No. _____

IN THE

Supreme Court of the United States

Noel Cruz,

Petitioner,

v.

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 WRIT OF CERTIORARI

W. THEODORE KOCH, III
KOCH, GARG & BROWN
8 W. Main St., Ste. 2-10
Niantic, CT 06357
(860) 452-6860
general@kgb-law.com

Counsel for Petitioner

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QUESTION PRESENTED

Should the protections of *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which prohibits mandatory life sentences and requires an individualized sentencing proceeding for a juvenile facing a life-sentence, be extended to include 18-year-olds?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceedings.

RELATED PROCEEDINGS

Luis Noel Cruz v. United States of America, No. 19-989 (§ 2255 appeal)

Luis Noel Cruz v. United States of America, No. 3:11CV787(EBB) (§ 2255 case)

United States v. Millet, *et al.*, No. 96-1011 (criminal appeal)

United States v. Luis Noel Cruz, Crim No. 3:94CR112(AHN) (criminal proceeding)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Second Circuit decision under review is reported at *Cruz v. United States*, 826 Fed. Appx. 49 (2d Cir. 2020). The District Court's order is unreported, but is reproduced in the appendix and available at *Cruz v. United States*, No. 11-CV-787 (JCH), 2018 U.S. Dist. LEXIS 52924, 2018 WL 1541898 (*Hall, J.* Mar. 29, 2018).

JURISDICTION

The Second Circuit issued its decision on September 11, 2020. The Second Circuit denied Petitioner's Petition for Panel Rehearing or, in the Alternative, Rehearing En Banc on November 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

A. Factual Background

Luis Noel Cruz ("Noel") was born in Boston, and grew up partly in Puerto Rico and partly in Bridgeport, CT. In Bridgeport he experienced "a lot of crime," including drug dealing and violence. "From an early age, I saw people getting shot or killed." This was all part of daily living. T. 9/29/17, 9. Fights were common. Noel, who is physically small, was robbed, shot and jumped several times. On one such occasion he was attacked on his girlfriend's doorstep by three aggressors. After initially resisting, he curled up into a fetal position. The assailants beat his head

into the concrete steps so badly that "I was watching what was happening from 15 feet above the air." Id, 9, 11. Afterwards, he got up and walked home. Id, 12. At home, Noel's father abused alcohol and suffered from psychological problems. He would keep very quiet and then "explode." He kept a lock on the food in the pantry, and Noel grew up believing this was normal. T. 9/29/17, 10.

When the Latin Kings appeared in the neighborhood, Noel was drawn to them. "It was something to be a part of. It was a brotherhood family. You know, you gain respect. You're accepted. You were never alone." T. 9/29/17, 12-13. His childhood friend sponsored his membership into the gang at age fifteen years old. T. 9/29/17, 18. The Latin Kings taught Noel was not to be soft or taken as a punk; to gain respect by fighting and getting money in the streets. T. 9/29/17, 14. He was taught not to speak to any figure of authority, be that police, corrections officers, probation officers, judges or even his own lawyer. T. 9/29/17, 27-76.

The Latin Kings was a hierarchical organization, but Noel never held a position of authority. His responsibility was to "assist meetings, pay dues, learn the literature and abide by the rules and regulations of the organization," T. 9/29/17, 16. His reward was: "No matter where you went as soon as you saw a Latin King, you being a member of the Latin Kings, you automatically fit in…. It wasn't like he had to know you or you had to know him personally. Just the fact that he was a Latin King that was—that meant that, you know, you would be accepted there." T. 9/29/17, 13.

The Latin Kings called their leaders' orders "missions." A mission could be anything, including murder. Before missions, the Latin Kings had a prayer, "The Warrior Prayer," in which one asked "a higher power to bless the mission." T. 9/29/17, 14. Missions were not mere suggestions – if a Latin Kings member disobeyed an order, the mission would be carried out by someone else before the gang would turn on the one who disobeyed. T. 9/29/17, 19, 74.

After a while, Noel saw "the workings of" the Latin Kings, including betrayals and "power grabs." Then his son was born. At one meeting a crown leader appeared to offer amnesty to all those who wished to turn in their Latin King identification and paperwork and colors. Noel went home, gathered those items, returned and attempted to accept. She "looked at me kind of funny." She asked if he was sure. He said he was. She appeared to accept his resignation. T. 9/29/17, 16-17.

On the night of the murders, May 13-14, 1994, Noel was twenty weeks past his eighteenth birthday. Noel's friend received an order that Ra Ra (Arosmo Diaz), a member of the Latin Kings, was to be executed. Noel accompanied his friend under the false belief that they were obtaining guns.

Once Ra Ra was waiting in a car for them—along with the second victim, Tyler White—Noel's friend pulled him between two buildings and told him what they really had to do. Noel did not want to kill anybody. *Id* at 18. His friend told him that the Latin Kings were debating what should happen to Noel, because of his "disrespecting and trying to get out." *Id* at 19. The friend continued, "man, you put me in a fucked-up position," and shot his gun in the air. Believing that he would be murdered if he did not carry out the mission, Noel entered the car with his victims and pulled the trigger.

After his arrest, Noel was terrified of cooperating against the Latin Kings. The man he had killed, Arosmo Diaz, was targeted because he was suspected of cooperating with the government.

B. Procedural Background

In December 1994, a grand jury indicted Noel for, *inter alia*, three Violent Crimes in Aid of Racketeering (ViCAR), in violation of 18 U.S.C. § 1959(a). Those three charges were based on the conspiracy to murder Diaz, the murder of Diaz, and the murder of White. Mr. Cruz was ultimately convicted on all three ViCAR counts, among others.

On May 4, 1999, the Second Circuit affirmed the conviction. *United States v. Diaz*, 176 F.3d 52 (2d Cir. 1999). Between 2001 and 2013, Noel filed four habeas petitions under 28 U.S.C. § 2255, each of which was denied. On July 22, 2013, the Second Circuit granted Cruz'z request to file a successive petition under § 2255(h)(2) to raise a claim under this Court's decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Cruz's evidentiary hearing on the merits of his claim was heard by the District Court, *Hall, J.*, on September 13 and 29, 2017.[1] During that hearing, the District Court heard extensive testimony from expert witness Dr. Laurence Steinberg about the status of scientific research on adolescent brain development. In sum, Dr. Steinberg testified that the neurobiological and psychological science underlying this Court's decisions in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 61 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and *Miller* applied to later adolescents, including 18-year-olds. The government did not contest the accuracy of that testimony. The District Court also heard from Noel about his personal background. After post-hearing memoranda and oral argument, the District Court granted Cruz's § 2255 motion. The centerpiece of that decision was the District Court's conclusion that the rule articulated in *Miller* applied to Noel's life without parole sentence. The District Court determined that there was a national consensus and a scientific consensus to support a conclusion that the Eighth Amendment forbid the imposition of mandatory life without parole sentences on individuals who were 18 years old at the time they committed their crimes.

[1] The District Court had subject matter jurisdiction over the federal criminal prosecution and the subsequent proceedings under 18 U.S.C. § 3231 and 28 U.S.C. § 2255.

The government appealed from that judgment. On appeal, the Second Circuit determined that it was bound by its precedent in *United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019), which held that *Miller* did not apply to individuals over 18. *Cruz v. United States*, 826 Fed.Appx. 49 (2d. Cir. 2020). Neither the *Sierra* Court nor the Court in the proceeding below engaged in an independent Eighth Amendment analysis concerning the existence of a national consensus against imposition of life without parole sentences on 18 year olds.

ARGUMENT

"[T]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

The past two decades have seen a fundamental change in the way the criminal justice system treats juveniles convicted of serious crimes. This Court's Eighth Amendment jurisprudence is no exception. In *Roper v. Simmons*, 543 U.S. 551 (2005), this Court recognized that the Eighth Amendment's prohibition on cruel and unusual punishment barred capital punishment for juvenile offenders. In *Graham v. Florida*, 560 U.S. 48 (2010), this Court held that juvenile offenders could not be sentenced to life imprisonment without the possibility of parole for non-homicide crimes. In *Miller v. Alabama*, 567 U.S. 460, (2012) this Court forbade the imposition of mandatory life without parole sentences on juveniles for homicide crimes.

The common thread running through this Court's recent juvenile Eighth Amendment cases is the recognition that juveniles are different from adults. In *Roper*, *Graham*, and *Miller*, this Court identified three differences between juveniles and adults that justified treating juveniles differently: First, youth exhibit a "lack of maturity and an underdeveloped sense of responsibility," often resulting in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S., at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290

(1993)); *Graham*, 560 U.S., at 68; *Miller*, 567 U.S., at 471. This Court specifically relied on the fact that juveniles are overrepresented statistically in virtually every category of reckless behavior. Second, youth are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S., at 569; *Graham*, 560 U.S., at 68; *Miller*, 567 U.S., at 471. Third, the "character of a juvenile Is not as well-formed as that of an adult. The personality traits of juveniles are "more transitory" and "less fixed." *Roper*, 543 U.S., at 570; *Graham*, 560 U.S., at 89; *Miller*, 567 U.S., at 471.

However, as far back as *Roper*, this Court recognized that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S., at 574. Nonetheless, this Court recognized in *Roper* that it needed to draw a line. It chose to draw the line at 18. The choice to draw the line at 18, however, finds a single line of explanation in the *Roper* decision: "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S., at 574.[2] In *Miller*, this Court relied on *Roper* in holding

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[2] The notion that 18-year-olds are adults is a recent development in legal history. Until fairly recently, the age of majority in the United States was 21:

> Notably, the term "minor" or "infant"—as those terms were historically understood—applied to persons under the age of 21, not only to persons under the age of 18. The age of majority at common law was 21, and it was not until the 1970s that States enacted legislation to lower the age of majority to 18. *See, e.g., Black's Law Dictionary* 847 (9th ed. 2009) ("An infant in the eyes of the law is a person under the age of twenty-one years, and at that period . . . he or she is said to attain majority . . . ." (quoting John Indermaur, *Principles of the Common Law* 195 (Edmund H. Bennett ed., 1st Am. ed. 1878))); id. ("The common-law rule provided that a person was an infant until he reached the age of twenty-one. The rule continues at the present time, though by statute in some jurisdictions the age may be lower." (quoting John Edward Murray Jr., *Murray on Contracts* § 12, at 18 (2d ed. 1974))); *see generally* Larry D. Barnett, *The Roots of Law*, 15 Am. U. J. Gender Soc. Pol'y & L. 613, 681-86 (2007).

the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S., at 479.

However, *Miller*, which concerned the sentences of two juveniles who were age 14 at the time of their crimes, did not consider the question of whether its holding should extend to those over the age of 18. This case presents this Court with the opportunity to do so. The petitioner asks this Court to consider whether the protections articulated in *Miller* – a prohibition on mandatory life sentences and a requirement for an individualized sentencing proceeding – should be afforded to a person who was 18-year-old at the time of his offense.

I. Contemporary standards of decency, as previously found by this Court, require extending the rationale of *Miller* to 18-year-old offenders.

In its prior juvenile sentencing cases, this Court recognized that contemporary standards of decency require sentencers to consider the mitigating qualities of youth when deciding what sentence to impose. Those decisions were based on the hallmark features of youth, and their relevance to an offender's culpability and amenability to rehabilitation. The hallmark features of youth, however, are not limited to juveniles. Scientific research has shown that 18-year-olds possess those same qualities. In fact, 18-year-olds are much closer to juveniles than they are to older adults. The writ of certiorari is warranted in this case to evaluate whether recent scientific developments, when considered in light of this Court's precedent, compel the conclusion that *Miller* should be extended to 18 year olds.

NRA of Am. v. Bureau of Alcohol, 700 F.3d 185, 201-02 (5th Cir. 2012) (citations in original); *see also* Blackstone, 1 Commentaries on the Laws of England 463 (St. George Tucker ed. 1803) (noting that "full age in male or female is twenty-one years" and "till that time is an infant, and so stiled in law.").

A. The Norm

This Court's decisions in *Roper*, *Graham*, and *Miller* recognized a simple fact: that sentencers should have the ability to consider the mitigating qualities of youth. Collectively, those cases recognized an important contemporary standard of decency: that those individuals who exhibit the "hallmark features of youth" are, as a class, less culpable than full-grown adults who do not exhibit those features.

Notably, however those cases recognized that "youth is more than a chronological fact." *Miller*, 567 U.S. 460, 476 (2012) (quoting *Eddings v. Oklahoma*, 455 U.S 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). That is, the inappropriateness of mandatory life-without-parole sentences for juveniles as articulated in those cases was not based on youth *qua* youth. Rather, it was based on a number of transient features that are characteristic of youth: their lack of maturity, vulnerability to negative influences, and susceptibility to a changing character. *Roper*, 543 U.S., at 569-70; *Graham*, 560 U.S., at 68, 89; *Miller*, 567 U.S. at 471.

In sum, this Court's precedents recognize that contemporary standards of decency include the following norm: sentencers must have the discretion to impose less than a life sentence for defendants who exhibit the hallmark characteristics of youth, regardless of the seriousness of their crimes. Effectuating that norm requires a fully individualized sentencing procedure before sentencing a defendant to life without parole. *Miller v. Alabama*, 567 U.S., at 479. The instant case presents the question of whether this norm includes 18-year-olds.

B. The Science

This Court has frequently granted certification in Eighth Amendment cases to address whether a norm recognized by its prior cases applies to a particular set of facts. In *Atkins v. Virginia*, this Court held that the Eighth Amendment's prohibition on cruel and unusual punishment forbids execution of the mentally

retarded. *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In two subsequent cases, *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) and *Moore v. Texas*, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017) this Court considered the applicability of that principle to particular factual circumstances.

Hall and *Moore* are notable for their recognition that well-accepted scientific principles are essential to resolving the factual question of whether a particular individual falls within the scope of a previously articulated norm. In *Hall*, this Court relied heavily on standards set by the medical community to arrive at its conclusion that Florida law was inconsistent with sound scientific principles, and recognized that mental retardation must be determined by reference to more than just an IQ score. In *Moore*, this Court made explicit that its precedent did not "license disregard of current medical standards." *Moore*, 137 S. Ct., at 1049. Together, *Hall* and *Moore* recognize that, when Eighth Amendment principles rely on psychological qualities exhibited by a class of people, the applicability of contemporary standards of decency require examination of the relevant science. In other words, the factual question of whether a particular class of individuals falls within the group of people to whom a norm applies is one that must be resolved with an eye toward the relevant science.

Perhaps most notably, the hallmark characteristics of youth identified in *Roper* and relied upon in *Graham* and *Miller* are not unique to those age 17 and under. This Court's decisions in *Roper*, *Graham*, and *Miller*, relied on three important differences between youth and adults, all of which apply to 18-year-olds. First, youth exhibit a "lack of maturity and an underdeveloped sense of responsibility," often resulting in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S., at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)); *Graham*, 560 U.S., at 68; *Miller*, 567

U.S., at 471. This Court specifically relied on the fact that juveniles are overrepresented statistically in virtually every category of reckless behavior. Second, youth are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S., at 569; *Graham*, 560 U.S., at 68; *Miller*, 567 U.S., at 471. Third, the "character of a juvenile Is not as well-formed as that of an adult. The personality traits of juveniles are "more transitory" and "less fixed." *Roper*, 543 U.S., at 570; *Graham*, 560 U.S., at 89; *Miller*, 567 U.S., at 471.

At the proceeding below, undisputed scientific evidence was presented to the District Court through the testimony of Professor Laurence Steinberg, a renowned expert whose work was relied upon by this Court in *Roper*, 543 U.S., at 570, and *Miller*, 567 U.S., at 472. Steinberg defined adolescence to include 18 years olds – it is age 10 through 20. T. 9/13/17, 6. Adolescence is divided in to three phases: early adolescence occurs (age 10 through 13), middle adolescence (age 14 through 17), and late adolescence in (ages 18 through 20). Adolescents are distinguishable from adults in that they are:

- more impulsive
- prone to engage in risky and reckless behavior
- motivated less by punishment and more by reward
- less oriented to the future and more oriented to the present, and
- susceptible to the influence of others. T. 9/13/17, 6.

These fundamental differences between adolescents and adults are the result of interactions between two parts of the brain: the cognitive control system and the limbic system. The cognitive control system is made of the prefrontal cortex, located directly behind the forehead, and its connections. It is responsible for self-regulation—the ability to control behavior, thoughts and emotions—and advanced thinking skills such as logical reasoning and planning ahead. It is the rational

center. T. 9/13/17, 7-8. The limbic system is a deep structure within the brain, responsible for processing emotion and social information, and experiencing reward and punishment. It is the emotional center. T. 9/13/17, 7-8.

The rational prefrontal and the emotional limbic system are both always active, and are always in communication with one another. During adolescence, however, their communication is temporarily disrupted due to a phenomenon called maturational imbalance. During puberty, the emotional limbic system is stimulated, while the rational prefrontal cortex develops very gradually, resulting in situations during which the limbic system overwhelms the prefrontal cortex. The limbic system is like a car's engine and the prefrontal cortex like the car's brakes; the adolescent brain is like a hot-rod with bad brakes.

As a result of the limbic system's dominance, adolescents are less able to control their behavior when compared to older adults. Late adolescents are particularly unable to control their behavior in circumstances involving "hot cognition."[3] Sound-decision-making during hot cognition requires emotional regulation – an ability that continues to develop through age 24. T. 9/13/17, 25. As a result, adolescents often make impulsive and risky decisions in situations involving hot cognition. During late adolescence in particular, risk taking and reward seeking intensifies when adolescents are in unsupervised groups of their peers. T. 9/13/17, 24. The ability of late adolescents to make decisions in circumstances involving hot cognition is "absolutely" more similar to mid-adolescents than to adults. T. 9/13/17,

[3] There are two varieties of cognition. "Cold cognition" involves making decisions while calm, unaroused, and solo. T. 9/13/17, 10. It involves the use of basic thinking skills that are more or less developed by the time a person reaches 16 years old. Hot cognition involves making decisions while under emotionally aroused circumstances – such as when a person is angry, enthusiastic, fearful, or in a group setting. Hot cognition involves the use of the same basic thinking abilities, but tempered by emotional regulation.

70. Dr. Steinberg noted that he is "absolutely certain," to a reasonable degree of scientific certainty, that the hallmark characteristics of adolescence continue through at least age 20. T. 9/13/17, 71

Dr. Steinberg is not alone in his conclusions. In the years since this Court's decisions in *Miller*, *Graham*, and *Roper*, empirical research in neurobiology and developmental psychology resulted in the emergence of a consensus recognizing that the distinctive attributes of youth are present in older adolescents.[4] Recent research

[4] See, e.g., "The Teenage Brain," special issue, 22 *Current Directions in Psychological Science* no. 2 (2013); Dosenbach, N., et al., *Prediction of Individual Brain Maturity using fMRI*, 329 Science 1358 (2011); Fair, D., et al*., Functional Brain Networks Develop from a "Local to Distributed" Organization*, 5 PLoS Computational Biology 1 (2009); Hedman A., et al., *Human brain changes across the life span: A review of 56 longitudinal magnetic resonance imaging studies*, 33 Human Brain Mapping 1987 (2012); Pfefferbaum, A., Rohlfing, T., Rosenbloom, M., Chu, W., & Colrain, I., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (ages 10 to 85 years) Measured with Atlas-based Parcellation of MRI*, 65 NeuroImage 176 (2013); Simmonds, D., Hallquist, M., Asato, M., & Luna, B., *Developmental Stages and Sex Differences of White Matter and Behavioral Development through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*, 92 NeuroImage 356 (2014); Somerville, L., Jones, R., & Casey, B.J*., A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 Brain & Cognition 124 (2010); Casey, B. J., et al. *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 Developmental Psychobiology 225 (2010); Steinberg, L*., A Social Neuroscience Perspective on Adolescent Risk-taking*, 28 Developmental Review 78 (2008).; Van Leijenhorst, L., et al., *Adolescent Risky Decisionmaking: Neurocognitive Development of Reward and Control Regions*, 51 NeuroImage 345 (2010); Cohen, A. et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-emotional Contexts*, 4 Psychological Science 549 (2016); Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop",* 64 American Psychologist 583 (2009); Cauffman, E., Shulman, E., Steinberg, L., Claus, E., Banich, M., Graham, S., & Woolard, J., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 Developmental Psychology (2010); Braams, B., van Duijvenvoorde, A., Peper, J., & Crone, E., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 Journal of Neuroscience 7226

has been especially supportive of the conclusion that 18-year-olds are indistinguishable from their younger counterparts in terms of brain development. *See, e.g.*, Icenogle, et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample* ("*Maturity Gap*"), 43 L. & Human Behavior 69 (2019); Michaels, A *Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139 (2016). Like juveniles, they are "more likely than somewhat older adults to be impulsive, sensation seeking, and sensitive to peer influence in ways that influence their criminal conduct." Icenogle, et al., *Maturity Gap*, 43 L. & Human Behavior, at 83. Additionally, like juveniles, 18-year-olds lack the capacity to control their behavior when in an emotionally aroused state. Cohen, et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temple L. Rev. 769, 786 (2016). In sum, the research confirms that, when compared to adults in their mid-twenties, eighteen-year-olds are "more like adolescents in their behavior, psychological functioning, and brain development." Scott, et al., *Young Adulthood as a Transitional Legal Category*, 85 Fordham L. Rev. 641, 645 (2016).

In the proceeding below, Dr. Steinberg adopted the article *Young Adulthood as a Transitional Legal Category* as fairy representing the contemporary state of the science. Scott, et al., *Young Adulthood as a Transitional Legal Category*, 85 Fordham L. Rev. 641, 642 (2016). The authors of that article noted that a decade's worth of research after this Court decided *Roper* has "found that biological and psychological development continues into the early twenties." *Id.*, at 642. The authors further noted that the developmental stage between ages 18 and 21 "has

(2015); Shulman, E., & Cauffman, E. *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 Developmental Psychology 167 (2014).

taken on heightened importance as a period of preparation for adult roles. We conclude that the research supports a regime that recognizes young adults as a transitional category between juveniles and older adult offenders." *Id.*, at 644. Several other additional insights from that article are relevant to the applicability of *Miller* to persons aged 18:

- **In conditions of negative arousal, 18 to 20-year olds performed tests of self-control just as poorly as 13 to 17-year olds, while 21 to 24-year olds performed better.** *Id.*, at 650.
- Criminal activity is a symptom of the general inclination among late adolescents to engage in risky activity, and many of their crimes are attributable to developmental immaturity. *Id*, at 646.
- Developmental change into the early twenties "are now viewed as normative, driven by processes of brain maturation that are not under the control of young people." *Id.*, at 647.
- People mature intellectually before they mature emotionally and socially, with declines in sensation-seeking and improvements self-control occurring between ages 17 and 30. *Id.*, at 648.

The authors explained that harsh punishments have little effect on crimes committed by late adolescents because much of that crime "is the product of immature risk-taking propensities." *Id.*, at 659. The authors expressly concluded that "mandatory minimum adult sentencing regimes should exclude young adult offenders, just as juvenile offenders are excluded in some states." *Id.*, at 662.

C. The Petitioner

The science supporting the extension of *Miller* is not mere theory. The petitioner in this case serves as a paradigm example of the type of individual whose life should not be defined by his worst actions at age 18. When he was a young adult, the petitioner participated in a gang-related double murder. His criminal

actions, however did not reflect "irreparable corruption." *Miller*, 567 U.S., at 479-80 (quoting *Roper*, 543 U.S., at 573). Rather, they reflect his "transient immaturity." *Id.*

The petitioner's crime was committed in a frenzy of hot cognition. He was forced to make an immediate decision under the implied threat of "kill or be killed." He needed to make that decision in the presence of a trusted childhood friend. For the petitioner, the potential penalty for violating the law was far less salient than the penalty for disobeying the Latin Kings. Furthermore, he was motivated by an anticipated reward: committing the murder would earn him redemption in the eyes of the gang.

The petitioner's life since the crime serves as an example of how late adolescents who commit horrific acts can nonetheless be reformed. Despite having no hope of ever seeing freedom again, the petitioner turned his life around. He availed himself of the programs in prison. When he was in his mid-twenties, he renounced the Latin Kings. In nearly 25 years of incarceration, he received only a single disciplinary ticket. The petitioner exemplifies the need for individualized sentencing hearings for 18-year-olds: his tragic childhood led directly to his involvement with criminal activity and his eventual commission of a double murder. But his growth did not end there. While incarcerated, he "grew out" of the criminal lifestyle and turned himself into a productive member of his community, just like a majority of 18-year-old offenders. Michaels, A., *A Decent Proposal: Exempting Eighteen to Twenty-Year Olds from the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 164 (2016) ("by their mid-20s, at least three fourths of these new offenders are expected to cease all offending.").

II. Objective indicia of society's standards reflect a growing trend toward treating 18-year-olds differently from older adults.

Even setting aside this Court's precedent, objective indicia of society's contemporary standards of decency reflect a growing trend toward treating 18-year-olds differently from older adults. In examining these objective indicia, this Court should be mindful of its prior recognition that what matters for Eighth Amendment purposes is "the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315, 122 S. Ct. 2242, 2249 (2002). The trend over the past several decades has moved in one direction – to be more protective of youth in sentencing, including those who are 18 years old. While multiple jurisdictions have come to recognize that 18-year-olds are different from older adults for the purposes of sentencing, not a single jurisdiction has gone the other way. Moreover, the life sentences for 18-year-olds are exceedingly rare in the federal system. Additionally, social trends have emerged that encourage adolescents to remain in an adolescent social setting beyond the age of 18. The writ of certiorari is warranted in this case to examine whether there is now a national consensus opposing the imposition of mandatory life without parole sentences on 18 year olds.

A. Legislative Enactments

This Court has previously recognized that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham*, 560 U.S., at 62 (internal quotation marks and citation omitted). However, mere tallying of legislative enactments is inappropriate in circumstances where this Court is not considering whether to categorically bar a penalty for a class of offenders. *Miller*, 567 U.S., at 460, 485. Rather, this Court has identified two other tools that are useful in determining the existence of a national consensus: whether legislatures have expressly confronted a particular question, and the direction of changes in the law. I

In *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), this Court recognized that merely counting state legislatures was unhelpful when "most state legislatures have not expressly confronted the question" at issue. *Thompson*, 487 U.S., at 826; *see also Miller*, 567 U.S., at 485-86 (fact that multiple separate laws operating together had the effect of making particular sentence possible for juveniles did not justify a judgment that those states actually intended to subject such offenders to those sentences). Moreover, in *Atkins v. Virginia*, this Court recognized that a determination of a national consensus requires examining the "consistency of the direction of change" rather than the mere number of states. *Atkins v. Virginia*, 536 U.S. 304, 315, 122 S. Ct. 2242, 2249 (2002). Both of those factors favor finding a national consensus against imposition of life without parole sentences on 18-year-olds.

It is worth noting that, in the District Court proceedings, the government identified 25 jurisdictions that prescribe mandatory life imprisonment without the possibility of parole for 18-year-old offenders in at least some circumstances. This is fewer than the 39 jurisdictions permitting life imprisonment without parole for juvenile nonhomicide offenders at the time of *Graham*, and the 29 jurisdictions permitting mandatory life imprisonment without parole for juvenile homicide offenders. *Graham*, 560 U.S., at 62; *Miller*, 567 U.S., at 482. Thus, even if mere tallying of jurisdictions were important in this context, it would not control here.

The petitioner's research has not revealed any states that have recently adopted laws that permit life imprisonment without parole for 18-year-olds where it was previously unavailable. However, at least one state – California – has recently made life imprisonment without parole unavailable for 18-year-olds. Prior to 2015, the California penal code granted "youth offender parole eligibility" to all inmates convicted of crimes committed as juveniles. In 2015, California enacted Senate Bill No. 261, which extended the availability of youth offender parole eligibility to all

inmates whose offenses were committed before they reached 23 years of age. 2015 Cal SB 261, 2015 Cal ALS 471, 2015 Cal Stats. Ch. 471 (2015). The result is that, in California, 18-year-olds may no longer receive sentences that will imprison them for the rest of their lives without the possibility of parole. *See* Cal. Pen. Code § 3051.

Other state legislatures have recognized that 18-year-olds are different for the purposes of punishment. A review of the relevant legislation demonstrates a recognition that late adolescents are both less culpable and more amenable to rehabilitation than their older counterparts:

Alabama: Alabama sets its age of majority at 19. *See* Ala. Code § 26-1-1. Persons below the age of majority are eligible to be classified as "youthful offenders," which results in "no further action … taken on the indictment or information. Ala. Code § 15-19-1. Youthful offender states is available for intentional homicide crimes. Ala. Code § 15-19-1(c).

California: As noted above, California has legislatively extended the protections of *Miller* to persons who committed crimes before age 25.

Colorado: Colorado law permits those age 24 and younger to be transferred to Colorado's youthful offender system. Colo. Rev .Sat. § 18-1.3-407(1)(c)(2). Under that system, an individual's period of incarceration is suspended, and the individual must complete a youthful offender system program, which incudes a mandatory period of community supervision. Upon successful completion of that program, the youthful offender's sentence is considered completed. *See People v. Martinez*, 350 P.3d 986, 989, 2015 COA 33, ¶ 17 (Colo. 2015).

Florida: Florida defines "child" as a person under 21 years of age, and "young adult" as a person between the ages of 18 and 21. Fla. Stat. § 39.6251. Florida's Youthful Offender Act permits persons under age 21 to be designated as "youthful offenders." Fla. Stat. § 958.04. Youthful offenders are subjected to shorter

periods of incarceration with no mandatory minimums. *See Mendez v. State*, 835 So. 2d 348, 349, 28 Fla. L. Weekly 275 (Fla. Dist. App. 2003).

Georgia: Ga. Code Ann. § 42-7-2(7) provides: "'Youthful offender' means any male offender who is at least 17 but less than 25 years of age at the time of conviction and who in the opinion of the department has the potential and desire for rehabilitation" (emphasis added). GA Code. Ann. § 35-3-37(j)(4) provides for the expungement of misdemeanors of youthful offenders who have stayed out of trouble.

Hawai'i: Haw. Rev. Stat. § 706-667(1) provides: "….A young adult defendant is a person convicted of a crime who, at the time of the offense, is *less than twenty-two years of age* and who has not been previously convicted of a felony as an adult or adjudicated as a juvenile for an offense that would have constituted a felony had the young adult defendant been an adult" (emphasis added). It does not apply to murder. Haw. Rev. Stat. § 712-1256(1) provides: "Upon the dismissal of such person and discharge of the proceeding against the person under section 712-1255, this person, if the person was not over twenty years of age at the time of the offense, may apply to the court for an order to expunge from all official records all recordation relating to the person's arrest, indictment, or information, trial, finding of guilt, and dismissal and discharge pursuant to this section."

Indiana: Ind. Code § 11-14-1-5 defines "youthful offender" as an offender who "is less than twenty-one (21) years of age." It does not apply to those sentenced to greater than eight years.

Michigan: The Holmes Youthful Trainee Act of 1927, which originally protected youths up to age twenty-one, in 2015 was revised to allow for the expungement of the record of a youthful offender up to age twenty-four. See Mich. Comp. Laws § 762.11. For those over age twenty-one, the prosecutor's consent is required, and it does not apply to any "felony for which the maximum penalty is imprisonment for life," or a "major controlled substance offense."

Mississippi: Mississippi defines "minor" as an individual under 21 years old. Miss. Code Ann. § 1-3-27.

Nebraksa: Nebraska law defines all persons under the age of 19 as minors. Neb. Rev. Stat. § 43-2101.

New Jersey: NJ Stat. Ann. § 2C:43-5 provides: "Any person who, at the time of sentencing, is less than 26 years of age and who has been convicted of a crime may be sentenced to an indeterminate term at the Youth Correctional Institution Complex….". However: "This section shall not apply to any person less than 26 years of age at the time of sentencing who qualifies for a mandatory minimum term of imprisonment without eligibility for parole, pursuant to subsection c. of N.J.S. 2C:43-6; however, notwithstanding the provisions of subsection c. of N.J.S. 2C:43-6, the mandatory minimum term may be served at the Youth Correctional Institution Complex…." Id.

New York: NY CLS CPL § 720.35 classifies a youthful offender as a person charged with a crime alleged to have been committed when he/she was at least sixteen years old and less than nineteen years old.

Oklahoma: Oklahoma has a "Delayed Sentencing Program for Young Adults" available to nonviolent offenders whose crimes were committed between the ages of 18 and 21. Okla. Stat. tit. 22, § 996. Persons who meet the program criteria are able to avail themselves or rehabilitative services; upon completion of the program, the district court has a variety of sentencing options, including community sentencing and dismissal of the charges. *State ex rel. Prater v. The District Court of Oklahoma County*, 2008 OK CR 21, 188 P.3d 1281, 1284 (2008).

South Carolina: S.C. Code § 24-19-10(d)(ii) defines as a youthful offender anybody charged with a misdemeanor or a relatively less serious felony, up to age twenty-four. S.C. Code § 22-5-920 provides for expungement of youthful offenders' nonviolent crimes.

Virginia: VA Code § 19.2-311(B)(1) establishes a Youthful Offender Program for any person who was "convicted before becoming twenty-one years of age," not counting murder convictions.

Vermont: In 2017, Vermont passed Act 72, which raised the maximum age for "youthful offender" status from 17 to 21. 2017 Ct. ALS 72, 2017 Vt. Laws 72, 2017 Vt. ACT 72, 2017 Vt. S. 23 (2017). Youthful offenders in Vermont are subjected to an "entirely rehabilitative system" rather than a system of punishment. *See In re B.B.*, 2019 VT 86, ¶ 10, 224 A.3d 1149, 1152 (Vt. 2019).

West Virginia: West Virginia law provides for expungement of misdemeanors committed by individuals 25 years old and younger. W.V. Code § 61-11-26.

Federal Law. Additionally, federal law recognizes that 18-year-olds are different from older adults in ways that are relevant to criminal culpability. For example, federal law recognizes the proclivity of 18-year-olds to engage in risky behavior without full consideration of the potential long-term consequences, and, accordingly, makes it illegal for an 18-year-old to purchase a handgun from a licensed dealer, drink alcohol, or purchase tobacco products. 18 U.S.C. § 922(b)(1); 23 U.S.C. § 158.

B. Court Decisions

In recent years, courts have recognized that 18-year-olds are developmentally different from older adults. *See, e.g.*, *Mitchell v. Atkins*, 483 F. Supp. 3d 985 (W.D. Wash. 2020) ("Research shows that 18-to 20-year-olds are developmentally immature compared with older adults, increasing their risk to the community.").

The most significant development comes from the Washington Supreme Court, which recently held that, under the Washington Constitution, the protections of *Miller* must be afforded to those age 20 and younger. *In re Personal Restraint of Monschke*, Nos. 96772-5, 96773-3, 2021 Wash. LEXIS 152 (Mar. 11, 2021). Two

aspects of the decision are significant. First, the Washington court relied heavily on the fact that "neurological science recognizes no meaningful distinction between 17- and 18-year-olds as a class." *Id.*, at *19. Second, the Washington court examined other juvenile sentencing cases, and concluded that, in light of the scientific evidence, precedent demanded extending the protections of *Miller* to late adolescents. *Id.*, at *26-*30.

Although Washington is the only jurisdiction that has extended the constitutional protections of *Miller* to 18-year-olds, courts confronting the question have unanimously concluded that the relevant science supports such an extension. In *United States v. C.R.*, 792 F. Supp. 2d 343 (E.D.N.Y. 2011), the District Court determined that the defendant, who was 19 years old at the time of his crime, was a "developmentally immature young adult" and fell within the ambit of *Graham*. 792 F. Supp. 2d at 506. It found that a 5-year mandatory minimum would be cruel and unusual, based on the defendant's history. That decision was reversed, not on scientific grounds or a suggestion that the District Court's factual pronouncements were inaccurate, but because this Court had previously drawn the line at 18 years of age. *United States v. Reingold*, 731 F.3d 204, 215 (2d Cir. 2013).

A Kentucky circuit court found that *Roper*'s protection against the death penalty should be extended to persons under 21. *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Aug. 1, 2017). The *Bredhold* court relied heavily on scientific evidence that late adolescents exhibit the same hallmark characteristics of youth as their younger counterparts. The Kentucky Supreme Court reversed. However, that reversal was based on the fact that no punishment had been imposed, and that the defendants therefore lacked standing to challenge the constitutionality of the death penalty. *Commonwealth v. Bredhold*, 599 S.W.3d 409, 423 (Ky. 2020).

C. Federal Sentencing Practices.

An examination of federal sentencing practices further cements the fact that there is a national consensus against imposition of life sentences for 18-year-olds. The agency tasked with scrupulously analyzing federal sentencing nationwide is the United States Sentencing Commission (the Commission). "For even though the [United States Sentencing Guidelines] are advisory rather than mandatory, they are, as we pointed out in [Rita v. United States, 127 S. Ct. 2456 (2007)], the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall v. United States*, 128 S. Ct. 586, 594 (2007). This makes the Commission a litmus of national consensus.

In a May 2017 report by the Commission, *Youthful Offenders in the Federal System* (*Youthful Offenders*), the Commission begins by defining a youthful offender as a person "age 25 or younger at the time they are sentenced in the federal system." *Youthful Offenders* at *1.

> Traditionally, youthful offenders often have been defined as those under the age of 18, but for purposes of this study, the Commission has defined youthful offenders as a federal offender 25 years old or younger at the time of sentencing. The inclusion of young adults in the definition of youthful offenders is informed by recent case law and neuroscience research in which there is a growing recognition that people may not gain full reasoning skills and abilities until they reach age 25 on average.

Youthful Offenders at *5. The Commission's report affirms that life sentences for late adolescents are rare. It examines the actual sentencing of youthful offenders in the federal system between 2010 and 2015. During this time period, federal courts sentenced 86,309 youthful offenders. *Youthful Offenders* at *2. "There was a steady decline in the number of youthful offenders sentenced each year." *Id* at *13.

Most importantly, of those 86,309 youthful offenders, only ninety-six – roughly one-tenth of one percent – received life imprisonment. *Id* at *48. Of those

ninety-six, eighty-five were twenty-one or older at sentencing. *Id*. Between 2010 and 2015 only five defendants who received life were younger than twenty at sentencing, and **over that five-year period, only a single 18-year-old was sentenced to life.** *Id*.

One person out of nearly half a million in the federal system between 2010 and 2015 was eighteen years old at the time of sentencing, and received a life sentence. This is as clear an indicia as can be found that today's federal courts have turned away, almost entirely, from life sentences for late adolescents.

D. Social Trends.

Emerging social trends also signal a recognition that younger adults – including 18-year-olds – are different from older adults. Whereas 18-year-olds were once expected to be self-sufficient adults ready for work and marriage, today's younger adults are delaying the kinds of behaviors we expect adults to engage in. *See* Pimentel, D., *Seventh Annual Criminal Law Symposium: Juveniles & Criminal Law: Panel One: When are (should) Juveniles be Tried as Juveniles and When as Adults? The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 Tex. Tech L. Rev. 71, 74-79 (Fall 2013). In other words, while society once recognized adolescence to end at 18, modern society extends adolescence beyond that age.

The changing social trends are not a mere historical curio. Rather, they are directly related to a delay in the kinds of psychological development that cause individuals to "age out" of their criminal behavior:

> Over time, though, the transition to adulthood has been occurring later in life. Changing societal norms in the United States have delayed many milestones that signal transition from childhood to adulthood, such as college, marriage, employment and parenthood. These delayed milestones also delay the natural tendencies to desist from crime.

Nat'l Conference of State Legislatures, *The Legislative Primer Series for Front-End Justice: Young Adults in the Justice System* (Aug. 2019); available online at https://www.ncsl.org/Portals/1/Documents/cj/front_end_young-adults_v04_web.pdf. Scientific research supports the conclusion that, partly as a result of modern social changes, late adolescence is a "critical development period" and a "period of dependency and vulnerability" analogous to early childhood. *Young Adulthood*, supra, at 653-54, 657.

CONCLUSION

The Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

LUIS NOEL CRUZ
Petitioner

By: /s/ W. Theodore Koch, III
W. Theodore Koch, III, CT26854
Vishal K. Garg, CT31058
Koch, Garg & Brown
8 W. Main St., Suite 2-10
Niantic, CT 06357
Tel. (860) 452-6860
Fax (860) 452-6865
Email general@kgb-law.com

Counsel for Petitioner