No. 16-3820

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

v.

COREY GRANT,

Appellant

Appeal from the Final Judgment in a Criminal Case of the United States District Court for the District of New Jersey (Crim. No. 90-328). Sat Below: Honorable Jose L. Linares, U.S.D.C.J.

THIRD SUPPLEMENTAL BRIEF FOR APPELLEE

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Two recent developments confirm that this Court should affirm Corey Grant's discretionary 65-year term of imprisonment for murdering three victims and other offenses before turning 18. First, after *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), even life-without-parole for someone like Grant doesn't violate the Eighth Amendment where the sentencing court has authority to impose a lesser sentence in light of the defendant's youth but chooses not to. Here, Grant did not even receive a life sentence, and the District Court, fully aware it could impose a lesser sentence, nonetheless elected to sentence him to 65 years' imprisonment after considering Grant's youth. Second, shortly after *Jones*, Grant moved for compassionate release under 18 U.S.C. § 3582(c)(1)(A). That further proves his 65-year term of imprisonment is not life-without-parole even in effect, because the District Court can reduce it.

1. *Jones* Confirms the Constitutionality of Grant's resentencing.

Jones held that, in "a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and *sufficient*" under the Eighth Amendment. *Jones*, 141 S. Ct. at 1313 (emphasis added). The Supreme Court added "that a separate factual finding of permanent incorrigibility is not required." *Id.* To the contrary, "permanent incorrigibility is not an eligibility criterion akin to sanity or a lack of intellectual disability." *Id.* at 1315. Instead, "youth" is "a sentencing factor akin to a mitigating circumstance" in a capital case. *Id.* The sentencing court must consider youth, but has "wide discretion in determining" how much weight it deserves. *Id.* at 1316

Here, the District Court knew it could impose less than a life sentence and, after considering Grant's youth, imposed a 65-year term of imprisonment. *Jones* confirms that the Eighth Amendment requires no more. So there is no basis for a presumptive cap on his term of imprisonment, whether 30 years, as Grant has argued, or release before turning 65, as the original panel in this case had held. Rather, the Supreme Court's "precedents require a discretionary sentencing procedure in a case of this kind." *Jones*, 141 S. Ct. at 1322. Here, just as in *Jones*, Grant's resentencing "complied with those precedents because the sentence was not mandatory and the" sentencing "judge had discretion to impose a lesser punishment in light of" Grant's "youth." *Id.*

2. Grant Has No As-Applied Eighth Amendment Claim.

Jones left open the ***possibility*** of an "as-applied Eighth Amendment claim of disproportionality regarding" a life-without-parole sentence for a juvenile homicide offender. *Id.* But Grant has no viable as-applied challenge, for two reasons.

First, Grant did not receive a life sentence. He now is 47. The Bureau of Prisons projects he will complete his term of imprisonment on December 17, 2045, when he will be 72. If he doesn't lose any more good-time credit, he will become eligible for transfer to home confinement—that is, ***to leave prison***—when he is 71. *See* 18 U.S.C. § 3624(c)(2). Should he demonstrate that "extraordinary and compelling reasons warrant" a reduction of his term of imprisonment "consistent with applicable policy statements issued by the Sentencing Commission," the District Court could release him from prison

before then. 18 U.S.C. § 3582(c)(1)(A). Indeed, eight days after *Jones* issued, Grant moved for compassionate release under that very statutory provision. *See United States v. Grant*, No. 90-cr-328 (JMV), Docket Entry 62 (D.N.J) (filed April 30, 2021). Should that motion fail, nothing prevents Grant from filing later motions for compassionate release if his circumstances change.

Second, even before *Jones*, a life sentence for a juvenile was constitutional, provided the sentence permitted a meaningful opportunity for release. *See Graham v. Florida*, 560 U.S. 48, 75 (2010). Consequently, only the Eighth Amendment's "narrow proportionality principle" applies in a case like this, which "forbids only extreme sentences that are grossly disproportionate to the crime." *Id.* at 59–60 (quotation marks omitted). "A court must begin by comparing the gravity of the offense and the severity of the sentence." *Id.* at 60. Only in "the rare case" where that "threshold comparison" leads "to an inference of gross disproportionality" should the court "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions." *Id.*

This isn't one of those "rare" cases. The District Court carefully considered Grant's youth as a mitigating factor in his crimes. Counterbalanced against that, however, was Grant's guilt in one murder, his attempt at another and his role in the murder and dismemberment of a cooperating witness and the execution-style murder of a 16-year-old girl. Unlike other juveniles in Grant's gang, whose roles were limited to "the distribution of … drugs," A152,

Grant was the enforcer for a profit-making, "drug trafficking … enterprise," who distinguished himself from other juveniles with his "horrible" and "gruesome" conduct, A152–53. The District Court properly concluded the severity of Grant's many offenses, which included three murders committed on separate occasions, warranted a non-life, aggregate sentence of 65 years.[1]

3. There Is No Need for Additional Safeguards.

Lastly, the holding in *Jones* "does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder." *Jones*, 141 S. Ct. at 1323. So States may: (1) "categorically prohibit life without parole for all offenders under 18"; (2) "require sentencers to make extra factual findings before sentencing" a juvenile offender "to life without parole"; (3) "direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth"; or (4) "establish rigorous proportionality or other substantive appellate review of life-without-parole sentences." *Id.* "But the U.S. Constitution, as" the Supreme Court has "interpreted it, does not demand those particular policy approaches." *Id.* So they cannot be adopted here.

To be sure, this Court has "supervisory power to establish and maintain civilized standards of procedure and evidence in federal courts[.]" *Corley v. United States*, 556 U.S. 303, 307 (2009). But this Court should not exercise its

[1] There still is no national consensus over whether the Supreme Court's decisions in this area cover aggregate sentences for offenses committed on separate occasions or *de facto* life sentences for a single offense. Brief for Appellee at 33–37; Petition of Appellee for Rehearing En Banc at 10 n.3, 12.

supervisory powers to create safeguards that neither the Eighth Amendment nor Congress requires. *See Jones v. United States*, 527 U.S. 373, 380–84 (1999). Furthermore, federal courts cannot use their supervisory powers to enact new rules that "conflict[] with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. 140, 148 (1985). That "would confer upon the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980).

* * *

"In short," the District Court did what the Eighth Amendment requires: it expressly (and repeatedly) considered Grant's "youth as a mitigating factor when deciding whether to impose a life-without-parole sentence." *Jones*, 141 S. Ct. at 1316. The District Court balanced Grant's youth and potential for rehabilitation against his horrific crimes before exercising its broad discretion to impose a 65-year aggregate term of imprisonment. Because that sentence doesn't doom Grant to die in prison, this Court should affirm it in all material respects as procedurally and substantively reasonable.

Respectfully submitted,

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Date: May 18, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify as an Assistant United States Attorney for the District of New Jersey that:

(1) this supplemental brief complies with the five-page limit set by this Court;

(2) this supplemental brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared using a Microsoft WORD for Microsoft 365 word-processing system and it is in a proportionally spaced typeface, namely Calisto MT, that is at least 14 points; and

(3) The PDF version of this supplemental brief was prepared on a computer that is automatically protected by a virus detection program, namely a continuously updated version of McAfee Endpoint Security 10.7, and no virus was detected.

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Assistant U.S. Attorney

Dated: May 18, 2021

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on May 18, 2021, I caused this supplemental brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system.

I also certify that on May 18, 2021, I caused this supplemental brief to be served by the Notice of Docketing Activity generated by the Third Circuit's electronic filing system, on all counsel of record in this appeal for Defendant Corey Grant and the *amici curiae* who submitted briefs supporting him.

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Assistant U.S. Attorney

Dated: May 18, 2021