No. 18-6207

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL ERNESTO PAIZ GUEVARA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to the continued representation of two attorneys under 18 U.S.C. 3005, where the court initially appointed two attorneys for petitioner, the government then indicated it was not seeking the death penalty, a grand jury returned a superseding indictment that did not allege the statutory factors required for imposition of the death penalty, and one of petitioner's two attorneys subsequently was unable to continue his representation for medical reasons.

2. Whether petitioner's statutory minimum sentence of life without parole for murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1), is unconstitutional because petitioner was 19 at the time he committed his offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 894 F.3d 593.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2018. The petition for a writ of certiorari was filed on October 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of

murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1). 12/2/16 Judgment 1. He was sentenced to life imprisonment. 12/2/16 Judgment 2. The court of appeals affirmed. Pet. App. 1a-26a.

1. Petitioner was a member of La Mara Salvatrucha, or MS-13, a violent international street gang. Pet. App. 4a; see Presentence Investigation Report (PSR) ¶ 21. In March 2014, when petitioner was 19 years old, petitioner and six other MS-13 members murdered Gerson Martinez Aguilar, an MS-13 recruit, as punishment for breaking gang rules by stealing $600 from the gang and disrespecting another member. PSR ¶ 33; see Pet. App. 4a, 25a.

The gang members involved in the killing told Martinez Aguilar that they were having a meeting at Holmes Run Park in Fairfax, Virginia, and that he was going to receive a beating for violating the gang's rules. PSR ¶ 33. In fact, they planned to kill him and had already dug his grave. Ibid.; C.A. App. 4781-4782, 4999. When Martinez Aguilar arrived, the gang members beat him, then stabbed him repeatedly. PSR ¶ 33; C.A. App. 4778-4779. Petitioner participated in the stabbing, and he helped another gang member cut off Martinez Aguilar's head. C.A. App. 4778-4779, 4946, 5001. The gang members then broke Martinez Aguilar's legs with a pickaxe so that his body would fit into the hole they had dug. PSR ¶ 33.

2. In September 2014, a grand jury returned a superseding indictment charging petitioner and nine others with murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1). PSR ¶ 1;

Indictment 11. The penalty for murder in aid of racketeering is "death or life imprisonment." 18 U.S.C. 1959(a)(1). The indictment alleged certain aggravating factors that must be submitted to the jury in order for it to impose the death penalty under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591(a)(2), 3592(c). Indictment 13-15.

When a defendant "is indicted" for a "capital crime," 18 U.S.C. 3005 provides that he "shall be allowed to make his full defense by counsel; and the court * * * shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases." In October 2014, five days after petitioner's arrest, the district court sua sponte appointed attorneys David Baugh and William Michael Chick, Jr. to represent petitioner. Pet. App. 20a; see C.A. App. 27 (Docket entry Nos. 33, 34 (Oct. 1, 2014)). In March 2015, the government filed a notice of intent not to seek the death penalty as to petitioner. C.A. App. 48 (Docket entry No. 256 (Mar. 30, 2015)). Two months later, the grand jury returned a third superseding indictment that, as to petitioner, omitted the statutory aggravating factors under the FDPA. Id. at 1016-1032.

Trial for petitioner and seven of his co-defendants was set to begin on March 21, 2016. C.A. App. 49 (Docket entry No. 257 (Apr. 2, 2015)). In January 2016, petitioner moved for a continuance on the ground that Baugh had been diagnosed with a serious illness and would not be available for trial for "several

months." C.A. App. 1425; see Pet. App. 20a. The court held a telephonic hearing on January 25, 2016, withheld ruling on the motion, and instructed Chick to propose a replacement for Baugh within one week. C.A. App. 7293-7298. Four days later, petitioner filed a motion to sever and continue, asserting that he "wish[ed] for Mr. Baugh to remain on the case" and that Baugh's doctors were confident that he would be able "to participate in trial in four months (or more) from the date of this pleading." Id. at 1414. The motion stated that Chick had consulted with at least three attorneys "who qualify as Learned Counsel" but who did not believe they could accept the appointment without a continuance. Ibid. On February 1, 2016, petitioner filed a "supplemental motion," again arguing that the court should sever and continue the case so that Baugh could continue representing him. Id. at 7300-7304f.

On February 4, 2016, the district court held a second telephonic hearing on petitioner's motions, at the end of which it denied the motions to continue and to sever. C.A. App. 7305-7332. The court allowed Baugh to stay on the case until he and Chick decided that Baugh should withdraw, and it informed Chick that it was willing to appoint an additional attorney if he could find one who would represent petitioner without a continuance. Pet. App. 20a; C.A. App. 7331-7332. Baugh subsequently moved to withdraw, and the court granted the motion over petitioner's objection. C.A. App. 1537-1547; see Pet. App. 20a.

3. After the second telephone conference, the district court issued a written order explaining its reasons for denying petitioner's motions to continue and to sever. C.A. App. 4566-4583.

The district court observed that several courts of appeals had determined that Section 3005 does not require the appointment of two lawyers where a defendant is indicted for a capital offense, but the government does not seek the death penalty. C.A. App. 4572-4576. The court explained, however, that it was bound by the rule in Fourth Circuit, "[t]he only circuit that has come to a different conclusion," which holds that Section 3005 generally requires the appointment of two attorneys where the indictment charges a crime that carries the death penalty as a potential sentence, even though that penalty is not available in the defendant's case. Id. at 4577 (citing United States v. Boone, 245 F.3d 352, 359-360 (4th Cir. 2001) (requirement applied to defendant indicted for a capital offense, even though the United States did not seek the death penalty); United States v. Watson, 496 F.2d 1125, 1127-1129 (4th Cir. 1973) (requirement applied to defendant indicted for a capital offense, even though the defendant could not receive the death penalty under Furman v. Georgia, 408 U.S. 238 (1972) (per curiam)). The court stated that it had followed Fourth Circuit precedent by appointing two attorneys, but that Section 3005 "does not require the retention of a second defense attorney after (1) the Government determines not to seek

the death penalty, (2) two attorneys were appointed, and (3) on the eve of trial learned counsel became medically disabled." Ibid.

The district court rejected petitioner's arguments that declining to sever and continue the trial would unduly prejudice him. The court observed that "Mr. Chick is a qualified defense attorney" who had worked as an assistant public defender, practiced in a well-respected criminal defense firm, and worked for the Capital Defender's Office of Northern Virginia, "where he exclusively handled capital murder cases for clients facing the possibility of the death penalty." C.A. App. 4580. The court additionally noted that petitioner had received the "benefit" of having "access * * * to Mr. Baugh for one year and four months." Id. at 4581. The court also recounted that it had informed petitioner's counsel that it would "appoint additional counsel to replace Mr. Baugh if necessary." Id. at 4579. And it noted that "[w]hile Mr. Chick states that he has been unsuccessful" in locating such counsel, counsel for two of petitioner's co-defendants withdrew around the same time as Baugh did, and "both [of those defendants] found suitable replacements." Id. at 4579-4580 & n.1. The court determined that petitioner was "not being denied effective assistance of counsel by moving forward without Mr. Baugh's assistance." Id. at 4581.

Finally, the district court explained that continuing or severing petitioner's case "would be prejudicial to the Government, waste unnecessary judicial resources, prolong the

pretrial detention of co-defendants, and jeopardize evidence as well as the safety of witnesses" who were "at risk for retaliation from MS-13 gang members." C.A. App. 4581-4582. The court also observed that "[f]inding another trial [date] that would accommodate eight defendants, fifteen defense attorneys and the Government for a six to eight week jury trial would be extremely difficult." Id. at 4582.

4. At trial, the jury found petitioner guilty of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1). 12/2/16 Judgment 1.

In advance of sentencing, petitioner argued that the statutory minimum sentence of life imprisonment required by 18 U.S.C. 1959(a)(1) violated the Eighth Amendment as applied to him. C.A. App. 7127-7134. Petitioner relied on Miller v. Alabama, 567 U.S. 460 (2012), which held that a mandatory sentence of life without parole is unconstitutional for a defendant under 18 years of age at the time of his offense. Id. at 465. Although petitioner was 19 at the time of Martinez Aguilar's murder, he contended that Miller's rationale applied to him. C.A. App. 7129-7133. The district court rejected petitioner's argument and sentenced petitioner to life imprisonment. Id. at 7220; see 12/2/16 Judgment 2.

5. The court of appeals affirmed. Pet. App. 1a-26a.

a. The court of appeals rejected petitioner's contention that the district court "denied him his statutory right to two

lawyers under 18 U.S.C. § 3005." Pet. App. 20a. The court observed that Section 3005 "does not directly address what is required of a district court under these circumstances," i.e., where the court initially appoints two attorneys, the government elects not to seek the death penalty, a grand jury returns a superseding indictment omitting the statutory factors required to impose the death penalty, and one of the defendant's attorneys then must withdraw on the eve of trial due to medical issues. Id. at 21a. The court continued that no statute could "adequately address every possible change in representation that might occur before or during a trial" and that "[t]he district court must thus be afforded some measure of discretion to determine what justice requires in a particular case." Ibid. (citing Morris v. Slappy, 461 U.S. 1, 11-12 (1983)) (recognizing district courts' "broad discretion" in granting or denying continuances).

On the facts of this case, the court of appeals found that the district court had not abused its discretion in denying petitioner's motions to sever and to continue. Pet. App. 21a. The court observed that the district court had repeatedly "emphasize[d] its willingness to appoint replacement counsel," but "after a brief search for replacement counsel, Chick apparently ceased his efforts to find an additional attorney for [petitioner], and he never requested that the district court itself identify and appoint new counsel." Ibid. "In other words," the court continued, "neither [petitioner] nor Chick actually invoked § 3005

as neither 'request[ed]' that the district court assign a substitute attorney to replace Baugh." Ibid. This was "despite the fact that two attorneys for [petitioner's co-]defendants were forced to withdraw from the case around the same time as Baugh, and replacement attorneys were found and appointed for each of those defendants." Id. at 21a-22a.

Like the district court, the court of appeals determined that granting petitioner's motions to sever and to continue his trial "would have placed the government witnesses in potential danger and strained the government's resources." Pet. App. 22a. And it noted that the district court had determined that petitioner would receive a "fair trial even if * * * Chick were his only counsel at trial." Ibid.

b. The court of appeals also rejected petitioner's contention that his mandatory sentence of life imprisonment violated the Eighth Amendment because he was 19 years old at the time of the offense. Pet. App. 25a-26a. The court determined that Miller, supra, was of "no help" to petitioner because he was an adult at the time of Martinez Aguilar's murder. Id. at 25a. The court recognized that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Ibid. (quoting Roper v. Simmons, 543 U.S. 551, 574 (2005)) (brackets omitted). But it explained that "rules based on age are historically common and appear in many areas of the law," observing that although "[t]he lines drawn" by such statutes may be an

"imperfect fit[] for some individuals," they are nevertheless constitutional. Id. at 26a.

ARGUMENT

Petitioner renews his contentions that he had a statutory right to two attorneys throughout trial under 18 U.S.C. 3005, Pet. 7-13, and that the statutory minimum term of life imprisonment imposed on him violates the Eighth Amendment, Pet. 14-19. The court of appeals correctly rejected those arguments, and the decision below does not conflict with any decision of this Court or of another court of appeals. Moreover, this case would be a poor vehicle for considering the first question presented because any error in denying petitioner's motions to continue and to sever was harmless. This Court has previously denied petitions for review raising questions related to both the first[1] and second[2] questions presented. The same result is warranted here.

1. Petitioner contends (Pet. 7-13) that he was entitled to two attorneys under 18 U.S.C. 3005 throughout a trial at which he was not exposed to the death penalty, for a crime -- murder in aid of racketeering in violation of 18 U.S.C. 1959(a)(1) -- that allows for such a penalty. In particular, petitioner argues (Pet. 9) that "[t]he two-lawyer obligation under the statute is triggered, not by whether the death penalty is actually being sought, but

[1] See Douglas v. United States, 555 U.S. 1033 (2008) (No. 08-5678); Waggoner v. United States, 543 U.S. 1005 (2004) (No. 04-5993).

[2] See In re Helmstetter, 138 S. Ct. 59 (2017) (No. 16-8207).

instead by a defendant's indictment for a capital crime." Petitioner further argues (Pet. 8-13) that the two-lawyer mandate remains -- and displaces the district court's usual discretion over motions to sever and to continue -- regardless of subsequent events, including the government's decision not to seek the death penalty and counsel's need to withdraw for medical reasons. Petitioner's claim does not warrant further review.

a. Petitioner's assertion (Pet. 9) that any charge of violating 18 U.S.C. 1959(a)(1) is necessarily a "capital crime" for purposes of 18 U.S.C. 3005 is seriously undermined by the Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), and by the cases following it. In Ring, the Court applied to capital prosecutions its holding in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Thus, the Court held in Ring, the jury must determine any aggravating fact necessary to make the defendant eligible for the death penalty. 536 U.S. at 609. The Court explained that Arizona's "first-degree murder statute authorizes a maximum penalty of death only in a formal sense," because a defendant may not in fact be sentenced to death under Arizona law without a finding of a statutory aggravating circumstance. Id. at 604 (citation and internal quotation marks omitted). These aggravating

circumstances are in "effect" the "'functional equivalent'" of an element of the capital crime. Id. at 604, 605, 609 (quoting Apprendi, 530 U.S. at 494 n.19); see also Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (opinion of Scalia, J.) (stating that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances'").

In federal prosecutions, the consequence of that holding is to require that aggravating circumstances be charged in the indictment just as other penalty-increasing facts must be. See, e.g., United States v. Cotton, 535 U.S. 625, 627 (2002) (recognizing the indictment requirement in the non-capital context); see also Harris v. United States, 536 U.S. 545, 563 (2002) (opinion of Kennedy, J.) (facts that increase the maximum statutory sentence are "what the Framers had in mind when they spoke of 'crimes' and 'criminal prosecutions' in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment."). The FDPA provides that the death penalty may not be imposed for homicide offenses unless the jury finds both a statutory aggravating factor (such as multiple victims or substantial planning and premeditation) and a particular level of culpable intent. See 18 U.S.C. 3591(a)(2),

3592(c), 3593(e)(2). Accordingly, following Ring, the government has submitted to the grand jury any statutory aggravating factor on which it intends to rely to make the defendant death-eligible.[3] The government is required to give the defendant notice of those factors "a reasonable time before the trial." 18 U.S.C. 3593(a).

Although earlier versions of the indictment in this case alleged aggravating factors necessary for the imposition of the death penalty under the FDPA, the government gave notice more than a year before trial of its intent not to seek the death penalty. See p. 3, supra. The grand jury then returned a third superseding indictment which did not include the aggravating factors required to impose the death penalty. Accordingly, under the principles announced in Ring, petitioner was not at the relevant time "indicted for * * * [a] capital crime" within the meaning of 18 U.S.C. 3005, and he was not entitled to the services of a second court-appointed counsel at trial.

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[3] The courts of appeals have unanimously confirmed that submitting these aggravating factors to the grand jury is consistent with the FDPA. United States v. Mikos, 539 F.3d 706, 714-716 (7th Cir. 2008), cert. denied, 558 U.S. 816 (2009); United States v. Fell, 531 F.3d 197, 237 (2d Cir. 2008), cert. denied, 559 U.S. 1031 (2010); United States v. Sampson, 486 F.3d 13, 21-23 (1st Cir. 2007), cert. denied, 553 U.S. 1035 (2008); United States v. Brown, 441 F.3d 1330, 1367 (11th Cir. 2006), cert. denied, 549 U.S. 1182 (2007); United States v. LeCroy, 441 F.3d 914, 921 (11th Cir. 2006), cert. denied, 550 U.S. 905 (2007); United States v. Allen, 406 F.3d 940, 949 (8th Cir. 2005) (en banc), cert. denied, 549 U.S. 1095 (2006); United States v. Barnette, 390 F.3d 775, 789 (4th Cir. 2004), summarily vacated on other grounds, 546 U.S. 803 (2005); United States v. Robinson, 367 F.3d 278, 290 (5th Cir.), cert. denied, 543 U.S. 1005 (2004).

b. This case does not present the question whether petitioner was ever entitled to the appointment of a second attorney. After petitioner was arrested on charges of murder in aid of racketeering, the district court appointed two lawyers, at least one of whom petitioner agrees met the qualifications specified by Section 3005. See C.A. App. 25-27 (Docket entry No. 21 (Sept. 26, 2014), Docket entry Nos. 33, 34); see, e.g., Pet. 7 (referring to Baugh as "Learned Counsel"). Petitioner thus had the benefit of both attorneys' services for the entire period when he faced the possibility of the death penalty.

Because petitioner initially had counsel satisfying Section 3005, this case presents only the question whether any statutory right to a second attorney continues even after the government has ruled out seeking the death penalty and a superseding indictment reflecting that decision has been returned -- and more specifically, whether the second-lawyer requirement supersedes the district court's typically "broad discretion" to consider a defendant's request for a continuance. Morris v. Slappy, 461 U.S. 1, 11 (1983). The court of appeals correctly determined that Section 3005 does not have that effect.

Section 3005 was amended in 1994 with the enactment of the FDPA, to provide that counsel appointed in a federal capital case must be "learned in the law applicable to capital cases." FDPA, Pub. L. No. 103-322, Tit. VI, § 60026, 108 Stat. 1982. The FDPA also requires advance notice of intent to seek the death penalty,

as noted above. 18 U.S.C. 3593(a). Thus, the FDPA contemplated (consistent with this Court's capital-sentencing jurisprudence) that the death penalty would not be sought in every case in which the charge might support a death sentence and that the decision would be made well in advance of trial. Congress therefore would not have intended that a defendant remain eligible for a second attorney skilled in the law of capital sentencing once, under the governing statutory framework and operative indictment, no capital sentence is possible. Congress rationally wanted a defendant to have the benefit of additional counsel who is skilled in capital sentencing procedures when the case will proceed under the FDPA's complex provisions, but that expertise confers no benefit once the government has declined to seek the death penalty under the FDPA. Nor does anything in the statute suggest that Congress intended for Section 3005's two-lawyer requirement to remove a district court's inherent discretion to address scheduling matters in those circumstances.[4]

c. As petitioner acknowledges (Pet. 8), "most" courts of appeals have held that "a defendant is not entitled to benefits he would otherwise receive in a capital case if the government announces that it will not seek the death penalty." United States

[4] Petitioner contends (Pet. 12-13) that Section 3005 placed the burden on the district court, rather than on petitioner's counsel, to identify a replacement for Baugh. But as discussed above, Section 3005's two-lawyer requirement did not apply at the time Baugh moved to withdraw. The precise procedures required by that provision therefore are not at issue here.

v. Grimes, 142 F.3d 1342, 1347 (11th Cir. 1998), cert. denied, 525 U.S. 1088 (1999); accord United States v. Cordova, 806 F.3d 1085, 1101 (D.C. Cir. 2015); United States v. Douglas, 525 F.3d 225, 237 (2d Cir.), cert. denied, 555 U.S. 1033 (2008); United States v. Waggoner, 339 F.3d 915, 917-919 (9th Cir. 2003), cert. denied, 543 U.S. 1005 (2004). Two additional circuits have indicated in dicta that second counsel need not be retained once "it becomes clear that the death penalty is no longer an option." In re Sterling-Suarez, 306 F.3d 1170, 1175 (1st Cir. 2002); accord United States v. Casseus, 282 F.3d 253, 256 (3d Cir.), cert. denied, 537 U.S. 852 (2002).

Petitioner points out (Pet. 8) that in United States v. Boone, 245 F.3d 352 (2001), the Fourth Circuit held that Section 3005 "provides an absolute statutory right to two attorneys" whenever the defendant is indicted under a statute that carries the death penalty as a potential sentence. Id. at 358. Although Boone is in tension with decisions from other circuits, it does not directly conflict with them. In Boone, the defendant was never provided with a second attorney learned in death-penalty law, id. at 358-359, and the Fourth Circuit emphasized its concern that defendants indicted for death-eligible crimes have experienced counsel during the time when the government is considering whether to seek the death penalty. Id. at 360. That concern is not at issue here, because petitioner had the benefit of two attorneys

throughout the period during which the death penalty remained a possibility.

Moreover, any disagreement between the Fourth Circuit and other courts of appeals is not implicated in this case. The court of appeals here recognized that under Boone, Section 3005 "appl[ies] even when the government does not actually seek the death penalty" so long as "the defendant is indicted for a capital crime." Pet. App. 20a. The court distinguished Boone, however, on the ground that "Section 3005 does not directly address what is required" where the government is not seeking the death penalty and, on the eve of trial, one attorney must withdraw due to medical issues. Id. at 21a. In other words, even applying the more defendant-friendly rule of Boone, the court of appeals held that petitioner was not entitled to relief. Petitioner thus seeks not for this Court to adopt the rule of Boone (as opposed to that adopted by other circuits), but to expand that rule considerably.[5]

d. In any event, even if the district court had violated Section 3005 in this case, any violation would have been harmless. A non-constitutional error is harmless unless the error had a

[5] To the extent petitioner suggests the decision below conflicts with Boone, any intra-circuit tension would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). That is particularly so because the Fourth Circuit decided Boone before this Court decided Ring, and it has not had occasion to reconsider Boone since that time. See United States v. Shepperson, 739 F.3d 176, 178 n.1 (4th Cir. 2014) (noting tension between Boone and decisions of other courts of appeals but stating that "it does not affect the resolution of this case").

substantial and injurious effect or influence on the jury's verdict. Kotteakos v. United States, 328 U.S. 750, 776 (1946). "[T]he purpose of 18 U.S.C. § 3005 is to allow a capital defendant to 'make his full defense by counsel.'" United States v. Casseus, 282 F.3d 253, 256 (3d Cir.), cert. denied, 537 U.S. 852 (2002). Petitioner was "not harmed in any way" by the lack of a second counsel with special capital expertise in a trial in which petitioner was not exposed to the death penalty. Ibid. In fact, petitioner was not deprived of counsel with capital-case expertise; his remaining attorney had significant experience with death penalty cases. See C.A. App. 4580.

Petitioner points out that this was his attorney's first federal trial and asserts that his attorney played a "secondary role" in the case until Baugh's withdrawal. Pet. 7, 11. But simply because the attorney was trying his first case in federal court does not mean he could not render effective assistance, particularly given his extensive experience as a criminal defense attorney. See C.A. App. 4580. There is no indication that petitioner's attorney lacked adequate time to prepare for trial, and petitioner never sought a continuance on that basis. Nor has petitioner pointed to any deficiencies in his attorney's representation, which in any event would more appropriately be raised in collateral proceedings. See Massaro v. United States, 538 U.S. 500, 504-505 (2003).

2. Petitioner separately contends (Pet. 14-19) that his sentence of life imprisonment for murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1), violates the Eighth Amendment because he was 19 at the time of the offense. Petitioner relies (Pet. 14) on Miller v. Alabama, 567 U.S. 460 (2012), in which this Court held that a state law requiring "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eight Amendment's prohibition on 'cruel and unusual punishments.'" Id. at 465. The Court reasoned that "juveniles have diminished culpability and greater prospects for reform," such that "'they are less deserving of the most severe punishments.'" Id. at 471 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). Thus, the sentencing court or jury "must have the opportunity to consider mitigating circumstances" before sentencing juveniles under the age of 18 at the time of the offense to life without parole. Id. at 489.

The court of appeals correctly determined that Miller does not invalidate petitioner's sentence because he was 19 at the time of the offense, and Miller's holding is limited to those who were "under the age of 18 at the time of their crimes." Miller, 567 U.S. at 465. Petitioner does not argue to the contrary; instead, he contends that this Court should "extend" Miller to "adult teenager[s]" because "'[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.'" Pet. 16-19 (quoting Roper v. Simmons, 543 U.S. 551, 574

(2005)). In particular, petitioner cites studies on which this Court has relied in its juvenile justice cases indicating that "gains in impulse control," brain maturation, and development of future planning skills may "last[] until age 19 or later" and "'continue to develop until the early 20s.'" Pet. 18 (quoting Am. Psychological Ass'n et al. Amicus Br. at 13, Miller, supra (No. 10-9646)).

Petitioner's argument lacks merit. This Court addressed the issue of where the line should be drawn in Roper, where it concluded that the death penalty is unconstitutional as applied to those who were minors at the time of their offenses. 543 U.S. at 574. The Court recognized that "[d]rawing the line at 18 years of age is subject * * * to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Ibid. The Court explained, however, that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," and concluded that "[i]t is * * * the age at which the line for death eligibility ought to rest." Ibid. The Court again drew a "clear line" at 18 in Graham when holding that life imprisonment without parole was unconstitutional for minors who commit non-homicide offenses. 560 U.S. at 74. And Miller relied on both Roper and Graham, identifying the age of 18 as the line at which life imprisonment could be mandatory, even though the

defendants in Miller were 14 years old at the time of their offenses. Miller, 567 U.S. at 465, 471-473.

Petitioner cites no authority supporting his claim that Miller's holding should apply to defendants convicted for crimes committed after their 18th birthdays. Instead, he cites decisions -- several of which have been vacated -- that rely on state law or consider youth under a discretionary sentencing regime.[6] Indeed, the decision below is in accord with those of several other courts of appeals, which have rejected arguments that Miller should be expanded to those who were 18 or older at the time of their offenses. See United States v. Williston, 862 F.3d 1023, 1039 (10th Cir.), cert. denied, 138 S. Ct. 436 (2017); United States v. Marshall, 736 F.3d 492, 497-498 (6th Cir. 2013), cert. denied, 573 U.S. 922 (2014).

[6] State v. O'Dell, 358 P.3d 359, 363-368 (Wash. 2015) (en banc) (holding that youth may support "an exceptional sentence below the standard range" as a matter of state law); People v. House, 72 N.E.3d 357, 389 (Ill. App. Ct. 2015) (relying on state constitutional provision), vacated, 111 N.E.3d 940 (Ill. 2018); Sharp v. State, 16 N.E.3d 470, 480 (Ind. Ct. App. 2014) (same), vacated on other grounds, 42 N.E. 3d 512 (Ind. 2015); United States v. Walters, 253 F. Supp. 3d 1033 (E.D. Wis. 2017) (considering youth under 18 U.S.C. 3553(a) factors).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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