No.

In the

Supreme Court of the United States

FELIX LOPEZ-CABRERA,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JESSE M. SIEGEL
Counsel of Record
233 Broadway, Suite 707
New York, New York 10279
(212) 207-9009
jessemsiegel@aol.com

Attorney for Petitioner Felix Lopez-Cabrera

QUESTION PRESENTED FOR REVIEW

Whether Supreme Court jurisprudence finding mandatory life sentences for juveniles cruel and unusual under the Eight Amendment, and non-mandatory life sentences cruel and unusual for juveniles unless they are "irreparably corrupt" and "permanently incorrigible," applies to individuals between the ages of 18 and 21.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the following individuals were parties to the original proceeding before the district court that issued the judgment we petition the Court to review:

Leonides Sierra, Richard Gonzalez, Jose Cruz, Edwin Ciriaco, Anibal Ramos, Alfred Laford, Antonio Pena, Julio Brito, Juan Nunez, Christopher Johnson, Donald Novas, Jose Feliciano, Jose Marmelejos, Noel Acosta-Disla, Tomas Castillo, Hugo Almonte, Cesar Almonte, Carlonell Paulino, Ronald Peralta, Jose Castillo, Mark Martinez, Jose Ballenilla, Luis Cabrera-Recio, Loren Guzman, Melvin Amparo, Jonathan Majdanski, Miguel Strong, Jose Barcarer, Jose Geronimo-Figueroa, Edgardo Ponce, Michael Delacruz, David Patino, Eduardo Holguin, Ronny Evangelista, Luis Cabrera, Mr. Carlos Rodriguez, Henry O. Pena, Dave McPherson, Vance Hill, Greydin Liz-Castillo, Nelson Jorge-Martinez, Luis Saladin, Christopher Robles, Joseph Hernandez, Jonathan Evangelista, Henry Paulino, Juan Carlos Giraldo Franco, Alejandro Soriano, Lenin Morel, Ramon Lizardi, Lewis Santos, Maria Mejia, Jose Mejia, Javier Beltran, Michael Cabrera, Julian Lopez, Christian Nieves, Yandel Silverio, Vladimir Diaz, Andry Lazala, Raymond Sosa, Manuel Geraldo, Hargelis Vargas, Joan Vasquez, Argenis Guillen,

Heriberto Martinez, Andy Ciprian, Albert Salce, Anderson Abreu, Carlos Urena, Limet Vasquez, Miguel Delance, Jugo Cespedes, Carlos Lopez and Luis Beltran[1].

[1] Carlos Lopez and Luis Beltran were co-appellants in the United States Court of Appeals for the Second Circuit, and are expected to file petitions for *certiorari* addressing the same issue argued herein.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

United States Constitution:

Other Authority:

No.

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October Term, 2019

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Felix Lopez-Cabrera respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 1, 2019.

OPINIONS BELOW

The opinion of the Second Circuit dated August 1, 2019, attached hereto as Appendix A, is reported at *United States v. Sierra, et al,* 933 F.3d 95 (2d Cir.

2019). The order of the Court of Appeals of November 7, 2019, denying rehearing *en banc*, attached hereto as Appendix B, is unreported.

JURISDICTION

This petition for certiorari is being filed within 90 calendar days of the order denying rehearing *en banc*. This Court's jurisdiction is invoked under Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Title 18, United States Code, section 1959(a), provides, in relevant part:

> Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished –
>
> (1) for murder, by death or life imprisonment, or a fine under this title, or both[.]

STATEMENT OF THE CASE

A. The Conviction and Sentence.

Felix Lopez-Cabrera was charged with committing crimes as a member of the Trinitarios street gang in the Bronx and elsewhere. After a trial that lasted almost three months, he was convicted of numerous crimes, including, as relevant here, racketeering, 18 U.S.C. §§ 1961, 1962; racketeering conspiracy, 18 U.S.C. § 1962; four counts of murder-in-aid-of-racketeering, 18 U.S.C. § 1959(a)(1); and four related counts of using, carrying, and possessing a firearm, and thereby causing death, 18 U.S.C. § 924(j)(1). Each of the counts of murder-in-aid-of-racketeering carried a mandatory sentence of life without parole, and each of the other counts noted carried a potential life sentence.

The murders included one of a victim shot by a co-conspirator when Petitioner was 18 years-old; the felony murder of another victim shot and killed by a co-conspirator during an attempted robbery when Petitioner was 19 years-old; and the murders of two victims who, the jury found, were shot and killed by Petitioner eight days after he turned 20.

In advance of sentencing, Petitioner and co-defendants (and co-appellants before the Second Circuit) Carlos Lopez and Luis Beltran submitted a joint motion asking the district court to extend the reasoning of *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and find that imposing mandatory terms of life imprisonment for their

convictions of murder in aid of racketeering violated the Eighth Amendment, as each was between the ages of 18 and 22 at the times of the offenses.

The district court found *Miller* applies only to juveniles and declined to extend its reasoning to defendants 18 years-old and older.

In support of a motion to reconsider, Petitioner submitted a report prepared by a psychologist. It noted a family history of mental health problems. Petitioner's older paternal half-brother committed suicide at the age of 22, when Petitioner was about 12, and both his father and oldest living brother exhibited suicidal tendencies; once, Petitioner came upon his father attempting to cut his veins. Petitioner also reported excessive, daily marijuana usage, which was also described during the trial.

In the report, Petitioner's older brother described how Petitioner was often beaten up as a child, in a neighborhood dominated by members of the Bloods and Crips, where not many Hispanics lived. Petitioner described meeting a leader of the Trinitarios when he was 12, not long after his brother committed suicide, and thereafter joining the Trinitarios "unofficially" when he was 13 and "officially" when he was 16. Membership in the gang made him feel part of something "big," and provided protection against Bloods and Crips who repeatedly assaulted him, his brothers and friends.

Testing of Petitioner's academic skills showed him to function (when tested at age 25) at between 7th and 10th grade levels in various subjects. On a "structured inventory of symptoms of mental and emotional disorders," his scores were "significantly elevated" on seven of the nine scales- Obsessive-Compulsive, Interpersonal Sensitivity, Depression, Anxiety, Phobic Anxiety, Paranoid Ideation and Psychoticism; this showed him to "be experiencing significant psychological distress in multiple areas."

Of particular significance here, the report described tests designed to measure Petitioner's psychosocial maturity. Psychosocial maturity "consists of temperance (ability to control impulses, sensation seeking, and positive and negative emotional states); perspective (ability to consider future consequences of behaviors as well as consider others' perspectives), and responsibility (ability to accept personal responsibility for their actions and resist coercive influences in order to develop one's own identity)." Although Petitioner was tested at the age of 25, and there was no way to reconstruct his level of maturity when he committed the offenses, the report said "it is reasonable to assume that if Petitioner does exhibit present deficits relative to children and youth, those deficits would have been greater when he was 18-19 and less mature than he is at present."

As to temperance, Petitioner graded slightly lower than the average score of sixth graders on impulse control, and slightly above sixth graders' average score on

suppression of aggression. Tested regarding perspective, he scored substantially below sixth graders on "consideration of others." On a test designed to evaluate his consideration of future consequences, he tested slightly below college-aged students' average score.

The report concluded that Petitioner "has a history of symptoms consistent with depression, anxiety, and sub-threshold ADHD"; has "continued deficits in psychosocial maturity" that "are noteworthy"; and "experienced a number of influences in his life that limit the development of psychosocial maturity," including "family dysfunction, a violent neighborhood with strong gang influence, being bullied, and substantial problems with cultural adaptation after his move to this country."

The court declined to reconsider its decision refusing to extend *Miller*.

Petitioner was sentenced on July 8, 2015. Since the court found it mandatory to impose a life sentence for each of the four convictions of murder-in-aid-of-racketeering, defense counsel declined the opportunity to be heard further regarding sentencing.

The Court imposed ten concurrent terms of life imprisonment, for racketeering and conspiracy to commit racketeering, each of the four murders-in-aid-of-racketeering, and each of the four convictions of using, carrying and

possessing a gun and thereby causing death. The court imposed additional terms of imprisonment for narcotics and other related charges.

B. The Appeal.

The Second Circuit rejected the argument made by Petitioner and co-appellants "that Miller's holding should be extended to apply to them, because scientific research purportedly shows that the biological factors that reduce children's 'moral culpability' likewise affect individuals through their early 20s." (Appendix A at 5.) Rather, the Panel found it necessary to "draw a line," and noted the Supreme Court has repeatedly drawn the line at age 18 for Eighth Amendment purposes. (*Id*) (citing *Roper v. Simmons*, 543 U.S. 551, 574 (2005), *Graham v. Florida*, 560 U.S. 48, 74-75 (2010) and *United States v. Reingold*, 731 F.3d 204, 215 (2d Cir. 2013).)

The Second Circuit denied Petitioner's petition for rehearing *en banc*. (Appendix B.)

REASONS FOR GRANTING THE PETITION

Review is appropriate because the issue presented is one of exceptional importance, with dramatic sentencing consequences for the youngest of adult defendants: Whether Supreme Court precedent prohibiting mandatory life imprisonment, and severely restricting non-mandatory life imprisonment, for juveniles, applies to young adults between the ages of 18 and 21.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court found the Eighth Amendment forbids mandatory sentences of life imprisonment without parole for juveniles, largely based on scientific evidence showing that juvenile brains are different from adult brains in ways relevant to sentencing, and continue to be so into the mid-20s. More recent studies continue to show this.

It is illogical and arbitrary to draw a "bright-line" at 18 as the age at which it is constitutional for young people to face mandatory life sentences. Rather, either the urge for a bright-line rule should give way to individualized determinations when dealing with young people whose brains have not yet reached adult maturity, or the bright line should be drawn at 21, which is increasingly surpassing 18 as "the point where society draws the line for many purposes between childhood and adulthood." *See*, *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (finding 18 to be the appropriate line when that case was decided). In short, *Miller*, based on

scientific evidence, should be applied in a way that actually reflects that evidence and takes into account evolving standards.

Building upon *Miller*, the Court emphasized in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), that juveniles constitute a class of people who may not be sentenced to life imprisonment unless, following an evidentiary hearing, a sentencing court makes an individualized determination that the juvenile is "irreparably corrupt" and "permanently incorrigible." The Court reasoned the "distinctive attributes of youth" – including lack of maturity, underdeveloped sense of responsibility, vulnerability to negative influences, limited control over their environment, unformed character and a likelihood of changing with maturity - lessen juveniles' moral culpability and diminish the penological justifications for imposing life sentences on them. Because the class of those who cannot be sentenced to life imprisonment is defined by these distinctive attributes, rather than mere chronological age, there is no rational basis to exclude defendants under the age of 21 who share the same attributes from the class, especially since the scientific evidence relied upon in *Miller* – and more recent research - shows young people possess these attributes at least until 21 and generally into their mid-20s.

I. Extending the Protections of *Miller and Montgomery* to Defendants Between the Ages of 18 and 21 Will Allow the Court's Jurisprudence to Keep Up With and Reflect Developments in the Neuroscience on Which Those Cases Relied.

The specific issue in *Miller* was whether juveniles may face *mandatory* life imprisonment. Based largely on scientific studies concerning normal neurological development in juveniles, which makes juveniles less blameworthy and reduces the penological justification for locking them up until they die, the Court found such mandatory sentences violate the Eighth Amendment. In *Montgomery*, the Court explained that *Miller* created a class of defendants who may not, consistent with the Eighth Amendment, be sentenced to life without parole, even in homicide cases. The class consists of juveniles whose crimes reflect "transient immaturity," and excludes juveniles who are found, following an evidentiary hearing, to be "irreparably corrupt" and "permanently incorrigible."

At issue in *Montgomery* was whether *Miller*'s holding, "that a juvenile convicted of a homicide could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing," should apply retroactively to juvenile offenders whose convictions and sentences were final before *Miller* was decided. 136 S.Ct. at 725. Habeas petitioner Montgomery had been found guilty in a Louisiana court for a homicide committed in 1963, when he was 17 years old, and sentenced under a Louisiana law that required the trial court to impose a

sentence of life without parole. This deprived him of the opportunity "to present mitigation evidence to justify a less severe sentence," which might have included his "young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation." *Id*. at 726. After the Court decided *Miller* almost 50 years later, Montgomery sought review of his sentence in Louisiana state courts, but lost when both the trial court and the Louisiana Supreme Court held that *Miller* did not apply retroactively on state collateral review. *Id.* at 727.

The Court first addressed jurisdictional questions not present here. Finding it had jurisdiction, the Court noted, the "[s]tate's collateral review procedures are open to claims that a decision of this Court has rendered certain sentences illegal, as a substantive matter, under the Eighth Amendment." *Id.* at 732.

The Court next addressed the central question raised by Montgomery's petition: "[W]hether *Miller*'s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive." *Id*. The Court noted that a procedural rule "'regulate[s] only the *manner of determining* the defendant's culpability,'" *id*. (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)), whereas a substantive rule "forbids 'criminal punishment of certain primary conduct' or prohibits 'a

certain category of punishment for a class of defendants because of their status or offense." *Id* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

The Court held the rule announced in *Miller* was substantive under this standard. It noted that "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment," and that the "'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles." *Id*. (quoting *Miller v. Alabama*, 132 S.Ct. 2455, 2464, n. 4 (2012)). These precedents include *Graham v. Florida*, 560 U.S. 48 (2010), which bars life without parole for juveniles convicted of non-homicide offenses, and *Roper v. Simmons*, 543 U.S. 551 (2005), which prohibits capital punishment for those under 18 at the time of their crimes. *Id*. These precedents provide *Miller*'s "starting premise," the principle that "'children are constitutionally different from adults for purposes of sentencing,'" due to "children's 'diminished culpability and greater prospects for reform.'" *Id*. (quoting *Miller*, *supra*, 132 S.Ct. at 2464).

The Court found children different for sentencing purposes in three primary ways:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "control over their

> own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well-formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievable depravity."

Id. (quoting *Miller*, *supra*, 132 S.Ct. 2464 (other citations omitted)).

The *Montgomery* Court said that, "[a]s a corollary to a child's lesser culpability," *Miller* recognized the "'distinctive attributes of youth diminish the penological justifications' for imposing life without parole on juveniles." Minors are less blame worthy than adults, making the case for retribution weaker; they are immature, reckless and impetuous, and, as a result, "less likely to consider potential punishment," undercutting the deterrence rationale; and there is less need for incapacitation, as ordinary adolescent development lessens the likelihood they will forever be dangerous to society. *Id*. at 733 (citing *Miller*, 132 S.Ct. at 2465). Moreover, "Rehabilitation cannot justify the sentence, as life without parole 'forswears altogether the rehabilitive ideal.'" *Id*. (citing *Miller*, *supra*, 132 S.Ct. at 2465 (quoting *Graham*, *supra*, 560 U.S. at 74)).

Thus, the *Montgomery* Court found, as in *Miller*, that mandatory sentences of life without parole present "'too great a risk of disproportionate punishment," and that, before imposing such a sentence on a juvenile, a court must "take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id*. (quoting *Miller*, 132

S.Ct. at 2469). The Court said *Miller* made clear that, "in light of 'children's diminished culpability and heightened capacity for change,'" the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 733-34 (quoting *Miller*, 132 S.Ct. at 2469).

As explained in *Montgomery*, *Miller* created a class of juvenile defendants convicted of homicides whose members could *not* be sentenced to life without parole without violating the Eighth Amendment: those whose crimes reflect "'unfortunate yet transient immaturity.'" *Id*. (quoting *Miller,* 132 S.Ct. at 2460 (quoting *Roper, supra,* 543 U.S. at 573)) (emphasis added). The Court explained,

> Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" (citations omitted), it rendered life without parole an unconstitutional penalty for "*a class of defendants because of their status*" – that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

Id. (emphasis added.) It is unconstitutional to impose mandatory sentences of life imprisonment on juveniles, without a hearing at which "'youth and its attendant characteristics' are considered as sentencing factors," precisely because only those juveniles who are irreparably corrupt may receive such sentences, consistent with the Eighth Amendment. *Id.* at 735 (quoting *Miller*, 132 S.Ct. at 2460).

Because it created a class of defendants, juveniles whose crimes reflect transient immaturity, who cannot constitutionally receive life without parole,

"*Miller* announced a substantive rule of constitutional law," which applies retroactively to defendants on state collateral review. *Id*. at 736.

Montgomery's analysis is powerful support for the argument to extend *Miller*, because, what *Miller* describes as "distinctive attributes of youth," *Montgomery* emphasizes are characteristics of members of a class of defendants who cannot be sentenced to life imprisonment without a hearing.

To be sure, like *Miller, Montgomery* deals with "juveniles." But, of greater significance in *Montgomery*, juveniles possess attributes that define a class of defendants who cannot receive a specific punishment - life without parole - and it is clearly those attributes of the members of the class, rather than their mere chronological ages, that make the punishment unconstitutional for the members of the class. That is, other than those few who are "irreparably corrupt," defendants under 18 cannot receive life without parole, not because of the amount of time they have spent on earth, but because they have a "lack of maturity and underdeveloped sense of responsibility," they "are more vulnerable to negative influences and outside pressures," they have limited "control over their own environment," their character is not well-formed, they are immature, reckless and impetuous, etc.

Because it is this group of attributes that really defines the class, there is no rational basis to exclude from the class other people who possess the same attributes but who are over the age of 18. This is especially true because *Miller*

relied upon scientific studies showing these attributes are caused by normal brain development, which continues into the mid-twenties. There is even less reason to exclude individuals from the class when they not only exhibit the same attributes as members of the class, but also possess those attributes for the same reasons as members of the class –*i.e.*, normal brain development.

Scientific research following *Miller* has continued to demonstrate that this normal brain development continues into the mid-20s. *See, e.g.,* Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. Neuroscience 10937, 10943 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 Neuroimage 176, 176-193 (2013); Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 Crime & Justice 577, 582-83 (2015); Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1358-59 (2010).

In particular, research shows areas of the brain related to impulse control and susceptibility to peer pressure continue to develop well past the age of eighteen. See, *e.g.*, Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temple L. Rev. 769, 786-87 (2016); Elizabeth

S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 644 (2016); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 35 (2009); Alexander Weingard et al., *Effects of Anonymous Peer Observation on Adolescents' Preference for Immediate Rewards*, 17 Developmental Sci. 71 (2013).

In *Cruz v. United States*, No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. March 29, 2018)[1], granting a successive habeas petition, the district court found it was not precluded from applying *Miller* to a defendant who was 18 when he committed the offense, as "[n]othing in *Miller* [] states or even suggests that courts are prevented from finding that the Eighth Amendment prohibits mandatory life without parole for those over the age of 18." *Id*. at *14 (App. D at 13.) The court found that, "relying on both the scientific evidence and the societal evidence of national consensus … the hallmark characteristics of juveniles that make them less culpable also apply to 18-year-olds," such that "the penological rationales for imposing mandatory life imprisonment without the possibility of parole cannot be used as justification when applied to an 18-year-old." *Id*. at *25 (App. D at 22.)

For scientific evidence, the district court relied on testimony from Dr. Laurence Steinberg, the lead scientist in the amicus briefs of the American

[1] The government is appealing the district court's decision, Second Circuit Dkt. No. 19-989.

Psychological Association submitted to, and relied upon, by the Court in *Roper*, *Graham*, and *Miller*. Because Cruz was 18 at the time he committed the murders in question, Dr. Steinberg's testimony was geared toward that age. Nonetheless much of what he said applies as well to Petitioner, who was 18, 19 and 8 days past his 20th birthday when he committed his offenses, and supports the argument that, if a line is to be drawn, it should be at 21, and not 18.

Dr. Steinberg testified there had been major developments in the relevant neuroscience. Specifically, as of 2005, when the Court decided *Roper*, there had been virtually no research into brain development during "late adolescence," which he defined as 18 to 21, and young adulthood. He said research in those age groups had begun to accumulate toward 2010 and beyond, "so we didn't know a great deal about brain development during late adolescence until much more recently." *Id.* at *25 (App. D at 22.) Thus, the district court noted, "[W]hen the Roper Court drew the line at age 18 in 2005, the Court did not have before it the record of scientific evidence about late adolescence that is now before this court." *Id.* (App. D at 22.)

The court said Dr. Steinberg "distinguished between two different decision-making processes: cold cognition, which occurs when an individual is calm and emotionally neutral, and hot cognition, which occurs when an individual is emotionally aroused, such as in anger or excitement." *Id.* at *23 (App. D at 20.) While "the abilities required for cold cognition are mature by around the age of 16,

the emotional regulation required for hot cognition is not fully mature until the early- or mid 20s." *Id.* (App. D at 20.) According to Dr. Steinberg, late adolescents "'still show problems with impulse control and self-regulation and heightened sensation-seeking, which would make them in those respects more similar to somewhat younger people than to older people." *Id.* (App. D at 20.) In particular, "impulse control is still developing during the late adolescent years from age 10 to the early or mid-20s." *Id.* (App. D at 20.) Until the age of 24, "people exhibit greater risk-taking and reward-sensitive behavior when in the presence of their peers," indicating greater susceptibility to negative outside influences than adults. *Id.* at *24 (App. D at 21.) Finally, "Dr. Steinberg testified that people in late adolescence are, like 17 year-olds, more capable of change than are adults." *Id.* (App. D at 21.)

Dr. Steinberg testified he was "'absolutely confident' that development is still ongoing in late adolescence." *Id.* (App. D at 21.) Moreover, while, in 2003, he had written an article finding people younger than 18 were more impetuous, more susceptible to peer pressure, and had less fully formed personalities than adults[2], "Dr. Steinberg testified that, if he were to write the article today, with the developments in scientific knowledge about late adolescence, he would say 'the

[2] *See* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychol. 1009 (2003).

same things are true about people who are younger than 21.'" *Id.* (App. D at 21.)

Petitioner exhibits the delayed neurological development described by Dr. Steinberg. He was 18, 19, and eight days past his 20th birthday when he participated in the murders and related crimes for which he was sentenced. At sentencing, he submitted a psychological report that established he possessed the "distinctive attributes of youth" that make it unconstitutional to sentence juveniles to life imprisonment. This included the results of tests designed to measure his "psychosocial maturity," which encompasses the attributes of youth discussed in *Miller* and *Montgomery*. Petitioner showed significant deficits as to temperance, with grades slightly lower than the average score of sixth graders on impulse control, and slightly above sixth graders' average score on suppression of aggression. Tested regarding perspective, he scored substantially below sixth graders on "consideration of others." On a test designed to evaluate his consideration of future consequences, he tested slightly below college-aged students' average score.

II. National Consensus and Trends Increasingly Favor 21 as the Age at Which Society Distinguishes Between Childhood and Adulthood.

The Court's evolving jurisprudence in *Roper, Graham* and *Miller* addresses "whether 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' show a 'national consensus' against a sentence for a

particular class of individuals." *Miller*, 567 U.S. at 482 (quoting *Graham*, 560 U.S. at 61). While, in 2005, *Roper* found 18 to be the age at which "society draws the line for many purposes between childhood and adulthood," 543 U.S. at 574, there is a growing consensus in favor of treating "late adolescents" – particularly, individuals younger than 21 - differently than fully mature adults.

In the death penalty context, in *Commonwealth of Kentucky v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 at 1* (Ky. Cir. Ct. Aug. 1, 2017), *argued,* No. 2017-SC-000436 (Ky. Sept. 19, 2019), a Kentucky Circuit Court declared the state's death penalty statute unconstitutional as applied to those under the age of 21. The court found a "very clear national consensus trending toward restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age." *Id.* at *3 (App. E at 3.)

As in *Cruz*, *supra*, the court took testimony, as well as a written report, from Dr. Laurence Steinberg. The court noted that Dr. Steinberg's report "cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable." *Id.* (App. E at 3.) Thus, "If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling." *Id.* at *4 (App. E at 3.)

In non-death penalty sentencing, courts have increasingly relied on *Miller*, and developments in the neuroscience on which it is based, to treat late adolescents differently than adults. *See, e.g., Cruz v. United States*, *supra* (applying *Miller* to vacate a life without parole sentence for an 18 year-old defendant); *State v. O'Dell*, 358 P.3d 359, 366 (Wash. 2015) (en banc) (permitting an 18 year-old to seek a downward departure from a standard range of sentence on the basis of the developmental attributes recognized in *Miller*); *State v. Norris*, No. A-3008-15T4, 2017 WL 2062145, at *5 (N.J. Super. Ct. App. Div. May 15, 2017) (unpublished)(App. F) (relying on *Miller* and remanding for resentencing a 75-year aggregate sentence imposed for murder on a 21 year-old defendant, as, where the sentence is the practical equivalent of life without parole, courts must "consider at sentencing a youthful offender's 'failure to appreciate risks and consequences' as well as other factors often peculiar to young offenders"); *United States v. Walters*, 253 F. Supp. 3d 1033, 1036 (E.D. Wis. 2017) (imposing a below-guidelines sentence of time served on a 19 year old, as "[c]ourts and researchers have recognized that given their immaturity and undeveloped sense of responsibility, teens are prone to doing foolish and impetuous things"); and *In Re Poole*, 24 Cal.App.5th 965, 982-83 (Cal. Ct. App. 2018) (vacating denial of parole as the parole board gave inadequate consideration to the youth of a 19-year-old offender).

Reflecting this trend, in February 2018, the American Bar Association issued a resolution urging "each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense." *See* ABA Resolution 111: Death Penalty Due Process Review Project Section of Civil Rights and Social Justice, Report to the House of Delegates at 1-3 (adopted 2018), available at https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf (last visited February 5, 2020). The ABA considered developments in scientific understanding of adolescent brain development and trends in the legal treatment of late adolescents, including "a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18." *Id.* at 10.

The trend toward treating late adolescents differently than fully mature adults is shown by legislation in different areas. On December 20, 2019, President Trump signed legislation raising the national age to purchase cigarettes to 21, effective immediately; prior to this, nineteen states, Washington D.C., and at least 540 localities had raised the age to purchase cigarettes from 18 to 21[3]. The national

[3] *See* Campaign for Tobacco-Free Kids, *States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21*, https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf (last visited February 5, 2020)

drinking age is 21[4]. Individuals under the age of 23 are considered legal dependents of their parents for purposes of the Free Application for Federal Student Aid (FAFSA), and those under the age of 24 are dependents for tax purposes.[5] Individuals may remain on their parents' health insurance until age 26 under the Affordable Care Act.[6] Typically, people must be 20 or 21 to rent a car and are usually assessed higher rental fees if they are under the age of 25.[7]

More than 45 states have extended the eligibility for foster-care services to youth over the age of 18, and the Individuals with Disabilities Education Act (IDEA) permits eligible students to receive services through age 21 if they have not earned a high school diploma.[8]

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[4] *See* 23 U.S.C.A. § 158 (2012).

[5] *See Dependency Status*, FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/fafsa/filling-out/dependency (last visited February 5, 2020); *Filing Requirements, Status, Dependents,* I.R.S, https://www.irs.gov/faqs/filing-requirements-status-dependents (follow "Is there an age limit on claiming my child as a dependent?") (last visited February 5, 2020); 26 U.S.C.A. § 152 (2017).

[6] 42 U.S.C.A. § 300gg-14 (2010); The Ctr. for Consumer Info. & Ins. Oversight, *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Families and Businesses*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/CCIIO/Resources/Files/adult_child_fact_sheet.html (last visited February 5, 2020).

[7] *See, e.g.*, *Restrictions and Surcharges for Renters Under 25 Years of Age*, BUDGET.COM, https://www.budget.com/budgetWeb/html/en/common/agePopUp.html (last visited February 5, 2020); *Under 25? We've Got You Covered*, HERTZ.COM, https://www.hertz.com/rentacar/misc/index.jsp?targetPage=Hertz_Renting_to_Drivers_Under_25.jsp (last visited February 5, 2020).

[8] *See* Juvenile Law Center, *National Extended Foster Care Review: 50-State Survey of Extended Foster Care Law & Policy* (2018), https://jlc.org/resources/national-extended-foster-care-review-50-state-survey-law-and-policy (last visited February 5, 2020); 20 U.S.C.A. § 1412 (a)(1)(A) (2016).

Clearly, laws draw certain lines at 18 – for example, as the age at which individuals may serve on juries, vote, or, in some states, marry. But, there is a significant difference between voting, serving on a jury, and marrying, and being sentenced to die in prison. While it is necessary to set an age at which one is required to perform the duties of citizenship, or able to exercise the right to marry, the type of individualized determinations required by *Miller* and *Montgomery* should be required before a young person with a still-developing brain is sentenced to die in prison.

There is nothing that makes the voting age a more appropriate dividing line between childhood and adulthood than the drinking age. It is simply an arbitrary choice – as is any rule that disregards the significant body of scientific research concerning adolescent brain development relied upon in *Miller* and *Montgomery*.

Bright line rules may be necessary in certain circumstances, and may be appropriate where there are no compelling countervailing considerations. However, they are neither necessary nor appropriate in deciding whether it is constitutional to sentence young people with still-developing and unformed brains to die in prison, especially where sentencing courts are capable of making an individualized determination as to the appropriateness of such a penalty for a particular defendant. At the very least, where the Court has relied upon scientific

evidence showing that adolescent brains continue to develop in ways relevant to sentencing into the mid-twenties, any line drawn should accord with that evidence.

CONCLUSION

In *Miller,* the Court explained the evolution in its jurisprudence governing the sentencing of juveniles: "Our decisions rested not only on common sense – on what 'any parent knows' – but on science and social science as well." 567 U.S. at 471.

We respectfully submit any parent knows their late adolescent children - between the ages of 18 and 21 - are far from having the maturity of adults, and, in many ways, are far more like children. More recent developments in neuroscience confirm this, and trends in the law and society reflect it.

For these reasons, a writ of certiorari should issue to review the judgment and the opinion of the Second Circuit.

Respectfully submitted,

JESSE M. SIEGEL
Counsel of Record
Law Office of Jesse M. Siegel
233 Broadway, Suite 707
New York, NY 10279
212-207-9009

IRVING COHEN
Law Office of Irving Cohen
233 Broadway, Suite 1800
New York, NY 10279
212-964-2544

Attorneys of Record for
Petitioner Felix Lopez-Cabrera

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