JOHN J. GIBBONS FELLOWSHIP IN
PUBLIC INTEREST & CONSTITUTIONAL LAW

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Via ECF

Patricia Dodszuweit, Clerk
United States Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

RE: *United States of America v. Corey Grant*, No. 16-3820
Argued *En Banc* February 20, 2018

Dear Ms. Dodszuweit:

Appellant respectfully submits this letter in response to the Court's question of May 11, 2021: "what impact, if any, does *Jones v. Mississippi* have on the issues in the instant case?" The answer, in short, is none.

Grant's case arises out of the particular facts of his 2016 resentencing. In 1992, Grant was sentenced for offenses resulting from his involvement in a drug gang between the ages of 13 and 15 to concurrent terms of life (for murder and attempted murder) and 40 years (for drugs), with a consecutive term of five years (for weapons). After *Miller v. Alabama*, 567 U.S. 460 (2012), held that a juvenile homicide defendant may not be sentenced to life without parole absent consideration of his youth, Grant filed a petition under 28 U.S.C. § 2255, which the district court granted. A9. At resentencing, the court first determined that a new sentence was proper only as to those counts for which Grant had originally been sentenced to life, leaving in place a term of 45 years. A152. Then, referencing Grant's institutional record and other evidence of rehabilitation, the court found that "Mr. Grant is not that rarest of exception referenced in *Miller*, where the lifetime without parole is appropriate[.]" A151. The court then imposed a new, aggregate sentence of 65 years.

This appeal raises two issues. First, because Grant was specifically adjudged *not* "irreparably incorrigible," A150, he is entitled to "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" at a time that will allow for "fulfillment outside prison walls" and "reconciliation with society." *Graham v. Florida*, 560 U.S. 48, 75, 79 (2010). In other words, because Grant was

determined capable of reform, it would have been unconstitutional to sentence him to life without parole under *Miller* and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), of which his sentence of 65 years was the functional equivalent. *See* App.'s Brief at 21-31; App.'s Reply at 1-11; *see also* App.'s Supp. Br. (Mar. 8, 2019) at 9-10 (agreeing that courts can assure that a non-incorrigible juvenile's sentence provides the requisite "meaningful opportunity" through appropriate consideration of relevant factors at sentencing) (citing *En Banc* Tr. at 7:11-15).

Second, the district court was required to vacate Grant's sentence on all counts and resentence him *de novo* under the "sentencing package doctrine." *See* App.'s Brief at 47-53 (citing *United States v. Miller*, 594 F.3d 172, 181-82 (3d Cir. 2010)); App.'s Reply at 21-26. That is, Grant's original sentences—the life sentence for murder and attempted murder and the 40-year sentence for drug offenses—were clearly "interdependent," *United States v. Ciavarella*, 716 F.3d 705, 735 (3d Cir. 2013); the mandatory life terms for murder and attempted murder rendered sentencing on the drug counts "merely symbolic," *Grant*, 887 F.3d at 158 (Cowen, J., concurring in part and dissenting in part), a fact that explicitly informed the court's decision to "send a message" by imposing a long, 40-year term for drugs, A450-51. *See Sneade v. Vargo*, 2018 WL 6809182, at *5 (E.D. Va. Dec. 27, 2018) (requiring resentencing *de novo* under *Miller* where "[original] life without parole sentence tainted the judge's decision with respect to his other convictions"); *Com v. Costa*, 33 N.E.3d 412, 417 (Mass. 2015) (requiring resentencing *de novo* because change in juvenile sentencing law "transformed a choice that could be regarded as 'somewhat symbolic' into one of some consequence"). By not resentencing Grant *de novo* on all counts, the district court failed to "'reconstruct the sentencing architecture . . . to ensure that the punishment still fits both crime and criminal,'" as the sentencing package doctrine requires. *United States v. Davis*, 112 F.3d 118, 122 (3d Cir. 1997) (citation omitted). Moreover, there can be no question but that the original 40-year term for drugs was "'highly consequential, establishing a substantial floor'" which the resentencing court felt obligated to exceed to punish Grant on the other counts. *Grant*, 887 F.3d at 158 (Cowen, J.) (citation omitted). In this manner, a vestige of the original, unconstitutional sentence drove up the number at

resentencing, such that the *Miller* violation was never purged.[1] *See Dumas v. Clarke*, 2017 WL 344 6640, at *11 (E.D. Va. July 14, 2017) (failure to resentence *de novo* would "unnecessarily tie the hands of the Circuit Court . . . , as the court would be weighing the considerations of [] youth in light of *Miller* and *Montgomery* without being able to reflect such considerations in his total sentence"); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014) (holding *Miller* "wiped the slate clean," and remanding "to consider the entire sentencing package").

The decision in *Jones* has no bearing on either of these issues. In *Jones*, the Court addressed the question of whether "a sentencer who imposes a life-without-parole sentence [on a juvenile] must also make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with [such] an implicit finding[.]" Slip. Op. at 1. The Court's answer was that neither *Miller* nor *Montgomery* imposed any such "magic-words requirement," *id.* at 17-18, because "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth," *id.* at 15.

But *Jones* reaffirmed the central holding of *Miller* and *Montgomery* that a sentence of life without parole is unconstitutionally disproportionate for a juvenile who is, in fact, capable of rehabilitation. Thus, *Montgomery* held that *Miller* applied retroactively because it announced a new, substantive rule of law, "bar[ring] life without parole [] for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at 209. And *Jones* expressly endorsed this substantive limitation, quoting the "key paragraph from *Montgomery*" with approval:

> "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this

[1] The Court requested additional briefing on this issue after oral argument *en banc*. *See* Clerk's Letter (Mar. 1, 2019).

> punishment is disproportionate under the Eighth Amendment."

Slip. Op. at 7-8 n.2 (quoting *Montgomery*, 577 U. S. at 211). Indeed, *Jones* repeated that life without parole is unconstitutional for certain juveniles—those like Grant, who are capable of rehabilitation—and that the sentencing discretion mandated by *Miller* is necessary to protect such juveniles against disproportionate punishment:

> On the question of what *Miller* required, *Montgomery* was clear: "A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole *from those who may not*."

Id. at 12 (quoting *Montgomery*, 577 U.S. at 210) (emphasis added). Further, lest there be any confusion, *Jones* was explicit that, "[t]oday's decision does not overrule *Miller* or *Montgomery*." *Id.* at 19. Rather, *Jones* simply reiterated that *Miller* did not impose any "'formal fact-finding requirement'" so as to "'avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems.'" *Id.* at 5, 18-19 (quoting *Montgomery*, 577 U.S. at 211).[2]

It follows that *Jones* does not speak to either issue in Grant's case. Regarding Grant's first claim, it remains unconstitutional to sentence a juvenile like Grant, who is capable of reform, to life without parole. The Government is thus incorrect that Grant's new sentence is constitutional under *Jones* merely because it was "entirely discretionary and [the court] considered youth as a mitigating factor." Govt. Letter (April 22, 2021). If the record were silent as to Grant's capacity for reform, this Court would be required to presume that the district court had exercised its discretion in accordance with *Miller*'s substantive guarantee. But where, as here, the district court specifically found Grant capable of reform, it is not enough that the court considered Grant's youth and imposed a discretionary sentence; the court's finding forbade it from imposing a sentence of life without the possibility of parole. The only remaining question, then, is whether there is any constitutional distinction between life without parole and a sentence of 65 years, *i.e.* whether Grant's sentence

[2] Of course, such federalism concerns are not implicated by this appeal.

will permit him a "'meaningful opportunity to obtain release,'" *Miller*, 567 U.S. at 479 (citation omitted), with a real chance for "fulfillment outside prison walls" and "reconciliation with society." *Graham*, 560 U.S. at 79; *see* App.'s Brief at 21-31; App.'s Reply at 1-11. *Jones* does not, of course, address this question, but as Grant has argued, his sentence – whereby he has no chance of release until his 70s, after nearly 60 years of incarceration – is one of *de facto* life without the opportunity for parole consideration and is thus unconstitutional.

Likewise, *Jones* obviously offers no guidance regarding Grant's sentencing package doctrine claim. That is, *Jones* did not in any way present the question of whether a defendant convicted of multiple offenses must be resentenced *de novo* on all counts where one sentence was vacated under *Miller*. That said, *Jones* did emphasize that *Miller* "required a discretionary sentencing procedure" to "ensure[] individualized consideration of youth" and safeguard against the "'risk of disproportionate punishment.'" Slip. Op. at 11, 16 (quoting *Miller*, 567 U.S. at 479); *see id.* at 12 (calling "[t]he key assumption of both *Miller* and *Montgomery*" that individualized consideration of youth ensures a sentence that "is appropriate in light of the defendant's age"). In that regard, if *Jones* bears upon this case at all, it supports Grant's contention that *de novo* resentencing was proper to ensure an appropriate, individualized sentence that bears no trace of Grant's former, mandatory one.

In sum, because Grant was specifically determined to be capable of reform at the time of his resentencing in 2016, the limited holding in *Jones* has no impact here. As a result, the Court should properly resolve the two fundamental issues Grant presents, and for the reasons he has argued, vacate and remand for *de novo* resentencing consistent with his demonstrated capacity for rehabilitation.

Respectfully submitted,

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg

cc: Bruce P. Keller, Esq., Assistant U.S. Attorney, w/encs. via ECF