. *United States v. Pete*, 525 F.3d 844 (9th Cir. 2008) and 277 F.App'x 730.

Six years after his sentencing, and ten years after the crime, this Court decided the case of *Miller v. Alabama, 567 U.S. 460 (2012)*. Miller was a 14-year-old juvenile at the time that he committed a murder. He was sentenced to a mandatory term of life imprisonment without possibility of parole under state law. The *Miller* Court ruled that a mandatory life term without possibility of parole for those under the age of 18 at the time of the crime violates the Eighth Amendment because children are "constitutionally different" than adults. The later decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) ruled the *Miller* decision to be substantive and retroactive.

On June 7, 2013, appellant filed a collateral action under 28 U.S.C. § 2255(f). He pointed out that, like homicide juveniles Miller and Montgomery, he did not have the opportunity to argue for anything less than life-without-parole under 18 U.S.C. § 1111(b). He asked: "an opportunity to persuade the sentencing judge, based on individualized mitigating factors, (for) a sentence that includes a meaningful opportunity for release". He requested the services of a professional under the Criminal Justice Act to assess his development toward maturity and to determine whether he was "permanently incorrigible" and the "rare" case described in *Miller*. The sentencing judge denied such request on the ground that a new report (12 years after the first report) would not add anything new. However,

sentence was reduced from life to 708 months which was calculated based on petitioner's life expectancy so petitioner would "pass on from this life into the next outside of the confines of a prison yard". (T.7/22/14,p.44).

On appeal in *United States v. Brandon Pete, 819 F.3d 1121 (9th Cir. 2016)*, petitioner was granted a second resentencing with the benefit of an expert opinion. Similar to the opinion by Dr. Rosenzweig twelve years earlier, a neuropsychologist concluded that petitioner was "salvageable". Petitioner also presented evidence that during his incarceration he had devoted many hours to educational pursuits and had achieved certificates in a variety of subject materials. His testimony was that he has been accepted as a non-violent inmate and tasked with responsibilities requiring him to be trustworthy and to interact with other inmates. (T.5/10/17,p.50-62). Over objection, the district judge accepted the updated PSR with a base offense level of 43 advising a life-without-parole sentence. Although the starting point for petitioner's sentence was life-without-parole at level 43, the sentencing judge was persuaded to reduce the sentence from 706 months to 648 months.

REASONS FOR GRANTING THE WRIT

I. Offense level 43 as it pertains to a juvenile recommends an unconstitutional life-without-parole sentence as a starting point and pervades the entire sentencing process.

Advisory guideline offense level 43 recommends a life sentence without parole for each and every juvenile, as well as every adult offender, regardless of such offender's past criminal history category or any attributes of youth. The intent of the Sentencing Commission was: "to treat each guideline as carving out a 'heartland', a set of typical cases embodying the conduct that each guideline describes". Manual, Ch.1,Pt.A (p.7 of 2016 version). The Commission's belief was that despite a sentencing court's legal freedom to depart from guidelines "they will not do so very often". (Id.8(b)).

This Court's decisions in *Miller v. Alabama, 567 U.S. 460 (2012)* and *Montgomery v. Louisiana, 136 S.Ct. 718 635 (2016)* are to the contrary. These decisions rule that the Eighth Amendment requires that life-without-parole for a former juvenile is allowable only for the rare juvenile offender who is permanently incorrigible – not for the typical or "common" case. Juvenile offenders whose crimes, although severe, reflect the "transient immaturity of youth" comprise "the vast majority of juvenile offenders". *Montgomery,* 136 S.Ct. at 734. As the Court of Appeals summarized the holding in *Miller:* "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders"." *Briones*, 890 F.3d at 815. The sentencing scheme devised by

the Sentencing Commission via level 43 does exactly what this Court has ruled is forbidden by the Eighth Amendment.

Another consideration is that level 43 does not take into account the prognosis for change in the individual juvenile. Punishment is a legitimate objective of sentencing. In the case of a juvenile, *Miller* requires a more forward-looking approach. Instead of the question "what has he done?' The Eighth Amendment demands consideration of the question "what is he going to do? Is he going to change as he matures? If *Miller* was merely a procedural decision, the order that matters are considered would not matter; that is, whether the prognosis comes first or last would not matter. However, *Miller* is substantive. The conflict between appellate court judges if shown by the dissent in *Briones*. (App."B").

The constitution requires a more forward-looking approach. For the majority of juvenile offenders, the constitutional question is the "capacity to change" as expressed in petitioner's case in *United States v. Pete, 819 F.3d 1121, 1133 (2016).* In short, for an adult the focus is on what he has done. For a juvenile, the constitutionally required focus must be on the capacity for change and mature. to outgrow the "attributes of youth" which had led to a severe crime. Offense level 43 does not accommodate these distinctions.

In the present case, two professionals have opined that petitioner Pete is "salvageable". (Dr. Rosenzweig in 2003 and Dr. Walker in 2016). But petitioner is faced with the dilemma of a starting point of life-without-parole according to the advisory guideline. In effect, a juvenile must start from the unconstitutional point of a life-without-parole sentence but then under *Booker* he may attempt to persuade the sentencing judge that he should be treated differently. It is as if the district judge said: "OK, life-without-parole unless you can convince me otherwise". As *Montgomery* put it: "*Miller* rendered life without parole an unconstitutional penalty". *Briones, supra, at 825.*

THEREFORE, this court should grant writ of certiorari.

II. TITLE 18 CANNOT JUSTIFY A LIFE-WITHOUT-PAROLE SENTENCE FOR A JUVENILE SINCE 18 U.S.C. § 1111(b) CANNOT CONSTITUTIONALLY BE APPLIED TO A JUVENILE AS IT WAS APPLIED TO THE ADULT MEMBERS OF THE GROUP.

The Sentencing Reform Act of 1984, as amended, 18 U.S.C. ¶ 3551 et seq., and 28 U.S.C. §§ 991-998 (1982 ed., Supp. IV) delegated certain legislative and judicial power to the Sentencing Commission for the purposes of federal sentencing under definite parameters. *Mistretta v. United States, 488 U.S. 361 (1989)*. These legislative standards for establishment of guidelines are set forth at

28 U.S.C. § 994(b)(1). They require that all guidelines promulgated pursuant to 28 U.S.C. ¶ 991(a)(1) be in the form of "a sentencing range" or, alternatively, be consistent with Title 18. The parameters of delegation of legislative authority to determine a term of imprisonment are:

> ... the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.
> (28 U.S.C. § 994(b)(2))(Emphasis supplied).

Congress has legislated that the § 994(b)(2) guidelines "establish a range that is consistent with all pertinent provisions of title 18, United States Code". § 994(b)(1). That legislative command does not mean that title 18 must treat all juveniles the same as all adults. The Eighth Amendment to the constitution takes precedence over any legislative pronouncement. When title 18 as it pertains to a juvenile was altered by the constitutional decision in *Miller/Montgomery*, the basis for upholding the life-without-parole provisions of level 43 as it pertains to a juvenile were also changed. Hence, there is no basis for upholding the authority for level 43 based on a pre-*Miller* interpretation of the constitution. Title 18 was altered as it pertains to a juvenile by this Court but offense level 43 has not been altered.

Although *Miller* was decided seven (7) years ago in 2012, neither the Congress nor the Sentencing Commission have seen fit to revisit the statute or the level 43 recommendation as they pertain to juveniles. A transferred juvenile still receives the same Guideline treatment as an adult seven years after this Court's decision. The Sentencing Commission has not made any allowance for consideration of the attributes of youth prior to its advisory recommendation of life-without-parole for transferred juveniles. This inaction is contrary to *Miller/Montgomery*.

Finally, the 2016 *Pete* appeal specifically noted that:

> Ftne 10. Pete does not argue that *Miller* compelled the Commission to revise base offense level 43 as it pertains to minors. (819 F.3d at 1135). (App"B").

The issue was squarely presented in a timely manner in the 2018 appeal. App "B".

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

DATED: January 12, 2019.

/s/ Atmore Baggot
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APPENDIX A

740 Fed.Appx. 151 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Branden PETE, Defendant-Appellant.

No.
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Submitted October 16, 2018 *
San Francisco, California
|
Filed October 18, 2018

Attorneys and Law Firms

Karla Delord, Assistant U.S. Attorney, DOJ-USAO, Phoenix, AZ, for Plaintiff-Appellee

Atmore Baggot, Attorney, Atmore Baggot, Attorney at Law, Apache Junction, AZ, for Defendant-Appellant

Appeal from the United States District Court for the District of Arizona, Stephen M. McNamee, District Judge, Presiding, D.C. No. 3:03-CR-00355-SMM-04

Before: HAWKINS and HURWITZ, Circuit Judges, and ROSENTHAL, ** District Judge.

MEMORANDUM ***

This is the second appeal following Branden Pete's convictions for second-degree *152 murder, felony murder, and conspiracy to murder. Pete was 16 when he and three others raped and killed Charlotte Brown. In the first appeal, this court vacated Pete's sentence of 708 months' imprisonment and remanded for resentencing. On remand, the district court sentenced him to a 648-month prison term. [1] We affirm.

1. Pete argues that *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), invalidated U.S.S.G. § 2A1.1 and base offense level 43 for juvenile offenders, and that his Guidelines sentence calculation was erroneous. The argument is foreclosed by *United States v. Briones*, which held that *Miller* did not overrule the Supreme Court's instruction that "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range." *See* 890 F.3d 811, 816–17 (9th Cir. 2018) (quoting *Gall v. United States*, 552 U.S. 38, 49, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). Pete's claim also fails because it incorrectly assumes that using base offense level 43 requires a life sentence. The Guidelines are advisory, *United States v. Booker*, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and the district court sentenced Pete to a term of years, not life. [2]

2. Pete also contends that base offense level 43 is unlawful because it does not give a "range," as 28 U.S.C. § 994(b)(1) requires. Pete recycles this argument from his 2014 appeal. *See Pete*, 819 F.3d at 1134–35. The prior panel rejected this argument because offense level 43 is consistent with the federal murder statute, 18 U.S.C. § 1111. *Id.* The argument is both wrong and foreclosed by the law of the case. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

3. Pete further argues that the district court erred in applying U.S.S.G. § 2A1.1 instead of § 2A1.2 because the jury acquitted him of premeditated first-degree murder and convicted him of second-degree murder. But the jury convicted Pete of felony murder arising from kidnaping or sexual abuse, which is governed by § 2A1.1. U.S.S.G. §§ 2A3.1, 2A4.1 (cross-referencing § 2A1.1); *see* § 2A1.1 cmt. 2(B). The district court did not err in applying § 2A1.1.

4. Nor did the district court commit prejudicial error in applying the enhancement for obstructing justice. U.S.S.G. § 3C1.1. Without the two-point enhancement, Pete's adjusted offense level would have been 45 instead of 47. It would still have defaulted to 43, the level from which the district court began the calculation of his sentence. If there was error, it was harmless.

AFFIRMED.

All Citations

740 Fed.Appx. 151 (Mem)

Footnotes

* The panel unanimously concludes that this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Lee H. Rosenthal, Chief United States District Judge for the Southern District of Texas, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 *See United States v. Pete*, 819 F.3d 1121 (9th Cir. 2016); *United States v. Pete*, 525 F.3d 844 (9th Cir. 2008); *United States v. Pete*, 277 F. App'x 730 (9th Cir. 2008); *United States v. Brandon P.*, 387 F.3d 969 (9th Cir. 2004).

2 *Miller* is not implicated here. In *Miller*, the defendants were juveniles sentenced to life without parole. *Miller*, 567 U.S. at 465, 132 S.Ct. 2455. Pete did not receive a life sentence without parole.

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APPENDIX B

890 F.3d 811

UNITED STATES of America, Plaintiff-Appellee,
v.
Riley BRIONES, Jr., AKA Unknown Spitz, Defendant-Appellant.

No. 16-10150

United States Court of Appeals, Ninth Circuit.

Argued and Submitted August 15, 2017
San Francisco, California
Filed May 16, 2018

Summaries:

Source: Justia

The Ninth Circuit affirmed a juvenile defendant's life sentence without parole where the juvenile was convicted of felony murder and other crimes. The panel held that the district court did not err in resentencing defendant by first calculating and using the sentencing guideline range of life imprisonment; under Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the district court was required to consider the hallmark features of youth before imposing a sentence of life without parole on a juvenile offender; and the district court took into account evidence of defendant's rehabilitation as part of its inquiry into whether defendant was a member of a class of permanently incorrigible juvenile offenders.

Vikki M. Liles (argued), Phoenix, Arizona, for Defendant-Appellant.

Patrick J. Schneider (argued), Assistant United States Attorney; Krissa M. Lanham, Deputy Appellate Chief; Elizabeth A. Strange, First Assistant United States Attorney; United States Attorney's Office, Flagstaff, Arizona; for Plaintiff-Appellee.

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

OPINION

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.

[890 F.3d 814]

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, 132 S.Ct. 2455, 183 L.Ed.2d 407 (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, 132 S.Ct. 2455 (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,

[890 F.3d 815]

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 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

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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, 127 S.Ct. 2456, 168 L.Ed.2d 203 (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, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007) (emphasis added) (citing *Rita v. United States* , 551 U.S. 338, 347–48, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007)). 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.

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

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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 you—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, 132 S.Ct. 2455.

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 you.' " --- U.S. ---- , 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016) (quoting *Miller* , 567 U.S. at 472, 132 S.Ct. 2455). 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

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to this harshest possible penalty will be uncommon.' " *Id* . at 733–34 (quoting *Miller* , 567 U.S. at 479, 132 S.Ct. 2455).

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 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.

[890 F.3d 819]

> • 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

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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* , 567 U.S. at 480, 132 S.Ct. 2455. 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, 96 P.3d 213 (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, 127 S.Ct. 2456, 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.... 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, 127 S.Ct. 2456.

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, 127 S.Ct. 2456 ; *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).

[890 F.3d 821]

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, 129 S.Ct. 1423, 173 L.Ed.2d 266 (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, 127 S.Ct. 2456 ; *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 Fed.Appx. 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* , 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (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.

[890 F.3d 822]

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, 132 S.Ct. 2455. 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* , --- U.S. ----, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016) (citing *Miller v. Alabama* , 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (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

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the possibility of parole." Majority Op. at 816.

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, 132 S.Ct. 2455 ; *see* Majority Op. at 817–18. 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, 132 S.Ct. 2455. 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

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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, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). "[W]here the defendant or prosecutor presents nonfrivolous reasons for imposing a [non-Guidelines] sentence, ... the judge will normally ... explain why he has rejected those arguments." *Id.* at 357, 127 S.Ct. 2456 ; *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, 127 S.Ct. 2456. 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 offenders 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, 132 S.Ct. 2455), 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

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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, 132 S.Ct. 2455. 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.

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 820 (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

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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 815. 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 821. 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, 127 S.Ct. 2456. 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, 130 S.Ct. 2011, 176 L.Ed.2d 825 (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, 132 S.Ct. 2455. 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.

[890 F.3d 827]

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 820. 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 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 818. 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 819, 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

[890 F.3d 828]

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 Fed.Appx. 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, 132 S.Ct. 2455).

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.

Notes:

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

[1] The dissent's statement that Briones "expressed remorse repeatedly and at length," *Dissenting Opinion* , p. 825, is simply not supported by the record.

[2] Our colleague in dissent criticizes the majority for following this rule. *See Dissenting Opinion* , p. 825 (objecting to the reference to reasonable inferences from the record).

[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. 824. Our colleague would have preferred different phrasing from the district court, *see id.* , pp. 824–25, but no such requirement can be gleaned from *Miller* or *Montgomery* .

[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. 825–26. 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).

[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. 827. Under the applicable standard, the sentencing judge's remarks were adequate. *See Kleinman* , 880 F.3d at 1041.

[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 lack of an adequate statement of fact of incorrigibility from the sentencing judge. *See Dissenting Opinion* , pp. 826–27 & 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. 827. 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.")

[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.

[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.

APPENDIX C

819 F.3d 1121

UNITED STATES of America, Plaintiff–Appellee,
v.
Branden PETE, Defendant–Appellant.

No. 14–10370.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 18, 2015.
Filed April 11, 2016.

Summaries:

Source: Justia

Defendant, 16 years old at the time of the offenses, was convicted of felony murder and related charges resulting in a mandatory life sentence without the possibility of parole. Miller v. Alabama subsequently held unconstitutional for juvenile offenders mandatory terms of life imprisonment without the possibility of parole. The district court refused to appoint a neuropsychological expert under 18 U.S.C. 3006A(e) on resentencing. The court concluded that, under these circumstances, a reasonably competent attorney would have found the services of the requested expert necessary to provide adequate representation at defendant's resentencing. By precluding defendant from developing this potential mitigating evidence, the district court abused its discretion. The court also concluded that a reasonable attorney would have considered an up-to-date neuropsychological evaluation necessary had defendant been a nonindigent defendant. And because a current evaluation could have provided mitigating evidence in support of a lesser sentence, defendant was sufficiently prejudiced by the failure to appoint a psychological expert before resentencing. Therefore, the court vacated defendant's sentence and remanded for resentencing. The court further concluded that defendant has not shown the district court erred by calculating the Guidelines' recommended base offense level as 43; defendant has not demonstrated that the district court committed prejudicial error when it considered the PSR's calculation of criminal history points attributed to his juvenile offenses; and, even assuming that defendant's objection to the district court's calculation of his criminal history category based on his juvenile offenses was forfeited, as opposed to waived, and assuming the district court committed plain error by attributing criminal history points to three of his juvenile offenses, defendant has not shown prejudice as a result of the error.

[819 F.3d 1123]

Atmore L. Baggot (argued), Apache Junction, AZ, for Defendant–Appellant.

John S. Leonardo, United States Attorney, District of Arizona; Krissa M. Lanham, Deputy Appellate Chief; Joan G. Ruffennach, Assistant United States Attorney (argued), Phoenix–AZ, for Plaintiff–Appellee.

Before: WILLIAM A. FLETCHER, MARSHA S. BERZON, and CARLOS T. BEA, Circuit Judges.

[819 F.3d 1124]

OPINION

BERZON, Circuit Judge:

Branden Pete was 16 years old when he committed a crime that resulted in a mandatory sentence of life without the possibility of parole. Later, *Miller v. Alabama*, --- U.S. ----, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), held unconstitutional for juvenile offenders mandatory terms of life imprisonment without the possibility of parole. On resentencing, the district court refused to appoint a neuropsychological

expert pursuant to 18 U.S.C. § 3006A(e) to help Pete develop mitigating evidence.

Our principal question on appeal is whether the district court abused its discretion in declining to appoint such an expert to aid the defense. We conclude that it did, and so remand for appointment of an expert, and for resentencing after considering any expert evidence offered. We also consider, and reject, Pete's other challenges to his resentencing.

I.

A. The Crime

In May 2002, Pete, a Navajo youth who lived on an Arizona reservation, was riding in a car with three men, Hoskie James, Harris James (Hoskie's son[1]), and Irvin Cepi. At the time, Pete was 16 years old, Hoskie was 41, Harris was 20, and Cepi was 23. Hoskie drove the car. Pete and Harris had been drinking for some time before meeting up with Cepi and Hoskie, and the four riders continued to drink while driving.

Hoskie pulled over to pick up a hitchhiker, Charlotte Brown. After a period of driving, Hoskie stopped the car in a wooded area and everyone got out. One member of the group suggested that they rape Brown. They then took turns holding her down and raping her.

After the rapes, everyone got back in the car. The victim sat between Pete and Cepi in the back seat, naked, while Hoskie drove away. Although the exact events and chronology are unclear, it appears that either Brown threatened to call the police, or the group became concerned that she would. As a result, some member of the group—probably Cepi—suggested killing her.

Hoskie stopped the car once again, and the victim was either ordered or dragged out of the car. She was then physically forced or ordered to the ground. Pete and Harris held Brown down while Cepi, who had retrieved a large rock, threw it onto her head. Brown's face was bleeding, but she continued to breathe, making "stuffy nose" sounds. Pete then threw another rock at Brown's head or face, apparently killing her. Pete asked Harris to "throw [a rock] on her," but Harris said no.

Pete and Cepi then dragged Brown's body into a ditch and covered it with rocks. The perpetrators returned to the car and drove home. Later, to conceal the crime, Harris and Pete set fire to Brown's clothes and shoes and to their own clothing as well.

B. Pre–Trial Events

After Brown's remains were discovered, Pete was arrested. He was held in Navajo tribal custody until a juvenile information was filed in the U.S. District Court for the District of Arizona.

[819 F.3d 1125]

United States v. Brandon P., 387 F.3d 969, 971 (9th Cir.2004).[2] The United States petitioned to try Pete as an adult, invoking the transfer provisions of 18 U.S.C. § 5032.[3] *Id.* In preparation for the transfer proceedings, the court granted Pete's request under section 3006A(e) for a forensic psychiatric evaluation.

The forensic evaluator, Dr. Herschel D. Rosenzweig, interviewed Pete for three hours in May 2003 and reviewed a number of case-related materials. Dr. Rosenzweig described Pete as "cordial, polite and cooperative throughout the interview," and as "wholly responsive to all inquiries to the best of his ability." Pete had "fair vocabulary and [a] relatively poor fund of general information." Pete's "first language is Navajo" and he "had a long history of learning difficulties, [attending] special education programs while in school." Pete dropped out of school at the age of 13, in seventh grade, when his "level of

learning in school was two to three years delayed."

Pete's "mother and father were severe alcoholics and drank most of the time." At the age of 14, Pete began to drink alcohol more regularly than he had before (he didn't remember when he first used alcohol) and began using marijuana; at 15, he started using cocaine. Pete believed he was "quite dependent and addicted to alcohol, and [ ] acknowledged that [he] ha[d] a serious problem with this substance."

After dropping out of school, Pete lived with various family members. He worked odd jobs, mostly to earn money to buy alcohol and marijuana. Pete described getting into trouble when he used alcohol, but said he didn't drink while living with his older brother in New Mexico. While living with that brother, Pete studied for his GED and intended to complete the exam, but his mother urged him to come live with her, back in Arizona, and he did. Pete's father, who physically abused both Pete and Pete's mother, died shortly before Pete committed the crimes underlying this appeal.

Pete, Dr. Rosenzweig concluded, was a substance abuser who "had virtually no support or help from his family while attending school," and who, "with the exception of one older brother ..., d[id] not identify any positive role models within his family system." He "appear[ed] to be a youngster who c[ould] be readily intimidated, and influenced by others such that he has little resilience against participating in drug and alcohol abuse when in the company of those who are so inclined." "[B]ut when provided with [positive role] models, he appears to be capable of responding in a very appropriate manner." The doctor noted that Pete was a model prisoner in his ten months at the juvenile facility. According to staff, he had been "an extremely cooperative inmate, had no incidents or inappropriate behavior," and was "polite and cooperative," "essentially ... a model inmate," attaining the top of five privilege levels in his time there.

Dr. Rosenzweig opined, ultimately, that Pete was "a very salvageable young man, and with adequate structure and support, appropriate treatment resources and abstinence from substance abuse, he ha[d] the

[819 F.3d 1126]

potential of becoming a responsible and productive citizen."

The district court considered Dr. Rosenzweig's evaluation but rejected the doctor's ultimate conclusions, on the ground that the doctor's opinion was influenced by Pete's inconsistent recitation of the crime and events leading to it. The court then granted the United States' motion to transfer the case to try Pete as an adult. *Brandon P.*, 387 F.3d at 971. We affirmed the transfer. *Id.* at 978.

C. Convictions and Initial Sentencing

Pete's trial began in October 2005. Harris pled guilty and testified at Pete's trial.[4] *United States v. Pete*, 277 Fed.Appx. 730, 733 (9th Cir.2008). The jury convicted Pete on counts of second-degree and felony murder, as well as conspiracy to murder. The judge sentenced him to concurrent mandatory terms of life imprisonment without the possibility of parole, pursuant to 18 U.S.C. § 1111.[5]

We affirmed the convictions and sentence on all grounds. *See Pete*, 277 Fed.Appx. 730 ; *United States v. Pete*, 525 F.3d 844 (9th Cir.2008).

D. Requests for Resentencing and for an Expert

In 2013, after the Supreme Court decided *Miller*, Pete moved for resentencing. The district court granted the motion, noting that *Miller* requires the court to give a juvenile offender "an opportunity to present

mitigating evidence to support a sentence less than life without parole," and ordering that Pete be resentenced on an open record.[6]

Before the resentencing, Pete filed an ex parte motion for expert services pursuant to section 3006A(e),[7] requesting that Marc Walter, Ph.D., be paid to assist him. Pete explained that Dr. Walter's help was "necessary to pursue information that might mitigate or lessen the sentence imposed on resentencing." Noting the passage of more than a decade since preparation of the original PSR and Dr. Rosenzweig's forensic evaluation, Pete explained:

> Dr. Walter would conduct a comprehensive neuropsychological evaluation which would let us know [Pete's] 'mental age', whether he has any cognitive dysfunction which could make him more suggestible or impair his judgment, and whether he has any particular mental disorders which could have played into his behavior.

Further, Dr. Walter "could offer insights into the impact incarceration has had on Mr. Pete, who has been in segregation much of his confinement."

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The court denied Pete's motion. It held that although Pete is financially qualified for an expert, he had not shown Dr. Walter's services were "necessary" within the meaning of section 3006A. The court noted that "[t]he purpose of th[e] re-sentencing is to allow defendant Pete to present mitigating evidence in support of a sentence of less than life without parole, in accordance with *Miller* ...." Pete's "2003 psychiatric evaluation ... includes such evidence," said the court, and although Pete "implie[d] that the passage of time may impact that evidence, ... it is difficult to conceive how.... For example, the passage of time would not change his 'family and home environment' nor the 'circumstances of the underlying homicide offense.' " "Not only that," explained the court, "but the 2003 evaluation encompasses the matters which the neuropsychologist intends to evaluate, rendering a second evaluation duplicative." Lastly, "any 'insights into the impact incarceration has had' on [Pete] is not the type of mitigating evidence which *Miller* contemplates."

E. The Pre–Sentence Report ("PSR")

In preparation for resentencing, the U.S. Probation Office calculated the offense level for Pete's crimes as 43. Originally, the PSR recommended that three of Pete's juvenile offenses be assigned two criminal history points each. The PSR also discussed Pete's prison record, which included:

> January 25, 2008, possessing intoxicants; January 29, 2008, possessing a dangerous weapon; March 13, 2008, fighting with another person; May 30, 2008, destroying property over $100; October 24, 2008, refusing to take alcohol test and being in an unauthorized area; March 15, 2009, assault without serious injury, wherein the defendant struck with his shoulder a staff member while in restraints; December 8, 2011, possession of a dangerous weapon; April 17, 2012, interfering with security devices, wherein the defendant burned a hole in the exterior window of his cell; April 22, 2012, setting a fire on the SITU range; June 27, 2012, refusing work/program assignment, wherein the defendant refused to accept a cellmate because he was not willing to accept "just

any cellie;" October 31, 2013, destroy property $100 or less.

The PSR concluded that the Guidelines range for Pete's crimes was life, and that, pursuant to section 1111, he was subject to two life sentences for the felony murder convictions. The probation officer recommended a life sentence because of "the seriousness of the offense and [to] protect the public from further crimes."

Pete objected to the six criminal history points attributed to three of his juvenile offenses in the PSR. The calculation was incorrect, he contended, because he never served a sentence for those offenses. The probation officer adjusted the calculation to give the offenses one point rather than two, but noted that this did not affect the Guidelines' recommendation of a life sentence.

Pete also challenged the PSR's characterization of his prison record, pointing out that (1) he had explained the circumstances surrounding each infraction; (2) ten "minor incidents in more than seven years is not unusual for an inmate confined prior to age 18, and [is] also not unusual for an inmate who has been transferred between nine different institutions"; and (3) "because these incidents came in spurts over a relatively short period of time, external stressors most likely prompted" them.

F. Resentencing Proceeding

At resentencing, the court first reviewed the PSR with the parties, asking whether

[819 F.3d 1128]

the proper calculation of criminal history points for Pete's juvenile offenses had been resolved. Pete's attorney confirmed, and the United States agreed, that the issue had been resolved.

Pete's counsel, Daniel Drake, then argued. Drake reported that he had met with Pete several times in preparation for resentencing and was struck by his client's inquisitiveness. Pete was "quite unlike" his teenage self, Drake maintained. Pete and Drake had discussed "a number of things, interesting things that, again, belie what [Pete] was like when he was 16." Drake listed Pete's recent reading materials, "including Friedrich Nietzche's[ ] Beyond Good and Evil[,] ... Victor Frankl's[ ] Man's Search For Meaning, ... [and] The Alchemist." According to Drake, "[t]hese things intrigue [Pete]. I can't imagine they would have caught his attention at the age of 16." Referring to the comments of a woman with whom Pete had corresponded over the years, Drake summarized, "Mr. Pete is a different person than he was when he committed this offense or when he was sentenced the first time."

Drake then discussed the crime, noting that the jury chose not to convict Pete of first-degree murder. He emphasized that Cepi, not Pete, instigated the crime; that Pete was the youngest participant; and that the car's occupants were drinking heavily. Further, the 2003 evaluation revealed that Pete's cognitive processes as a juvenile mirrored those that concerned the justices and underlay the decisions in *Miller* and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).[8]

Drake then reviewed the 18 U.S.C. § 3553 sentencing factors, explaining, among other things, that, were a life sentence reimposed, Pete would not be allocated the limited rehabilitative services available in prison; that a life sentence was not necessary to protect the public, "given Mr. Pete's growth and maturation"; and that deterrence would not be served by a life sentence because of the nature and extent of crime on the Navajo reservation.

Next, Drake explained that Pete had been in segregation for much of his dozen years in

prison and had been transferred many times. His status as a sex offender made him subject to mistreatment by other prisoners. The isolation, frequent transfer, and mistreatment were relevant to Pete's sentence, according to Drake, in two ways. First, they indicated that Pete would be affected in an excessively negative way by spending a lifetime in prison, nearly always in isolation. Second, Pete's sex offender status explained at least three of his assaultive infractions. Because of his status, other inmates "jumped him," and he had to fight back in self-defense. Also, he had been placed in a cell with another inmate with whom he felt unsafe.

Pete then personally addressed the court. He thanked the court for the opportunity to speak; described prison as a "rough journey" that had taken a mental and emotional toll on him; and explained that because he had spent 80% of his time in solitary confinement, he had done a lot of thinking, with the result that he felt he had "to better [him]self with knowledge, wisdom, understanding, and to ... have goals...." When the court asked about Pete's work toward his GED, Pete noted that he had studied and taken pretests, but that his solitary confinement prevented him from progressing further.

[819 F.3d 1129]

"[T]he majority of the reason" that he was in solitary confinement, Pete explained, was fear for his life. Being in the "general population ..., as with my charges, you know, it's political," and the "majority of penitentiary is run by gangs." But he maintained that he had changed quite a bit. He now had "morals, principles, and a code [he goes] by in [his] daily routine, and [he does] his best each and every day to meet those goals." Pete emphasized that he had "changed a lot," "matured" and "grown a lot," that he didn't "have the same mindframe as [he] had as an adolescent, as a youth, at the age of 16," and that he now had goals and wanted to do something positive with his life. Although he wished his crimes "didn't happen," he couldn't change the fact that they had.

The prosecutor then spoke. Addressing Pete's representation that he had changed, the prosecutor challenged that portrayal: "The defendant says that he has changed, that he has matured. His disciplinary record from the bureau of prisons is at odds with that." The prosecutor noted that Pete was at first housed in the general population but then had to be placed in segregated housing, "because he gets in trouble." Further, Pete had not made much progress toward his GED, having participated in fifteen or twenty classes, and then withdrawing in late 2013, which, the prosecutor suggested, meant Pete was not following through on his asserted goals.

The cruel nature of the crime, the prosecutor continued, justified any deviation between Pete's sentence and those imposed on other juveniles. As an example, the prosecutor referred to Pete's behavior, throwing the rock that probably killed Brown, while Harris refused to participate in stoning Brown. Pete's participation was not due to juvenile impulsivity or poor judgment, discussed in *Miller,* the prosecutor maintained. Overall, said the prosecutor: "I think that that singular act of depravity is just evil. It is not explained by the fact that you were neglected or you drink."

The district court then imposed the sentence. The court reasoned that Pete's prison infractions indicated he had not matured. Next, the court discussed the crime, noting that Pete "was an active knowing and willing participant," that Pete had had time to consider whether he wanted to participate, but that he chose to "deliver[ ] the fatal blow" and dispose of Brown's body and clothing, and that the crime was "one of the most cruel, deliberate, heinous acts I have seen in over 40 years." The court also emphasized that Pete had "demonstrated his violence and his antisocial nature while in jail...." Disagreeing with Dr. Rosenzweig's ultimate prediction

about Pete, "particularly when he said ... he thought there was some opportunities for the defendant to correct himself," the court announced that any sentence less than life would mean that, "upon release ..., [Pete] still poses a danger, and although they seem to suggest that after the age of 35 people start to diminish their propensity for criminal activity, I am not so sure it is accurate in this case." Although it acknowledged Pete's drinking and family life, the court opined that, "instead of trying to be better than the circumstances of his parents, [Pete] gave into it, and most of the time he spent as a youth was out of school, drinking, doing drugs, and getting into trouble, and there's no indication that that would go unabated."

To calculate the exact sentence, the court reasoned that Pete's life expectancy was 75 years. It then subtracted Pete's age and the amount of time he had already served to come to a sentence of 708

[819 F.3d 1130]

months—59 years—as the total appropriate sentence, elaborating:

> That means that you have the opportunity to get out of jail, Mr. Pete, when you are 75 years old and live the balance of whatever life you have left back on the reservation.
>
> By that time, the families will be gone. You will certainly be beyond the age of probably violent behavior. I doubt that even with that given amount of time you'll be able to do anything productive, but at least it gives you a chance to pass on from this life into the next outside of the confines of the prison yard.

The court thereupon imposed a 708–month sentence.

II.

On appeal, Pete first challenges the district court's denial of his motion for an expert under section 3006A(e). "A district court's denial of a request for public funds to hire an expert is reviewed for abuse of discretion." *United States v. Rodriguez–Lara,* 421 F.3d 932, 939 (9th Cir.2005), *overruled on other grounds by United States v. Hernandez–Estrada,* 749 F.3d 1154, 1164 (9th Cir.2014).

"The purpose of the Criminal Justice Act [is] to put indigent defendants as nearly as possible in the same position as nonindigent defendants...." *United States v. Sanders,* 459 F.2d 1001, 1002 (9th Cir.1972). For that reason, under section 3006A(e), "a district judge shall authorize the provision of expert services to a defendant financially unable to obtain them[9] where such services are necessary for adequate representation." *Rodriguez–Lara,* 421 F.3d at 939. A district court thus abuses its discretion in denying an expert "where (1) reasonably competent counsel would have required the assistance of the requested expert for a paying client, and (2) the defendant was prejudiced by the lack of expert assistance." *Id.* at 940 (citation omitted).

Here, both those conditions were satisfied.

A. Necessity

Critical to the question before us is the well-established principle that "a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing." *United States v. Quintieri,* 306 F.3d 1217, 1230 (2d Cir.2002) (citation omitted). Further, where, as here, a court is resentencing on an open record, the court is "free to consider any matters relevant to sentencing, even those that may not have been raised at the first sentencing hearing, as

if it were sentencing de novo." *United States v. Matthews,* 278 F.3d 880, 885–86 (9th Cir.2002) (en banc); *see also Pepper v. United States,* 562 U.S. 476, 490, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011) ("[A] district court may consider evidence of a defendant's rehabilitation since his prior sentencing."). Applying those precepts, we have rejected the contention that at resentencing a district court should not consider intervening events, *see United States v. Jones,* 114 F.3d 896, 897–98 (9th Cir.1997), and have held that a district court should have explained why a PSR was not updated for resentencing, as the earlier PSR did not account for five years during which time the defendant was imprisoned, *see United States v. Turner,* 905 F.2d 300 (9th Cir.1990).

More specifically on point here is *United States v. Hernandez,* in which the Second Circuit ruled that a district court should have considered changes in the defendant over the course of the 15 years

[819 F.3d 1131]

since the original sentence, including how the defendant's aging affected the likelihood of his recidivism; his rehabilitation in the interim; and intervening changes in sentencing law. *See* 604 F.3d 48, 53–55 (2d Cir.2010). We agree with *Hernandez* that at a resentencing, a district court should consider how the passage of time, including the defendant's maturation and personal development in the interim, affect such sentencing factors as likelihood of rehabilitation and recidivism.

In rejecting the motion to appoint an expert, the district court expressed views inconsistent with that principle. In particular, the district court noted that Pete's upbringing and the circumstances of the crime have not changed, and maintained that because a psychiatric evaluation had been done in 2003, a second evaluation would be "duplicative." "[I]t is difficult to conceive how," the district court stated, "the passage of time may impact [the psychiatric] evidence" presented during the pretrial proceedings nearly ten years before. Further, the district court held that the impact of incarceration on Pete "is not the type of mitigating evidence which *Miller* contemplates." We disagree with the district court as to all three aspects of its reasoning.

First, an evaluation for resentencing would not duplicate the 2003 evaluation. The 2003 evaluation *did* address Pete's family and home environment and the circumstances of the offense, including the extent of his participation and what familial and peer pressures may have played a role. Those section 3553 factors have not changed since Pete committed the offense. But his chronological age has changed. Contrary to the district court's assertion that "it is difficult to conceive how" the passage of time mattered with regard to Pete's family background and the nature of the crime, the passage of time could affect the degree to which Pete was negatively affected by his difficult upbringing, as well as what lessons he had learned, if any, by reflecting on the crime. Indeed, "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery,* 136 S.Ct. at 734. Moreover, if contemporary factors relating to psychological maturation and personal evolution were developed, the passage of time could affect the weight given to Pete's family background and the circumstances of the crime in the overall mix of mitigating circumstances.

Second, an individual's psychological makeup could certainly change significantly over a ten-year period, both cognitively and emotionally. Two psychological evaluations ten years apart are simply not "duplicative." *Cf. Griffin v. Johnson,* 350 F.3d 956, 965 (9th Cir.2003) (finding a current psychological evaluation "minimally probative" of a defendant's mental capacity to commit

murder eight years earlier); *Eley v. Bagley,* 604 F.3d 958, 967 (6th Cir.2010) (concluding that psychiatric evaluations performed nearly ten years after a crime had "virtually no probative value" in assessing the defendant's mental state at the time of the crime).

The district court's determination to the contrary was seemingly premised on an erroneously narrow temporal focus—that is, on the assumption that only Pete's mental status at the time of the crime and during the 2003 transfer evaluation is relevant. As we have discussed, however, the resentencing should have taken into account--and, indeed, to some degree did take into account—an assessment of the relevant factors, including the prospects for rehabilitation, as of the time of the resentencing.

[819 F.3d 1132]

Moreover, the likelihood of psychological change over time is very much heightened when, as here, the defendant was a juvenile both at the time of the crime and at the earlier psychological evaluation. As *Miller* observed, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control." 132 S.Ct. at 2464 (citation omitted). The Court in *Miller* also emphasized the specific characteristics of juvenile brain development and resulting mental states that often cause juveniles' impulsivity, recklessness, and vulnerability to outside pressures. *See id.* at 2464–65. As a result of these characteristics, juveniles have less control over their actions, and, critically, greater capacity to change over time so as not to repeat similar behavior, as compared to adults. *Id.* Youth's "signature qualities are all transient," concluded *Miller. Id.* at 2467 (citation omitted).

Miller also stressed that certain policy rationales underlying hefty punishments—culpability, incapacitation, and rehabilitation—differ as applied to juveniles. *Id.* at 2464–65. "*Miller,* then, 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.' " *Montgomery,* 136 S.Ct. at 734 (quoting *Miller,* 132 S.Ct. at 2465).

To account for the transience of youthful characteristics and the differing policy considerations applicable to minors, *Miller* mandated that a juvenile offender be "provide[d] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2469 (citation omitted). Accordingly, although *Miller* does "not foreclose a sentencer's ability to [impose life imprisonment] in homicide cases," the case does "require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

When the district court ruled that no expert testimony was "necessary," it ignored *Miller's* reasoning and directives. At the time of resentencing, Pete's neuropsychological condition had not been evaluated in more than a decade. An updated evaluation could have revealed whether Pete was the same person psychologically and behaviorally as he was when he was 16. Rather than being "duplicative," as the district court believed, a new evaluation could have shown whether the youthful characteristics that contributed to Pete's crime had dissipated with time, or whether, instead, Pete is the "rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 2469 (citation omitted); *see also Montgomery,* 136 S.Ct. at 733. Similarly, without current information relating to the policy rationales applicable specifically to juvenile offenders, Pete was hamstrung in arguing for a more lenient sentence.

More specifically, the significant mitigating evidence available to Pete at resentencing, other than his own testimony and that of his lawyer (neither of which the district court credited), would have been information about his current mental state—in particular, whether and to what extent he had changed since committing the offenses as a juvenile. This information was directly related to Pete's prospects for rehabilitation, including whether he continued to be a danger to the community, and therefore whether the sentence imposed was "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a) ; *see id.* (a)(2)(C), (D). Such information is pertinent to determining

[819 F.3d 1133]

whether, as *Miller* indicates is often the case, Pete's psychological makeup and prospects for behavior control had improved as he matured, with the consequence that his prospects for rehabilitation and the need for incapacitation had changed.

The third reason the district court gave for rejecting the request for funds to conduct a current psychological evaluation—that the impact of incarceration "is not the type of mitigating evidence [ ] *Miller* contemplates"—fares no better. As it turned out, the United States, and the district court, emphasized information about Pete's incarceration at the resentencing hearing, relying on the PSR to conclude that Pete's prison record indicated he had not appreciably changed or matured in the twelve years since he committed the offense. Yet, the district court precluded Pete from developing key rebuttal evidence—namely, current evidence as to his mental state. The refusal to authorize expert services thus assured a lopsided presentation of evidence, favoring the United States.

In particular, the court's refusal to approve a new psychological appraisal denied Pete the opportunity to respond effectively to the PSR's discussion of his prison record or to provide corroborating evidence that could substantiate his explanations for his prison infractions. Pete's explanation for his prison record was that his status as a sex offender caused him to be mistreated by other inmates, and therefore resulted in him being placed, indefinitely, in segregated housing. An expert's testimony could have bolstered Pete's arguments that the infractions, which tended to come in spurts over relatively short periods of time, reflected external stressors (such as mistreatment by other inmates), not some inherent and intractable defect in Pete's mature personality. *See Miller,* 132 S.Ct. at 2464 (citing "studies showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior" (citation and internal alterations omitted)); *Montgomery,* 136 S.Ct. at 733, 734. Similarly, the expert could have opined as to the excessively negative psychological impact that could result from placing Pete in segregated housing for many more years, were his sentence to remain lengthy. In all these respects, an expert could have provided substantive evidence to support the argument that Pete's prison record did not suggest he lacked the capacity for rehabilitation before the age of 75.

To be sure, Pete could have done a better job in his motion for an expert of explaining the ways in which the expert would aid his defense. But Pete did identify the issues he hoped the neuropsychologist would address—mitigating evidence in the form of an analysis of Pete's development and maturity since the offenses, as well as the impact incarceration had had on him.

In sum, the critical question under *Miller* was Pete's capacity to change after he committed the crimes at the age of 16. As to that consideration, whether Pete *has* changed in some fundamental way since that time, and in what respects, is surely key evidence. Under these circumstances, a reasonably competent

attorney would have found the services of the requested expert necessary to provide adequate representation at Pete's resentencing. *See* 18 U.S.C. § 3006A(e)(1). By precluding Pete from developing this potential mitigating evidence, the district court abused its discretion.

B. Prejudice

We next consider whether Pete has shown by clear and convincing evidence that the refusal to appoint an expert prejudiced

[819 F.3d 1134]

him. *See Rodriguez–Lara*, 421 F.3d at 946.

"[T]he function of the prejudice inquiry is to prevent appellate courts from second-guessing district judges in cases in which the requested services could not have mattered to the outcome." *Id.* at 947. But the inquiry is not meant "to force the defendant to prove that the requested expenditure would *necessarily* have produced a different result." *Id.* The prejudice question is, instead, whether the defendant "requested expert services in furtherance of a *claim* that would, if meritorious, change the outcome of the case." *Id.* (emphasis added). In other words, to show prejudice, the defendant requesting services is not required to proffer what evidence the expert *will* develop—or in this case, the *actual* results of the expert's examination. To so require would be to create a Catch–22, whereby a defendant who cannot afford to pay an expert could obtain an expert's services only by providing precisely the expert evidence he has no funds to pay for. Accordingly, the defendant need only identify the way in which an expert *could* develop evidence in support of a claim that would, if proven, materially benefit the defense. *Id.* at 946–47.

For example, *United States v. Hartfield*, 513 F.2d 254 (9th Cir.1975), ruled that the defendant was prejudiced by lack of access to an expert whom the defendant requested to examine the defendant's mental status, hoping that the examination would bear fruit as a defense to the crimes charged. Hartfield did not first have to demonstrate what the expert would have concluded. *See id.* at 258 ; *United States v. Bass*, 477 F.2d 723 (9th Cir.1973).

Here, the district court's denial of the neuropsychological expert prevented Pete from developing and presenting potentially useful mitigating evidence in line with *Miller*. The expert could have updated the court as to Pete's mental status, and, depending on his findings, backed up Pete's and his counsel's assertions that Pete (1) had changed positively during his time in prison; (2) was susceptible to rehabilitation; and (3) either no longer presented a danger to the community or likely would not be a danger at some time before he was 75. The expert could also have placed Pete's prison record in context, explaining the impact on Pete of segregated housing and harassment by other prisoners. Particularly because the district court was skeptical, at best, of Pete's and his counsel's representations as to these issues, Dr. Walter's evaluation was likely the only *Miller* -related evidence that could possibly convince the district court that Pete deserved leniency. Because Pete "requested expert services in furtherance of a claim that would, if meritorious, change the outcome of the case," *Rodriguez–Lara*, 421 F.3d at 947, he was prejudiced by not having access to the expert he requested.

In summary, a reasonable attorney would have considered an up-to-date neuropsychological evaluation necessary had Pete been a nonindigent defendant. And because a current evaluation could have provided mitigating evidence in support of a lesser sentence, Pete was sufficiently prejudiced by the failure to appoint a psychological expert before resentencing. We therefore vacate Pete's sentence and remand for resentencing.

III.

Pete next challenges the U.S. Sentencing Commission's authority to enact base offense level 43, which provides no sentencing "range." While 28 U.S.C. § 994(b)(1) delegates authority to the Commission to develop sentencing "ranges," it also requires the Commission to develop Guidelines consistent with "*all pertinent provisions of title 18, United*

[819 F.3d 1135]

States Code. " (Emphasis added). Level 43 corresponds to the mandatory minimum sentence of life codified in section 1111, a provision in title 18 with which the Guidelines must be consistent. *See also* U.S.S.G. § 2A1.1 & cmt. n. 1 (providing that the base offense level for murder offenses is 43, consistent with and incorporating section 1111). At least where a single sentence is compelled by statute, a sentencing "range" is properly limited to that sentence. We therefore do not decide whether a "range" is more than one suggested sentence where no particular sentence is mandated by statute.

Pete has not shown the district court erred by calculating the Guidelines' recommended base offense level as 43.[10] Notably, after conducting that calculation, the district court did not sentence Pete to the Guidelines life sentence, but instead to 708 months.

IV.

Pete also has not demonstrated that the district court committed prejudicial error when it considered the PSR's calculation of criminal history points attributed to his juvenile offenses. Even assuming that Pete's objection to the district court's calculation of his criminal history category based on his juvenile offenses was forfeited, as opposed to waived, *see United States v. Alferahin,* 433 F.3d 1148, 1154 n. 2 (9th Cir.2006), and assuming the district court committed plain error by attributing criminal history points to three of his juvenile offenses (but not to others that resulted in the same juvenile "sentence"), *id.* at 1154 ; *see also* Fed.R.Crim.P. 52(b), Pete has not shown prejudice as a result of the error, *see Alferahin,* 433 F.3d at 1157–58.

The Guidelines recommend life imprisonment for all criminal history categories at base offense level 43. So, even if the district court erroneously calculated the criminal history category, the Guidelines would recommend the same sentence for him. And, because the PSR identified many juvenile offenses for which Pete was not given criminal history points, it is unlikely that eliminating three points for three juvenile offenses would have materially changed the court's overall view of Pete's criminal history, considered apart from the offense level calculation. It is that overall perception, rather than the number of criminal history points, that mattered here, where the criminal history points did not affect the base offense level calculation and the court imposed a non-Guidelines sentence.

V.

While Pete's latter two challenges fail, we conclude that he was entitled to the assistance of an expert for resentencing. For that reason, we vacate the 708–month sentence and remand, instructing the district court to grant Pete's motion for expert services, and to resentence Pete after having done so.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.

Notes:

[1] Because Harris and Hoskie James share a surname, we refer to them by their first names.

[2] Although the record indicates that Pete spells his first name "Branden," his name was spelled "Brandon" in the case name of earlier iterations of this case.

[3] Section 5032 provides, in relevant part:

> A juvenile alleged to have committed an act of juvenile delinquency ... shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that ... the offense charged is a crime of violence that is a felony ..., and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

[4] Cepi was convicted by a jury and sentenced to life imprisonment without the possibility of parole. *See* 18 U.S.C. § 1111.

[5] In relevant part, section 1111 provides: "Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life...." 18 U.S.C. § 1111(b). Pete's felony murder convictions were treated as first-degree murder. *See id.* § 1111(a).

[6] The United States agreed before the district court that *Miller* applies retroactively and does not contest its retroactivity on appeal. After this case was argued, the U.S. Supreme Court agreed that the *Miller* rule is retroactive. *See Montgomery v. Louisiana*, ––U.S. ––––, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

[7] Section 3006(A)(e)(1) provides:

> Upon request.—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court ... shall authorize counsel to obtain the services.

[8] *Roper* held unconstitutional capital punishment imposed on individuals who were under 18 at the time of their crimes.

[9] The parties do not dispute that Pete is financially qualified for an expert.

[10] Pete does not argue that *Miller* compelled the Commission to revise base offense level 43 as it pertains to minors.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BRANDEN PETE, Defendant-Appellant.

No. 17-10215

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Submitted: October 16, 2018
October 18, 2018

NOT FOR PUBLICATION

D.C. No. 3:03-CR-00355-SMM-04

MEMORANDUM:

Appeal from the United States District Court for the District of Arizona Stephen M. McNamee, District Judge, Presiding

Submitted October 16, 2018** San Francisco, California

Page 2

Before: HAWKINS and HURWITZ, Circuit Judges, and ROSENTHAL,*** District Judge.

This is the second appeal following Branden Pete's convictions for second-degree murder, felony murder, and conspiracy to murder. Pete was 16 when he and three others raped and killed Charlotte Brown. In the first appeal, this court vacated Pete's sentence of 708 months' imprisonment and remanded for resentencing. On remand, the district court sentenced him to a 648-month prison term.[1] We affirm.

1. Pete argues that *Miller v. Alabama*, 567 U.S. 460 (2012), invalidated U.S.S.G. § 2A1.1 and base offense level 43 for juvenile offenders, and that his Guidelines sentence calculation was erroneous. The argument is foreclosed by *United States v. Briones*, which held that *Miller* did not overrule the Supreme Court's instruction that "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range." *See* 890 F.3d 811, 816-17 (9th Cir. 2018) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). Pete's claim also fails because it incorrectly assumes that using base offense level 43

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requires a life sentence. The Guidelines are advisory, *United States v. Booker*, 543 U.S. 220, 245 (2005), and the district court sentenced Pete to a term of years, not life.[2]

2. Pete also contends that base offense level 43 is unlawful because it does not give a "range," as 28 U.S.C. § 994(b)(1) requires. Pete recycles this argument from his 2014 appeal. *See Pete*, 819 F.3d at 1134-35. The prior panel rejected this argument because offense level 43 is consistent with the federal murder statute, 18 U.S.C. § 1111. *Id.* The argument is both wrong and foreclosed by the law of the case. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

3. Pete further argues that the district court erred in applying U.S.S.G. § 2A1.1 instead of § 2A1.2 because the jury acquitted him of premeditated first-degree murder and convicted him of second-degree murder. But the jury convicted Pete of felony murder arising from kidnaping or sexual abuse, which is governed by § 2A1.1. U.S.S.G. §§ 2A3.1, 2A4.1 (cross-referencing § 2A1.1); *see* § 2A1.1 cmt. 2(B). The district court did not err in applying § 2A1.1.

4. Nor did the district court commit prejudicial error in applying the enhancement for obstructing justice. U.S.S.G. § 3C1.1. Without the two-point

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enhancement, Pete's adjusted offense level would have been 45 instead of 47. It would

still have defaulted to 43, the level from which the district court began the calculation of his sentence. If there was error, it was harmless.

AFFIRMED.

Footnotes:

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes that this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Lee H. Rosenthal, Chief United States District Judge for the Southern District of Texas, sitting by designation.

1. *See United States v. Pete*, 819 F.3d 1121 (9th Cir. 2016); *United States v. Pete*, 525 F.3d 844 (9th Cir. 2008); *United States v. Pete*, 277 F. App'x 730 (9th Cir. 2008); *United States v. Brandon P.*, 387 F.3d 969 (9th Cir. 2004).

2. *Miller* is not implicated here. In *Miller*, the defendants were juveniles sentenced to life without parole. *Miller*, 567 U.S. at 465. Pete did not receive a life sentence without parole.

APPENDIX D

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
JOHNNY ORSINGER, AKA Johnnie Orsinger, Defendant-Appellant.

No. 15-10412
No. 15-10413

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Argued and Submitted: August 15, 2017
October 6, 2017

NOT FOR PUBLICATION

D.C. No. 3:01-cr-01062-DGC-3
District of Arizona

MEMORANDUM*

D.C. No. 3:01-cr-01072-DGC-5

Appeal from the United States District Court for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted August 15, 2017 San Francisco, California

Page 2

Before: O'SCANNLAIN and RAWLINSON, Circuit Judges, and EZRA,** District Judge.

Johnny Orsinger asks this Court to vacate his life sentences for four murders and to remand for re-sentencing. The facts of this case are known to the parties, and we do not repeat them here. We have jurisdiction pursuant to 28 U.S.C. § 1291.

I

Orsinger argues that the district court erred at his re-sentencing by failing properly to consider his claim that he was not permanently incorrigible and hence ineligible for a life sentence under *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), which held that *Miller v. Alabama*, 567 U.S. 460, 472 (2012), bars a sentence of life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Although the district court did not use the specific word "incorrigible," it did recognize that *Miller* permits life sentences for juvenile offenders only in "uncommon" cases, 567 U.S. at 479, and the court made a finding that Orsinger did indeed fit within that "uncommon" class of juvenile offenders. That conclusion was appropriately supported by a detailed consideration of the evidence viewed through the light of the factors identified in

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Miller and in 18 U.S.C. § 3553(a).

Orsinger also takes issue with the district court's focus on the heinous nature of his crimes. It is true that the heinousness was a key part of the court's analysis, but *Miller* allows—and in fact expects—a sentencing court to consider the nature of the offense as part of its analysis. 567 U.S. at 479-80 (tasking sentencing judges with differentiating between "the juvenile offender *whose crime reflects* unfortunate yet transient immaturity, and the rare juvenile offender *whose crime reflects* irreparable corruption.") (emphasis added) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). There was thus no error in the district court's considering the heinousness of the crimes.

II

Orsinger also argues that his sentence violates the Eighth Amendment because he is, in fact, not one of the incorrigible juvenile offenders for whom a life sentence is permissible. He specifically points to evidence of rehabilitation that he believes establishes he is not incorrigible. The district court did consider the evidence that Orsinger had improved himself while imprisoned, but it did

not find that sufficient to outweigh the countervailing evidence that Orsinger was one of the uncommon juvenile offenders for whom a life sentence was warranted. Orsinger is correct that he put forth evidence of rehabilitation, but we are persuaded that there are, at the very least, "two permissible views of the evidence" as to his

incorrigibility, so "the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).[1]

AFFIRMED.

Footnotes:

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

[1] Orsinger also argues preemptively that his appeal waiver does not preclude his challenge to his sentence, but because the government agrees with him, we do not consider the issue.
