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

_____

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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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

APRIL 19, 2021

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LUIS NOEL CRUZ, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	: : : : : : :	 CIVIL ACTION NO. 11-CV-787 (JCH) MARCH 29, 2018

RULING RE: SUCCESSIVE PETITION TO VACATE, SET ASIDE, OR CORRECT SENTENCE (DOC. NO. 37)

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I. INTRODUCTION

The Second Circuit authorized the petitioner, Luis Noel Cruz, to file a successive habeas petition pursuant to section 2255 of title 28 of the United States Code on July 22, 2013. See Mandate of the USCA (Doc. No. 23). On August 19, 2014, Cruz filed the Successive Petition to Vacate, Set Aside, or Correct Sentence currently pending before the court. See Successive Petition to Vacate, Set Aside, or Correct Sentence ("Pet. to Vacate") (Doc. No. 37). In it, Cruz argues, inter alia, that his sentence of mandatory life imprisonment without the possibility of parole violates the Eighth Amendment of the United States Constitution, relying on the rule announced in Miller v. Alabama, 567 U.S. 460 (2012). See id. at 10–22. The respondent, the United States ("the Government"), opposes Cruz's Petition. See Government's Response to Pet. to Vacate ("Resp. to Pet.") (Doc. No. 64).

For the reasons set forth below, Cruz's Petition is **GRANTED**.

II. FACTUAL BACKGROUND

Luis Noel Cruz was born on December 25, 1975. See Transcript of Evidentiary Hearing ("Cruz Tr.") (Doc. No. 114) at 77. Beginning on or about November 1991, when Cruz was 15 years old, he joined the Latin Kings, a violent gang with branches of operations in Connecticut. See Pet. to Vacate, Ex. 1, Indictment (Doc. No. 37-1) at ¶ 14. Cruz testified at an evidentiary hearing before this court that he never held a position of leadership in the gang and that members were expected to obey the orders, called "missions," of the leaders. See Cruz Tr. at 14–15, 19. He testified that a mission could include anything, including murder, and that disobedience would result in the same mission being carried out on the person who disobeyed. See id. at 14, 19. Cruz further testified that he attempted to renounce his membership in the Latin Kings prior to

the occurrence of the murders for which he is now serving concurrent life sentences. See id. at 16–17. While he believed at the time that he had successfully left the gang, he later learned that the leaders of the Latin Kings had viewed his attempt to resign as an act of disrespect and that his status in the gang was uncertain. See id. at 17, 19.

Cruz turned 18 on December 25, 1993. On May 14, 1994, when Cruz was 18 years and 20 weeks old, Cruz and another member of the Latin Kings, Alexis Antuna, were given a mission by gang leader Richard Morales. See United States v. Diaz, 176 F.3d 52, 84 (2d Cir. 1999). The mission was to kill Arosmo "Rara" Diaz. See id. Carrying out that mission, Cruz and Antuna shot and killed Diaz and his friend, Tyler White, who happened to be with Diaz at the time. See id. Cruz testified at the hearing before this court that he now admits to committing both murders. See Cruz Tr. at 27. He further testified that Antuna informed him at the time that the leaders of the Latin Kings were debating what would happen to him as a result of his attempt to leave the gang. See id. at 19. According to his testimony, Cruz believed that, if he did not carry out the mission, he himself would be killed. See id.

In December 1994, a grand jury indicted Cruz for, inter alia, three Violent Crimes in Aid of Racketeering ("VCAR"), in violation of section 1959(a) of title 18 of the United States Code. See Indictment at ¶¶ 75–81; United States v. Millet, No. 94-CR-112, Superseding Indictment (Doc. No. 625) at ¶¶ 74–79. The three VCAR crimes were the conspiracy to murder Diaz (Count 24), the murder of Diaz (Count 25), and the murder of White (Count 26). See id. Cruz and a number of his co-defendants went to trial and, on September 29, 1995, a jury convicted Cruz on all three VCAR counts, in addition to violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.

§ 1962(c), conspiracy to violate RICO, and conspiracy to commit a drug offense. See Millet, Verdict Form (Doc. No. 945); Millet, Judgment (Doc. No. 1072) at 1. On January 30, 1996, Cruz was sentenced to, inter alia, four concurrent terms of mandatory life without parole for the two VCAR murders, the RICO violation, and the conspiracy to violate RICO. See Judgment at 2.

Cruz is now 42 years old. He testified at the hearing before this court that, during his incarceration, he renounced the Latin Kings and has been a model inmate, teaching programs to other inmates and receiving only one disciplinary ticket during his 24 years of incarceration. See Cruz Tr. at 23, 70. His testimony is supported by letters from the staff at the Bureau of Prisons. See Pet. to Vacate, Ex. 2, 3.

III. PROCEDURAL BACKGROUND

On May 4, 1999, the Second Circuit affirmed Cruz's conviction on appeal. See Diaz, 176 F.3d at 73. Cruz subsequently filed four habeas petitions under section 2255 of title 28 of the United States Code, from 2001 to 2013, each of which was denied. See Resp. to Pet. at 4–6. On July 22, 2013, the Second Circuit granted Cruz's request to file a successive petition under section 2255(h)(2) to raise a claim under Miller. See Mandate of USCA. The Second Circuit determined that Cruz made a prima facie showing that he satisfied the requirements of section 2255(h) and directed this court to address "whether the United States Supreme Court's decision in Miller announced a new rule of law made retroactive to cases on collateral review." Id. at 1.

Cruz filed his Petition on August 18, 2014. See Pet. to Vacate. In it, he raised two arguments.[1] First, Cruz argued that he was 15 years old when he first joined the Latin Kings and, because membership in a RICO enterprise is an element of his VCAR conviction, he was a juvenile at the time that he committed the element of the crime that triggers mandatory life imprisonment, thereby making his sentence unconstitutional under Miller. See id. at 4–9. Second, he argued that Miller's prohibition of mandatory life imprisonment for adolescents should also be applied to those who were 18 at the time of their crimes because scientific research and national consensus indicate that 18-year-olds exhibit the same hallmark features of youth that justified the decision in Miller. See id. at 10–22.

On May 12, 2015, this court granted Cruz's Motion to Stay the proceedings, pending the Supreme Court's decision on the retroactivity of Miller. See Order Granting Motion to Stay (Doc. No. 49). In 2016, the Supreme Court held in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), that Miller v. Alabama announced a new substantive constitutional rule that was retroactive on collateral review. See Montgomery, 136 S. Ct. at 734.

On April 3, 2017, after briefing and argument, the court granted Cruz's Motion for a Hearing. See Ruling re: Motion for Hearing and Supplemental Section 2255 Motion ("Ruling re: Mot. for Hr'g") (Doc. No. 86). The court held that there was no issue of fact regarding Cruz's first argument, finding that Cruz remained a member of the Latin Kings

[1] Cruz also filed a Supplemental Section 2255 Motion seeking relief pursuant to Montcrieffe v. Holder, 133 S. Ct. 1678 (2013). See Supplemental Memorandum of Law (Doc. No. 43). This court denied relief on Cruz's supplemental argument. See Ruling re: Motion for Hearing and Supplemental Section 2255 Motion (Doc. No. 86) at 29–30.

after turning 18 and committed the murders at age 18. See id. at 19–22. Therefore, he was 18 "during his commission of each of the elements of the crime of VCAR murder." Id. at 21. Accordingly, the court declined to grant him a hearing to offer evidence in support of that theory. See id. at 22. The court found, however, that an issue of fact existed as to whether Miller's protections should apply to an 18-year-old and ordered the parties to present evidence of national consensus and scientific research on this issue. See id. at 23–29. The court denied the Government's Motion for Reconsideration of its decision. See Ruling re: Motion for Reconsideration ("Ruling re: Reconsideration") (Doc. No. 99).

On September 13 and 29, 2017, the court held evidentiary hearings at which an expert witness, Dr. Laurence Steinberg, testified about the status of scientific research on adolescent brain development and Cruz testified about the trajectory of his life.[2] See Transcript of Evidentiary Hearing ("Steinberg Tr.") (Doc. No. 111); Cruz Tr. After the hearing, the court permitted the parties to file supplemental briefings and held oral argument on February 28, 2018. See Petitioner's Post-Hearing Memorandum in Support of Pet. to Vacate ("Post-Hr'g Mem. in Supp.") (Doc. No. 115); Government's Post-Hearing Memorandum in Opposition to Pet. to Vacate ("Post-Hr'g Mem. in Opp.")

[2] The Government objected to the relevance of Cruz's testimony, arguing that "his specific characteristics have no bearing on whether this Court is authorized to rethink the Supreme Court's decision in Miller, much less whether any change would be warranted in Eighth Amendment jurisprudence." See Government's Post-Hearing Memorandum in Opposition to Pet. to Vacate ("Post-Hr'g Mem. in Opp.") (Doc. No. 117) at 29. The Government argues that such evidence is appropriately addressed only at a resentencing hearing for Cruz, should the court grant Cruz's petition. See id.

The court notes that Cruz's testimony was admitted only as a case study, or as one example, of the trajectory of adolescent brain development. See Miller, 567 U.S. at 478 (describing the facts surrounding each defendant's case as "illustrat[ing] the problem"). The court does not base this Ruling on the specific facts of Cruz's case.

(Doc. No. 117); Petitioner's Reply to Government's Post-Hr'g Mem. in Opp. ("Post-Hr'g Reply in Supp.") (Doc. No. 120); Minute Entry, Oral Argument Hearing (Doc. No. 124).

IV. LEGAL STANDARD

Section 2255 of title 28 of the United States Code permits a federal prisoner to move to vacate, set aside, or correct his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a) (2016). Therefore, relief is available "under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Cuoco v. United States, 208 F.3d 27, 30 (2d Cir. 2000) (quoting United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995)). The petitioner bears the burden of proving that he is entitled to relief by a preponderance of the evidence. See Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011).

V. DISCUSSION

The court adopts the analysis in its prior Ruling finding no issue of fact regarding Cruz's first argument that he was under the age of 18, when at least one element of the VCAR murders was committed. See Ruling re: Mot. for Hr'g at 19–22. Accordingly, Cruz's Petition is denied on that ground. The court undertakes in this Ruling to address Cruz's second argument: that Miller applies to him as an 18-year-old.

A. Requirements of Section 2255(h)(2)

1. Standard of Review Under Section 2255(h)

Before reaching the merits of Cruz's Petition, the court must first address the threshold issue of whether the requirements of section 2255(h)(2) have been satisfied. When a petitioner is filing a second or successive petition for habeas relief under section 2255(h), as here, the petitioner must receive authorization from the appropriate Court of Appeals to file the petition. See 28 U.S.C. § 2255(h). The Court of Appeals may certify the petition if it finds that the petition has made a prima facie showing that the petition "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Id.; 28 U.S.C. § 2244(b)(3)(C) (establishing a prima facie standard, which section 2255(h) incorporates); see also Bell v. United States, 296 F.3d 127, 128 (2d Cir. 2002). Without such certification by the Court of Appeals, the district court lacks jurisdiction to decide the merits of the petition. See Burton v. Stewart, 549 U.S. 147, 157 (2007).

Once the Court of Appeals has certified the petition, however, this court must conduct a "fuller exploration" of whether the petition has satisfied the requirements of section 2255(h). See Bell, 296 F.3d at 128 (quoting Bennett v. United States, 119 F.3d 468, 469–70 (7th Cir. 1997)). In doing so, the court is serving a gate-keeping function prior to determining the merits of the peition. If the court finds that the Petition has not satisfied the requirements of section 2255(h), the court must dismiss the Petition. See 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."); In re Bradford, 830 F.3d 1273, 1276 (11th Cir. 2016) (holding that section 2255(h)

incorporates section 2244(b)(4)). "Even where the Court of Appeals has authorized the filing of a successive petition, its order authorizing the district court to review the petition does not foreclose the district court's independent review of whether the petition survives dismissal." Ferranti v. United States, No. 05-CV-5222 (ERK), 2010 WL 307445, at *10 (E.D.N.Y. Jan. 26, 2010), aff'd, 480 Fed. App'x 634 (2d Cir. 2012). Although Ferranti cites section 2244(b)(4) for the proposition that the district court is authorized to dismiss a claim that does not meet the requirements of section 2255(h), id., the language of section 2244(b)(4) actually requires the district court to dismiss the claim in such situations. See 28 U.S.C. § 2244(b)(4) (stating that the district court "shall dismiss" such a claim); Ferranti v. United States, 480 Fed. App'x 634, 636–37 (2d Cir. 2012) (stating that such a claim "will be dismissed").

While the Court of Appeals' inquiry is limited to whether the petitioner has made a prima facie showing that the requirements are met, the district court must determine that they are actually met. See id.; see also Tyler v. Cain, 533 U.S. 656, 661 n.3 (2001). Because the standards used by the Court of Appeals and the district court are different, this court must determine de novo that the requirements of section 2255(h) are satisfied. See In re Moore, 830 F.3d 1268, 1271 (11th Cir. 2016) ("We rejected the assertion that the district court owes 'some deference to the court of appeals' prima facie finding that the requirements have been met." (citation omitted)); In re Pendleton, 732 F.3d 280, 283 (3d Cir. 2013) ("However, we stress that our grant is tentative, and the District Court must dismiss the habeas corpus petition for lack of jurisdiction if it finds that the requirements for filing such a petition have not been met."); Johnson v. United States, 720 F.3d 720, 720–21 (8th Cir. 2013).

2. Second Circuit's Mandate Authorizing Successive Petition

In this case, the Second Circuit authorized Cruz to "file a § 2255 motion raising his proposed claim based on Miller v. Alabama." Mandate of USCA at 1. The Mandate then directs this court to "address, as a preliminary inquiry under § 2244(b)(4), whether the United States Supreme Court's decision in Miller announced a new rule of law made retroactive to cases on collateral review."[3] Id. The Government argues that the Mandate only authorizes Cruz to file a successive petition on his claim that Miller applies to him because he was under the age of 18 at the time of the crime—that is, the claim rejected by this court in its Ruling on the Motion for a Hearing. See Motion for Reconsideration ("Mot. for Recons.") (Doc. No. 94) at 2–3. However, at oral argument on the Petition before this court, the Government acknowledged that the Mandate is ambiguous as to the nature of the proposed claim.

Cruz's Memorandum in Support of Application to File a Second or Successive Section 2255 Petition, filed before the Second Circuit, is unclear as to the exact nature of the argument he intended to raise. See Cruz v. United States (Second Circuit Court of Appeals), No. 13-2457, Memorandum of Law in Support of Application to File a Second or Successive Section 2255 Petition ("App. to File Successive Pet.") (Doc. No. 2). However, Cruz does state in the Memorandum that "the case involves conduct that is open to much speculation and interpretation, in that the charges include juvenile and non-juvenile conduct." Id. at 8. He also quotes a case stating that "modern scientific research supports the common sense notion that 18-20-year-olds tend to be more

[3] The Mandate focuses on retroactivity because the Petition was authorized prior to the Supreme Court's ruling in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), and likely also because Cruz's Memorandum likewise focused on the issue of retroactivity. See App. to File Successive Pet. at 2–8.

impulsive than young adults ages 21 and over." Id. (quoting Nat'l Rifle Assoc. of Am. v. Bureau of Alcohol, 700 F.3d 185, 209 n.21 (5th Cir. 2012)). Additionally, Cruz states in a Supplemental Memorandum that his crime involved two predicate acts—"one juvenile and the other 5 months after Applicant's 18th birthday."[4] Cruz v. United States (Second Circuit Court of Appeals), No. 13-2457, Supplementary Papers to Motion for Successive Petition (Doc. No. 14) at 2. Based on these statements, this court concludes that, when the Second Circuit authorized Cruz to file a successive petition, it was aware that he was at least 18 years old during an element of the offense.

Therefore, the court reads the Second Circuit's Mandate as authorizing this court's jurisdiction over both of Cruz's arguments under Miller. This reading of the Mandate is especially appropriate because Cruz was proceeding pro se when he petitioned the Second Circuit for certification to bring his successive petition. The court must interpret pro se filings liberally "to raise the strongest arguments that they suggest." See Willey v. Kirkpatrick, 801 F.3d 51, 62 (2d Cir. 2015). Therefore, the court liberally reads any ambiguity in Cruz's filings before the Second Circuit to include the claim now before the court and reads the Second Circuit's Mandate to include the claim now before the court. It will proceed to analyze whether such a claim satisfies the requirements of section 2255(h).[5]

[4] Like Cruz's original Memorandum in Support of Application to File a Successive Petition, the Supplemental Memorandum is also ambiguous. It does appear to reference the argument that he was under the age of 18 for one of the predicate acts of the offense. See Cruz v. United States (Second Circuit Court of Appeals), No. 13-2457, Supplementary Papers to Motion for Successive Petition (Doc. No. 14) at 2. However, the Supplemental Memorandum does not elaborate the argument with much clarity, nor is the rest of the Memorandum clear as to whether other arguments are also raised. In the face of such ambiguity, the court reads Cruz's pro se filings liberally to raise the strongest arguments that they suggest, as explained above. See Willey v. Kirkpatrick, 801 F.3d 51, 62 (2d Cir. 2015).

[5] Even if Cruz's Application before the Second Circuit is read not to contain the current claim that Miller applies to him as an 18-year-old, the court would nonetheless likely proceed to its gate-keeping

As noted previously, the court makes such a determination de novo. See, e.g., In re Moore, 830 F.3d at 1271. Thus, Cruz's argument that section 2255(h) is satisfied because "the Second Circuit's 2013 order is, by now, res judicata" is unavailing. See Post-Hr'g Reply in Supp. at 2. The Second Circuit's certification of the Petition under a prima facie standard does not determine the court's current, de novo inquiry of whether the Petition meets the requirements of section 2255(h).

3. Timeliness

Cruz also argues that the court should reject as untimely the Government's argument that section 2255(h) has not been satisfied because the Government failed to raise the argument at the outset of the case. See Post-Hr'g Reply in Supp. at 1. The court already addressed the Government's untimeliness in its prior Ruling. See Ruling re: Mot. for Recons. at 6–7. The court again reiterates that, by failing to raise this issue prior to oral argument, the Government "unnecessarily delayed and complexified this

inquiry of whether the claim satisfies the requirements of section 2255(h). By way of comparison, while Cruz's current successive petition was pending before this court, Cruz moved for leave before the Second Circuit to file another successive 2255(h) petition based on Moncrieffe v. Holder, 133 S. Ct. 1678 (2013), an entirely separate claim unrelated to either of his Miller claims. See Supplemental Memorandum of Law (Doc. No. 43) at 2; Response to 2255 Motion (Doc. No. 64) at 7. The Second Circuit denied his motion because it had already granted him leave to file the current petition, which was then already pending before this court. See Response to 2255 Motion at 7. In doing so, the Second Circuit stated, "If a § 2255 motion is already pending in district court pursuant to this Court's authorization under § 2255(h) motion, the movement [sic] may seek to amend that motion to add claims without first requesting leave of this Court." Id. (quoting the Second Circuit).

Therefore, the court considers it likely that, even if it found that Cruz's current Miller argument were not included in his Application to File Successive Petition before the Second Circuit, the Second Circuit would treat this claim in a similar manner as Cruz's Moncrieffe claim and permit him to seek permission from this court to include the claim in his Petition without seeking leave from the Circuit. As such, the court would then proceed to consider whether the claim satisfies the requirements of section 2255(h), leading to the same analysis the court conducts in this Ruling. Therefore, it is not significant to the outcome of this case whether Cruz's Memoranda before the Second Circuit expressly included the current claim or not.

proceeding." Id. at 6. However, the court is not prepared to go so far as to treat the Government's untimeliness as a waiver of the argument.

Other district courts in this Circuit have held that a district court lacks subject matter jurisdiction to rule on the merits of a successive petition under section 2255(h) if the petition has not been certified by the Court of Appeals according to the procedure set out in section 2244(b)(3). See Canini v. United States, No. 10 CIV. 4002 PAC, 2014 WL 1664240, at *1 (S.D.N.Y. Apr. 17, 2014); Otrosinka v. United States, No. 12-CR-0300S, 2016 WL 3688599, at *3 (W.D.N.Y. July 12, 2016), certificate of appealability denied, No. 16-2916, 2016 WL 9632301 (2d Cir. Dec. 14, 2016). To that extent, the requirements of section 2255(h) are jurisdictional and not subject to waiver. Whether the district court's responsibility to dismiss a petition certified under section 2244(b)(4) is also jurisdictional, however, is less clear. One case from the Third Circuit contains language indicating that section 2244(b)(4) is also jurisdictional. See In re Pendleton, 732 F.3d 280, 283 (3d Cir. 2013) ("[T]he District Court must dismiss the habeas corpus petition for lack of jurisdiction if it finds that the requirements for filing such a petition have not been met." (emphasis added)). Cruz has not pointed the court to any contrary case in which the Government's failure to timely raise the issue waived the argument and absolved the court of its responsibility to dismiss the claim under section 2244(b)(4).

Even if the 2255(h) issue as raised by the government is not jurisdictional, the court still declines to treat the Government's tardy raising of the argument as a waiver. The issue has since been thoroughly briefed by both parties, such that no party has been prejudiced by the Government's untimeliness. See Mot. for Recons.; Opposition

to Mot. for Recons. (Doc. No. 95); Post-Hr'g Mem. in Opp.; Post-Hr'g Reply in Supp. Therefore, the court proceeds to consider whether section 2255(h) has been satisfied.

4. Section 2255(h)(2) in the Miller Context

To find that section 2255(h) has been satisfied, the court must determine that the Petition contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The Government does not disagree that Miller satisfies these three requirements. The Supreme Court in Montgomery v. Louisiana held that Miller establishes a new substantive rule that applies retroactively on collateral review. See Montgomery, 136 S. Ct. at 734. That rule was previously unavailable to Cruz prior to the Miller decision in 2012.

However, the Government argues that Miller does not apply to Cruz's Petition because the Government reads the "new rule" in Miller to protect only defendants under the age of 18. See Post-Hr'g Mem. in Opp. at 2–6. According to the Government, Miller held the following: "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." Id. at 3 (emphasis omitted) (quoting Miller, 567 U.S. at 465). Therefore, the Government argues that Cruz's Petition does not rely on Miller, as Miller would not grant him relief as an 18-year-old. See id. at 2–6. Instead, the Government characterizes Cruz's Petition as asking the court to create a new rule expanding Miller, which the Government argues the court cannot do on a 2255 petition. See id.

The threshold inquiry before the court, then, is whether the Petition "contains" the new rule in Miller, according to the requirement of section 2255(h). This inquiry turns on

whether "contains" is read to require a petition to raise the specific set of facts addressed by the holding in Miller or whether it permits a petition to rely on the principle of Miller to address a new set of facts not specifically addressed by Miller, but also not excluded by it. Neither party has pointed the court to any binding case law addressing what it means for a petition "to contain" a "new rule" of constitutional law.

The Government has, however, identified two cases in which the courts determined that section 2255(h) did not authorize the filing of a successive petition under Miller for defendants who were 18 years old or older. See Post-Hr'g Mem. in Opp. at 5 (citing In re Frank, 690 Fed. App'x 146 (Mem.) (5th Cir. 2017); La Cruz v. Fox, No. CIV-16-304-C, 2016 WL 8137659, at *6 (W.D. Okla. Dec. 22, 2016), report and recommendation adopted, No. CIV-16-304-C, 2017 WL 420159 (W.D. Okla. Jan. 31, 2017)). In Frank, the Fifth Circuit declined to certify a petition under section 2255(h)(2) for a defendant who was 18 and 19 years old at the time of two of the murders for which he was sentenced to mandatory life without parole. See In re Frank, 690 Fed. App'x at 146. In La Cruz, the district court for the Western District of Oklahoma declined to transfer the case to the Court of Appeals for the Tenth Circuit to consider whether to authorize a successive 2255 petition. The court determined that such a transfer would be futile, as Miller did not apply to the petitioner, who was not under the age of 18 at the time of his crime. See La Cruz, 2016 WL 8137659, at *6.

The court also located two other cases with a similar outcome. See White v. Delbalso, No. 17-CV-443, 2017 WL 939020, at *2 (E.D. Pa. Feb. 21, 2017) (finding that the defendant was not entitled to file a second habeas petition under section 2244(b)(2) because he was 23 years old at the time of the crime); United States v. Evans, No.

2:92CR163-5, 2015 WL 2169503, at *1 (E.D. Va. May 8, 2015) (denying a successive 2255 motion, after certification by the Court of Appeals, because Graham did not apply to the 18-year-old petitioner).

The court is not bound by these precedents. To the extent that they may serve as persuasive authority, the court finds them unpersuasive because none of these opinions discuss what it means for the petition to "contain" a new rule in Miller. The cases assume, without analysis, that section 2255(h) only permits a petition to directly apply the holding of Miller. Rather than following such assumptions, this court will conduct its own analysis of what it means for a petition to "contain" a "new rule" of constitutional law.

In doing so, the court first notes that the D.C. Circuit reached the opposite conclusion on this question than the Fifth Circuit did in Frank. See In re Williams, 759 F.3d 66, 70–72 (D.C. Cir. 2014). In Williams, the petitioner was sentenced to life without parole for his role in a conspiracy to participate in a racketeer influenced corrupt organization ("RICO") and to distribute illegal drugs. See id. at 67. Like Cruz, Williams was a juvenile for the early years of his participation in the conspiracy from 1983 to 1987, but turned 18 in 1987 and continued to participate in the conspiracy until 1991. See id. Williams moved for authorization to file a successive petition raising claims under both Miller and Graham v. Florida, 560 U.S. 48, 74 (2010), which held life imprisonment without parole unconstitutional for juvenile non-homicide offenders. See id. at 68. The government in Williams argued that "Williams cannot rely on Graham, and therefore is not entitled to relief on the basis of Graham, because Graham's holding does not extend to conspiracies straddling the age of majority." See id. at 70; see also

id. at 71 (making the same argument for Williams's Miller claim). The D.C. Circuit rejected the government's argument, however, and granted certification on both claims. See id. at 70–72.

In doing so, the D.C. Circuit reasoned that the government's argument "goes to the merits of the motion, asking us in effect to make a final determination of whether the holding in Graham will prevail for Williams." Id. at 70. As such, the D.C. Circuit held that such an argument was not an appropriate inquiry for the court to consider in deciding whether the petitioner had made a prima facie case that the petition "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See id. The court finds the D.C. Circuit's approach in Williams more persuasive than the Fifth Circuit's approach in Frank because Williams expressly considers what it means for a petition to "rely on" a new rule and articulates its reasons for certifying the position.

As none of these cases are binding on this court, however, the court does not end its inquiry here, but also considers other cases reviewing successive habeas petitions based on other "new rules" of constitutional law beyond Miller, to the extent that those cases offer guidance in interpreting the requirements of section 2255(h).

5. Analogous Interpretation of Section 2255(h) from Cases Under Johnson v. United States

Thus, in addition to Williams, the court looks to an analogous situation in which courts have considered the meaning of section 2255(h), that is, in the context of successive habeas petitions following Johnson v. United States, 135 S. Ct. 2551 (2015). While these cases consider a different "new rule" than the one contained in Miller, the circuits in the Johnson context have more thoroughly engaged with the meaning of

section 2255(h)'s requirement that the petition "contain" a new rule and therefore provide relevant guidance to the court's analysis here.[6] Before addressing the circuits' various interpretations of section 2255(h), the court first briefly explains the context in which the question arises in the Johnson context.

In Johnson, the Supreme Court held "that imposing an increased sentence under the residual clause of the Armed Career Criminal Act [("ACCA")] violates the Constitution's guarantee of due process." Johnson, 135 S. Ct. at 2563. The Supreme Court then held that Johnson announced a new substantive rule that applies retroactively in cases on collateral review. See Welch v. United States, 136 S. Ct. 1257, 1265 (2016). Following Johnson and Welch, Courts of Appeals were faced with applications to file successive petitions under section 2255, seeking relief from sentences determined under the residual clause of section 4B1.2 of the Sentencing Guidelines. That section was not itself addressed by Johnson, but contains similar

[6] At oral argument, the Government argued that the Johnson line of cases is distinguishable from the Miller context. The Government argued that, because the language of the residual clause of the Armed Career Criminal Act ("ACCA") is nearly identical to the language of the residual clause in the Sentencing Guidelines, applying the rule in Johnson to petitions based on the Sentencing Guidelines is different than applying the rule in Miller to petitions of defendants who were 18 years old at the time of their crimes.

The court, however, does not consider this distinction significant. Just as Miller said nothing about defendants who were 18 years old at the time of the crime, Johnson says nothing about the Sentencing Guidelines. Thus, like Cruz's Petition here, successive 2255(h) petitions seeking to rely on Johnson to vacate convictions under the Sentencing Guidelines require the courts to consider whether section 2255(h) is limited to petitions raising the specific set of facts addressed in Johnson or whether it permits petitions to rely on the rule of Johnson to address a new set of facts not specifically addressed by that case. Cases considering that question provide relevant guidance for this court's inquiry because they address the meaning of the statutory words "to contain" in section 2255(h), which should maintain the same meaning regardless of the content of the new rule of constitutional law at issue.

Additionally, the court notes that, even if the analogy between the Johnson and Miller contexts for considering the section 2255(h) requirements is not perfect, there is no binding Second Circuit precedent indicating how the court should interpret section 2255(h) in the context of Miller. In such a situation, the court finds it helpful to consider persuasive authority interpreting the statute at issue, even in different contexts, in order to best anticipate how the Second Circuit would decide the question before the court.

language to the residual clause of the ACCA that was held to be unconstitutionally vague in Johnson. See, e.g., Blow v. United States, 829 F.3d 170, 172–73 (2d Cir. 2016), as amended (July 29, 2016); In re Hubbard, 825 F.3d 225, 235 (4th Cir. 2016); In re Arnick, 826 F.3d 787, 788 (5th Cir. 2016); In re Patrick, 833 F.3d 584, 588–89 (6th Cir. 2016); In re Embry, 831 F.3d 377, 379, 382 (6th Cir. 2016); Donnell v. United States, 826 F.3d 1014, 1015–17 (8th Cir. 2016); In re Encinias, 821 F.3d 1224, 1226 (10th Cir. 2016); In re McCall, 826 F.3d 1308, 1309 (11th Cir. 2016).

Analogous to the case here, those cases required the circuit courts to consider whether a successive petition under section 2255(h)(2) "contains" a new rule of constitutional law only when the petition involved the same statute as the holding in Johnson, or also when it relied on Johnson as applied to similar language in another statute. On this question, the circuits split. Compare Blow, 829 F.3d at 172–73 (certifying the successive petition and holding it in abeyance pending the Supreme Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017)); In re Hubbard, 825 F.3d at 235 (certifying the successive petition); In re Patrick, 833 F.3d at 588 (same); In re Encinias, 821 F.3d at 1226 (same); with In re Arnick, 826 F.3d at 788 (denying the application to file a successive petition); Donnell, 826 F.3d at 1017 (same); In re McCall, 826 F.3d at 1309 (same).

In 2016, the Supreme Court in Beckles v. United States held that the rule in Johnson did not apply to the Sentencing Guidelines, as made advisory by United States v. Booker, 543 U.S. 220, 233 (2005). See Beckles, 137 S. Ct. at 890. The Beckles Court held that the advisory Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause, but did not reach the question of whether

the Sentencing Guidelines, as applied mandatorily prior to Booker, could be subject to such a challenge under Johnson. See id. Notably, because Beckles was decided on certiorari from a first petition under section 2255, not a second or successive petition implicating section 2255(h), see id. at 891, the Court did not address whether the circuits that certified successive petitions under Johnson had correctly interpreted section 2255(h).

As a result, after Beckles, the circuits faced similar applications to file successive petitions under section 2255(h), seeking relief under Johnson from sentences imposed when the Sentencing Guidelines were mandatory. The circuits have again split on whether authorizing such petitions would be an appropriate application of section 2255(h)(2). Compare Moore v. United States, 871 F.3d 72, 74 (1st Cir. 2017) (certifying the successive petition); In re Hoffner, 870 F.3d 301, 309–12 (3d Cir. 2017) (same); Vargas v. United States, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 2017) (certifying the successive petition and directing the district court to consider staying the proceeding pending the Supreme Court's decision in Lynch v. Dimaya, 137 S. Ct. 31 (Mem.) (2016)); with Mitchell v. United States, No. 3:00-CR-00014, 2017 WL 2275092, at *4–*5, *7 (W.D. Va. May 24, 2017) (dismissing the petition as failing to satisfy the requirements of section 2255(h)); United States v. Gholson, No. 3:99CR178, 2017 WL 6031812, at *3 (E.D. Va. Dec. 5, 2017) (denying the petition as barred by section 2255(h)).

This court looks to these cases addressing Johnson as instructive for analyzing the reach of section 2255(h).[7] In the absence of binding precedent reviewing district court decisions made in the court's current posture, the reasoning of the circuit courts in deciding certification can provide relevant guidance in interpreting the meaning of section 2255(h) before this court. The court briefly summarizes below the interpretation and analysis of each side of the circuit split.

The most thorough analysis in favor of reading 2255(h) broadly is found in the Third Circuit case of In re Hoffner. In Hoffner, the Third Circuit interpreted section 2255(h), which requires that the claim "contain" a new rule of constitutional law," in accordance with the Supreme Court's reading of similar language in section 2244(b)(2)(A), which requires that the claim "relies on a new rule of constitutional law." See In re Hoffner, 870 F.3d at 308 (quoting Tyler v. Cain, 533 U.S. 656, 662 (2001)). In interpreting "relies on," the Third Circuit held that "whether a claim 'relies' on a qualifying new rule must be construed permissively and flexibly on a case-by-case basis." Id.

At a policy level, the court reasoned that construing the new rule flexibly advances "the need to meet new circumstances as they rise and the need to prevent injustice," which it concluded are particularly salient concerns in the context of a section 2255(h)(2) motion dealing with new substantive rules addressing the potential injustice of an unconstitutional conviction or sentence.[8] Id. at 309. Additionally, Hoffner cites

[7] In doing so, the court recognizes that its task requires a higher bar than that of the Court of Appeals because this court must determine that the requirements of section 2255(h) are actually met, not merely that the Petition has put forth a prima facie showing.

[8] The Hoffner court additionally made pragmatic arguments based on the prima facie standard of the Court of Appeals' inquiry and the protections of a fuller exploration by the district court. See In re Hoffner, 870 F.3d at 308–09. This court acknowledges that these arguments are irrelevant to its current inquiry due to the different standard and posture of the Court of Appeals' inquiry, but the court does not

Montgomery for the proposition that the state's countervailing interest in finality is not implicated in habeas petitions that retroactively apply substantive rules. See id. (quoting Montgomery, 136 S. Ct. at 732 (noting that "the retroactive application of substantive rules does not implicate a State's weighty interests in . . . finality")). Accordingly, the Hoffner court describes its reading of section 2255(h) as follows:

> [A] motion relies on a qualifying new rule where the rule substantiates the movant's claim. This is so even if the rule does not conclusively decide [ ] the claim or if the petitioner needs a non-frivolous extension of a qualifying rule. Section 2255(h)(2) does not require that qualifying new rule be the movant's winning rule, but only that the movant rely on such a rule.

Id. (internal quotation marks and citations omitted) (quoting In re Arnick, 826 F.3d at 789 (5th Cir. 2016) (Elrod, J., dissenting)).

The Third Circuit then concludes that the question of whether the new rule applies to the facts in the specific case is not part of the preliminary, gate-keeping inquiry under section 2255(h), but is instead a "merits question for the district court to answer in the first instance." Id. at 310–11 (emphasis added). In this way, the Third Circuit agrees with the D.C. Circuit's decision in Williams discussed previously. See In re Williams, 759 F.3d at 70–72. To support its distinction between the preliminary, gate-keeping inquiry and the merits question, the Hoffner court further draws support from other circuits that have likewise certified successive petitions in analogous situations by finding that whether the rule applies to the facts is a merits question. See In re Hoffner, 870 F.3d at 310–11 (citing In re Pendleton, 732 F.3d 280, 282 n.1 (3d Cir. 2013); In re

consider these arguments to undermine the rest of the Third Circuit's analysis, which is relevant to this court's inquiry into the meaning of section 2255(h)(2).

Sparks, 657 F.3d 258, 260 n.1 (5th Cir. 2010); In re Williams, 759 F.3d at 70–72); see also In re Hubbard, 825 F.3d at 231; United States v. Garcia-Cruz, No. 16CV1508-MMA, 2017 WL 3269231, at *3–*4 (S.D. Cal. Aug. 1, 2017) (finding that the petitioner had satisfied the "statutory prerequisite for filing a second or successive motion" under section 2255, but denying the motion on the merits).[9]

In line with the Third Circuit's analysis, the First Circuit reasoned in Moore v. United States that Congress used the words "rule" and "right" in section 2255 rather than the word "holding" for a reason:

> Congress presumably used these broader terms because it recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law.

Moore, 871 F.3d at 82. Therefore, the Moore court held that, while the "technical holding" of Johnson was that the residual clause in the ACCA is unconstitutionally vague, the "new rule" it established was broader than that and "could be relied upon directly to dictate the striking of any statute that so employs the ACCA's residual clause to fix a criminal sentence." Id. In so distinguishing the new rule from the holding, Moore supports the Third Circuit's broader reading of section 2255(h).

Additionally, the Tenth Circuit in In re Encinias considered and rejected the government's argument that the petition challenging the Sentencing Guidelines relied not on Johnson, but on a later Tenth Circuit decision applying Johnson to the

[9] The Government argues to the contrary that whether Miller applies to Cruz is a preliminary gate-keeping question that should be decided under the requirements of section 2255(h). See Post-Hr'g Mem. in Opp. at 2–6. However, if the gate-keeping inquiry under section 2255(h) includes whether the new rule of constitutional law applies to the petitioner, there would often likely remain no issue to be decided on the merits.

Guidelines. See In re Encinias, 821 F.3d at 1225–26. The Tenth Circuit concluded that the petition was "sufficiently based on Johnson to permit authorization under § 2255(h)(2)" because of "the similarity of the clauses addressed in the two cases and the commonality of the constitutional concerns involved." Id. at 1226. Not restricting section 2255(h) to Johnson's narrow holding, the Tenth Circuit granted the certification and stated, "[A]lthough the immediate antecedent for Encinias' challenge to the career-offender Guideline is our decision in Madrid, that decision was based, in turn, on the seminal new rule of constitutional law recognized in Johnson and now made retroactive to collateral review by Welch." Id. at 1225–26.

The court recognizes, however, that the answer to the question before it is, as with many issues of statutory construction, not clear cut. The clearest contrary argument for reading section 2255(h) narrowly is found in the Eighth Circuit's decision in Donnell v. United States. Donnell held that "to contain" in section 2255(h) means that "the new rule contained in the motion must be a new rule that recognizes the right asserted in the motion." Donnell, 826 F.3d at 1016. In the Eighth Circuit's view, mere citation of a new rule without such a nexus to the right would be insufficient. See id. Like the Third Circuit in In re Hoffner, the Eighth Circuit in Donnell also reasons from context that section 2255(h)(2) should be read to be consistent with section 2244(b)(2)(A), which requires that the claim "relies on" a new rule. See id. However, the Donnell court adopts a narrower interpretation of the words "relies on" than the approach endorsed by the Hoffner court. Compare Donnell, 826 F.3d at 1016–17; with In re Hoffner, 870 F.3d at 309. The Donnell court concludes that the claim cannot depend on the district court's creation of a second new rule different from that

specifically articulated by the Supreme Court. See id. The Eighth Circuit states that the new rule created by Johnson "must be sufficient to justify a grant of relief" and cannot "merely serve[ ] as a predicate for urging adoption of another new rule that would recognize the right asserted by the movant." Id. at 1017.

The Sixth Circuit in In re Embry recognized a similar logic and looked to Teague v. Lane, 489 U.S. 288 (1989), to determine whether the petition relies on a new rule recognized by the Supreme Court or requires the district court to create a second new rule. See In re Embry, 831 F.3d at 379. A "new rule" is one that is "not dictated by precedent." Id. (quoting Teague, 489 U.S. at 301). "A rule is not dictated by precedent . . . unless it is 'apparent to all reasonable jurists.'" Id. (quoting Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013)). Therefore, a rule is a new rule "unless all reasonable jurists would adopt the rule based on existing precedent." Id. (internal quotation marks omitted).[10] On the other hand, "a case does not announce a new rule, when it is merely an application of the principle that governed a prior decision to a different set of facts." Id. (quoting Chaidez, 133 S. Ct. at 1107).

Like the Sixth Circuit, the Government at oral argument urged this court to look to Teague in interpreting the requirements of section 2255(h). While there is no question that Teague is binding on this court, Teague does not address the issue currently before

[10] The Supreme Court has clarified, however, that the mere existence of disagreement does not necessarily indicate that the rule is new. See Beard v. Banks, 542 U.S. 406, 416 n.5 (2004) ("Because the focus of the inquiry is whether reasonable jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new." (emphasis in original)); id. at 423 (Souter, J., dissenting) (noting that the majority acknowledges that the all-reasonable-jurists standard "is objective, so that the presence of actual disagreement among jurists and even among Members of this Court does not conclusively establish a rule's novelty"); see also Moore, 871 F.3d at 81 ("In fact, it would not necessarily be a new rule of constitutional law even if we did disagree on the constitutional issue." (citing Beard, 542 U.S. at 416 n.5)).

the court. Teague enunciated the above definition of a "new rule" in the context of determining whether a new rule should be applied retroactively on collateral review. See Teague, 489 U.S. at 301. Teague does not address the question of whether a successive habeas petition "contains" or "relies on" a new rule for the purposes of satisfying the requirements of section 2255(h). Rather, it is the Sixth Circuit in Embry and the Eighth Circuit in Donnell that read the section 2255(h) inquiry to require courts to determine whether the petition asks the district court to recognize "a 'new rule' of its own." See In re Embry, 831 F.3d at 379; Donnell, 826 F.3d at 1017. Unlike Teague, Embry and Donnell are not binding on this court.[11]

Additionally, the language in Embry indicating that courts should determine whether a petition requires a second new rule is dicta. The Sixth Circuit articulated that reasoning, but declined to so hold. See id. at 381. Instead, the court granted Embry's application to file a successive petition and instructed the district court to hold the petition in abeyance, pending the Supreme Court's then-anticipated decision in Beckles. See id. at 382. The Sixth Circuit did so in part because it recognized that "[t]he inquiry is not an easy one." Id. at 379. The Sixth Circuit stated, "When it comes to deciding whether Embry has made a prima facie showing of a right to relief, there are two sides to this debate, each with something to recommend it." Id.

6. Interpretation of Section 2255(h) and Application to This Case

This court likewise acknowledges that the question of which of the above two approaches correctly interprets the requirements of section 2255(h) is a difficult one,

[11] If, of course, Donnell had been a Second Circuit opinion, the court's duty to address the difficult question now before it would have been easy.

and one on which the Supreme Court has not yet spoken.[12] In the absence of additional guidance, however, this court finds persuasive the Third Circuit's reading of section 2255(h) and applies in this case its approach to determining whether Cruz's petition contains the new rule enunciated by Miller for the following reasons.[13]

First, the court considers the Third Circuit's approach in Hoffner to be more supported by the statutory text. The text of section 2255(h) contains only three prerequisites and does not expressly require that the court additionally "scrutinize a motion to see if it would produce a second new rule." In re Hoffner, 870 F.3d at 311 (internal quotation marks omitted). The court agrees with the First Circuit in Moore that Congress's use of "rule" rather than "holding" indicates that it did not intend to limit the reach of the phrase "new rule" required by section 2255(h)(2) strictly to a case's "technical holding." See Moore, 871 F.3d at 82. The words "new rule" must then be read "in their context and with a view to their place in the overall statutory scheme." See Food & Drug Admin. V. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133

[12] The Supreme Court has granted certiorari in the case of Lynch v. Dimaya. See Lynch v. Dimaya, 137 S. Ct. 31 (Mem.) (2016). In Lynch, the Supreme Court will decide whether the residual clause of 18 U.S.C. § 16(b), using language similar to that struck down by Johnson in the ACCA, is unconstitutionally vague. See Dimaya v. Lynch, 803 F.3d 1110, 1111 (9th Cir. 2015).

While this decision may add clarity to the circuit split discussed above, it will do so by resolving the merits issue, not by determining the correct approach to section 2255(h). Lynch reaches the Supreme Court on certiorari from an appeal of a decision by the Board of Immigration Appeals, not on a successive habeas petition under section 2255. See id.

[13] Again, the court recognizes that its responsibility to review the requirements of section 2255(h) requires it to apply a higher standard than the prima facie showing required of the Court of Appeals in certifying a successive petition. See, e.g., Ferranti, 2010 WL 307445, at *10. Therefore, the court acknowledges that these circuit precedents considering certification are imperfect guides for the court's current inquiry under section 2255(h). However, because there is no binding precedent reviewing a district court's assessment of the section 2255(h) requirements, the court nonetheless looks to these certification cases as persuasive authority. As such, the court looks to the Court of Appeals cases discussed above for guidance in interpreting the language of section 2255(h). See, e.g., In re Moore, 830 F.3d at 1271.

(2000). The Sixth Circuit in Embry fails to do this when it focuses exclusively on the words "new rule" without engaging with the meaning of the rest of the sentence, which requires the petition "to contain" the new rule or, as in section 2244, to "rely on" the new rule. The court agrees with the Third Circuit that the meaning of "contain" requires the petition to rely on the new rule to substantiate its claim, but does not require the new rule to conclusively decide the claim on its facts. See In re Hoffner, 870 F.3d at 309.

Second, the court considers the Hoffner approach to be more consistent with the purposes of the Great Writ. "It (the Great Writ) is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." Schlanger v. Seamans, 401 U.S. 487, 491 n.5 (1971). Thus, in the Supreme Court's decisions "construing the reach of the habeas statutes," "[t]he Court uniformly has been guided by the proposition that the writ should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice" and "has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims." Kuhlmann v. Wilson, 477 U.S. 436, 447–48 (1986). While the Antiterrorism and Effective Death Penalty Act has narrowed the scope of the writ, the court agrees with the Third Circuit's weighing of the interests. In the context of retroactive application of a substantive rule, the state's countervailing interest in finality is less compelling, and the purpose of the Great Writ in preventing unjust confinement tips the scales in favor of a less narrow reading of section 2255(h). See In re Hoffner, 870 F.3d at 309 (citing Montgomery, 136 S. Ct. at 732).

Finally, in interpreting section 2255(h), this court seeks to anticipate how the Second Circuit would decide the issue. The Second Circuit cases addressing successive habeas petitions under Johnson did not address the question to the same analytical extent as the Third, Eighth, or Sixth Circuits. In two instances, however, the Second Circuit granted the application to file the successive petition and instructed the district court to consider staying the proceedings pending a Supreme Court decision in a potentially relevant case. See Blow, 829 F.3d at 172–73; Vargas, 2017 WL 3699225, at *1. Although the Second Circuit's order to stay the proceedings makes the import of these cases less compelling, such an outcome is certainly more in line with the reading of section 2255(h) adopted by the Third Circuit in Hoffner than by that of the Eighth or Sixth Circuits in Donnell or Embry.

Additionally, the Second Circuit denied certification to file a successive petition in Jackson v. United States and, in doing so, reasoned:

> Johnson does not support Petitioner's claim because he was not convicted under the statute involved in Johnson, 18 U.S.C. § 924(e), and he has not made a showing that any of the statutes under which he was convicted and sentenced contains language similar to the statutory language found unconstitutional in Johnson.

Jackson v. United States, No. 3:14-CV-00872-JCH, Mandate from USCA (Doc. No. 16) at 1–2. The second half of the above sentence implies that the Second Circuit would have considered certification appropriate if the petitioner had identified such a statute. This indicates that the Second Circuit does not read section 2255(h) as limited to the holding in Johnson. As such, the Mandate in Jackson is again more consistent with the Third Circuit's interpretation of section 2255(h) in Hoffner than the interpretations of the Eighth or Sixth Circuits in Donnell or Embry.

For all of the above reasons, the court interprets section 2255(h) using the approach articulated by the Third Circuit. Applying that reading of section 2255(h) to this case, the court finds that Cruz has satisfied the requirements for filing a successive petition.[14] See In re Hoffner, 870 F.3d at 308. As noted above, Miller is a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See 28 U.S.C. § 2255(h)(2); Montgomery, 136 S. Ct. at 734. Cruz's Petition "contains" and "relies on" Miller because Miller "substantiates [his] claim." See In re Hoffner, 870 F.3d at 309. Even if Cruz's claim may require a "non-frivolous extension of [Miller's] qualifying rule" to a set of facts not considered by the Miller Court, see id., his claim, nonetheless, depends on the rule announced in Miller. Miller's holding applies to a defendant under the age of 18, but the principle underlying the holding is more general: "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller, 567 U.S. at 479. Thus, who counts as a "juvenile" and whether Miller applies to Cruz as an 18-year-old are better characterized as questions on the merits, not as preliminary gate-keeping questions under section 2255(h).

[14] The court acknowledges that, in its previous Orders and Rulings, it used the language of "expanding" Miller, rather than "containing" or "relying on" the new rule in Miller. See, e.g., Order on Motion for Appointment of Counsel (Doc. No. 20) at 3 ("Counsel shall file a federal habeas motion and supporting memorandum . . . addressing whether Miller . . . may be expanded to apply to those who were over the age of 18 at the time of their crimes . . . ."); Ruling re: Mot. for Hearing at 23 ("Cruz argues that Miller's protection should be expanded to individuals who were under 21 at the time they committed their crimes."). The court does not, however, consider itself bound in this current Ruling by its less-than-thoughtful choice of language in prior Rulings, which could admittedly have been the result of sloppy drafting. At the time of the Order and Ruling cited above, the court was not considering the issue of whether Cruz's Petition "relied on" the new rule in Miller and therefore may have been less mindful of its choice of language in that regard.

B. Miller's Application to 18-Year-Olds

Having found that Cruz has satisfied the requirements of section 2255(h), the court now turns to the merits of Cruz's Petition. Cruz asks the court to apply the new rule in Miller to his case, arguing that the national consensus disfavors applying mandatory life imprisonment without parole to 18-year-olds and that the science indicates that the same indicia of youth that made mandatory life imprisonment without parole unconstitutional for those under the age of 18 in Miller also applies to 18-year-olds.

Before the court addresses the evidence of national consensus and scientific consensus, it first considers a preliminary argument raised by the Government. The Government argues that the court is prevented from applying Miller to an 18-year-old because it must follow the Supreme Court's binding precedents. See Post-Hr'g Mem. in Opp. at 6–8. It goes without saying that the court agrees that it is bound by Supreme Court precedent. However, it does not consider application of Miller to an 18-year-old to be contrary to Supreme Court (or Second Circuit) precedent.

As noted previously, Miller states, "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Miller, 567 U.S. at 465. The court does not infer by negative implication that the Miller Court also held that mandatory life without parole is necessarily constitutional as long as it is applied to those over the age of 18. The Miller opinion contains no statement to that effect. Indeed, the Government recognizes that, "The Miller Court did not say anything about exceptions for adolescents, young adults, or anyone else unless younger than 18." Post-Hr'g Mem. in Opp. at 8. Nothing in Miller then 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. Doing so would rely on and apply the rule in Miller to a different set of facts not contemplated by the case, but it would not be contrary to that precedent.[15]

Such a reading of Miller is consistent with the Supreme Court's traditional "reluctance to decide constitutional questions unnecessarily." See Bowen v. United States, 422 U.S. 916, 920 (1975). In Miller, it was unnecessary for the Court to address the constitutionality of mandatory life imprisonment for those over the age of 18 because both defendants in Miller were 14 years old. See Miller, 567 U.S. at 465. Therefore, the question of whether mandatory life imprisonment without parole is constitutional for an 18-year-old was not before the Court in Miller, and it would be contrary to the Court's general practice to opine on the question unnecessarily.

The Government argues nonetheless that Miller drew a bright line at 18 years old, which prevents this court from applying the rule in Miller to an 18-year-old. See Post-Hr'g Mem. in Opp. at 8; see also Roper v. Simmons, 543 U.S. 551, 574 (2005) (recognizing that the line may be over- and under-inclusive, but stating nonetheless that "a line must be drawn"). However, in so arguing, the Government fails to recognize that there are different kinds of lines. By way of illustration, in Thompson v. Oklahoma, 487 U.S. 815 (1988), the Supreme Court held that the death penalty was unconstitutional for

[15] The Government argues that the court should not deviate from the bright line drawn in Miller at age 18, "even where it believe[s] that the underlying rationale of that precedent ha[s] been called into question by subsequent cases." Post-Hr'g Mem. in Opp. at 6–7 (citing, inter alia, Agostini v. Felton, 521 U.S. 203, 237–38 (1997)). Distinct from this case, however, Agostini involved Supreme Court precedent that "directly control[led]" the case. See Agostini, 521 U.S. at 237. As noted above, Miller does not hold that mandatory life imprisonment without parole is constitutional as long as it is applied to those over the age of 18.

offenders under the age of 16. Id. at 838. It was not until Stanford v. Kentucky, 921 U.S. 361 (1989), rev'd by Roper, 543 U.S. at 574, however, that the Supreme Court held that the Eighth Amendment did not prohibit the execution of offenders ages 16 to 18. Id. at 380. In Stanford, the Court did not say that the ruling it set forth was found in the Thompson holding. Indeed, Stanford was not redundant of Thompson because the line drawn in Thompson looked only in the direction of offenders under the age of 16 and found them to be protected by the Eighth Amendment. Thompson's line did not simultaneously apply in the other (i.e. older) direction to prohibit the Eighth Amendment from protecting those over the age of 16. In contrast, Stanford's line did.

This distinction between the type of line drawn in Thompson and the type of line drawn in Stanford is reflected in the difference in the Supreme Court's treatment of these two cases in Roper v. Simmons. In deciding that the death penalty was unconstitutional as applied to offenders under the age of 18, the Roper Court considered itself to be overturning Stanford, but not Thompson. Compare Roper, 543 U.S. at 574 ("Stanford v. Kentucky should be deemed no longer controlling on this issue."); with id. ("In the intervening years the Thompson plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of Thompson extends to those who are under 18."). If the Government's argument that the line drawn in Miller prevents this court from applying its rule to an 18-year-old were correct, the same logic applied to the line drawn in Thompson would have required Roper to overturn Thompson rather than relying on and endorsing it. The language in Roper, however, makes clear that the court endorsed, rather than overturned, Thompson. See Roper, 543 U.S. at 574.

In drawing the line at 18, then, Roper, Graham, and Miller drew lines similar to that in Thompson, protecting offenders that fall under the line while remaining silent as to offenders that fall above the line. In the case of mandatory life imprisonment without parole, no Supreme Court precedent draws a line analogous to that in Stanford. Therefore, while this court recognizes that it is undoubtedly bound by Supreme Court precedent, it identifies no Supreme Court precedent that would preclude it from applying the rule in Miller to an 18-year-old defendant.

The Government also points in its Memorandum to a number of cases in which courts, faced with the question of applying Miller to defendants ages 18 or over, declined to do so. See Post-Hr'g Mem. in Opp. at 8–9, 10 n.1 (citing, inter alia, United States v. Marshall, 736 F.3d 492, 498 (6th Cir. 2013); Cruz v. Muniz, No. 2:16-CV-00498, 2017 WL 3226023, at *6 (E.D. Cal. July 31, 2017); Martinez v. Pfister, No. 16-CV-2886, 2017 WL 219515, at *5 (N.D. Ill. Jan. 19, 2017); Meas v. Lizarraga, No. 15-CV-4368, 2016 WL 8451467, at *14 (C.D. Cal. Dec. 14, 2016); Bronson v. Gen. Assembly of State of Pa., No. 3:16-CV-00472, 2017 WL 3431918, at *5 (M.D. Pa. July 17, 2017); White v. Delbalso, No. 17-CV-443, 2017 WL 939020, at *2 (E.D. Pa. Feb. 21, 2017)). The Government argues that this court should do the same.

In response, Cruz offers a number of reasons for distinguishing those cases from his, including that some of the cases cited by the Government did not involve mandatory life without parole, some involved defendants over the age of 21, and all but one did not involve expert testimony.[16] See Post-Hr'g Reply in Supp. at 6–7. While the court is

[16] The one case that Cruz identifies as including expert testimony is United States v. Marshall, 736 F.3d 492 (6th Cir. 2013). See Post-Hr'g Reply in Supp. at 6–7. The expert testimony in Marshall, however, was substantially different from the expert testimony before this court, as the testimony in Marshall did not focus on the science of typical adolescent brain development. Although the expert in

cautious in disagreeing with these other courts, it agrees with Cruz that very few of the courts that declined to apply Miller to 18-year-olds had before them a record of scientific evidence comparable to the one that this court now has before it. As to the few courts that did consider scientific evidence on adolescent brain development and nonetheless declined to apply Miller,[17] this court respectfully acknowledges those decisions to the

that case did testify that "the adolescence period does not end at 18 but actually extends into an individual's mid-20s," id. at 496, his testimony did not focus on the scientific evidence of development in typical 18-year-olds. Rather, the expert's testimony focused on a condition unique to the defendant in Marshall called Human Growth Hormone Deficiency, which "basically prevents maturation." See id. Therefore, the defendant in Marshall argued that his condition made him different from others who shared his chronological age. See id. at 497 (describing the defendant's developmental delay as "unique"). He was not arguing that 18-year-olds generally present the same hallmark characteristics of youth as 17-year-olds, as Cruz is arguing here. Thus, while the Marshall court considered expert testimony, it did not consider expert testimony comparable to that presented by Dr. Steinberg before this court.

[17] The court notes three cases cited by the Government that do consider scientific evidence. The petitioner in White v. Delbaso argued that "validated science and social science adopted by the high court has established that the human brain continues to develop well into early adulthood, specifically until the age of 25," but the district court for the Eastern District of Pennsylvania rejected such an argument and found that the petitioner was not entitled to file a second habeas petition based on Miller. See White v. Delbalso, No. 17-CV-443, 2017 WL 939020, at *2 (E.D. Pa. Feb. 21, 2017). That case differs from Cruz's in two key respects. First, the petitioner in White was 23 years old at the time of his crime, while Cruz was 5 months past his 18th birthday. As noted by the scientific evidence discussed in this Ruling, the evidence of continued development is stronger for 18-year-olds than it is for 23-year-olds. See Steinberg Tr. at 70–71 (indicating that he is "[a]bsolutely certain" that the scientific conclusions concerning juveniles also apply to 18-year-olds, but not as confident about 21-year-olds). Second, the court in White notes that the petitioner made an argument based on "validated science and social science," but does not discuss whether such evidence was presented to the court. Therefore, the court is unable to compare the depth or robustness of the evidence considered in White, if any.

At oral argument, the Government also cited two additional cases in which scientific evidence of adolescent brain development was presented. The Government noted that, in Adkins v. Wetzel, the petitioner cited to Dr. Steinberg's research to support the petitioner's argument that Miller's protections should apply to him despite the fact that he was 18 years old at the time of his underlying offenses. See Adkins v. Wetzel, No. 13-3652, 2014 WL 4088482, at *3–*4 (E.D. Pa. Aug. 18, 2014). The opinion states:

> In his habeas petition, he asserted that convicted eighteen year olds are similarly situated to younger teenagers because the frontal lobes of their brains are still developing. (Doc. No. 1 at 7) (citing Laurence Steinberg & C. Monahan, Age Differences in Resistance to Peer Influence, 43 Developmental Psychology 1531 (2007)). Likewise, in his objections, Petitioner contends that at the time of the underlying offenses, he suffered from the same diminished culpability as teenagers under the age of eighteen. (Doc. No. 26 at 25.) Petitioner did not submit any evidence in support of these arguments.

extent that they constitute persuasive authority, but recognizes its duty to decide this case on the law and record now before this court.[18]

The court now turns to the evidence presented by Cruz and the standard of cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment's prohibition of cruel and unusual punishment requires that "punishment for crime should be graduated and proportioned to [the] offense." Roper, 543 U.S. at 560 (internal quotation marks omitted). This proportionality principle requires the court to evaluate

Id. at *4. While the petitioner in Adkins cited to one of Dr. Steinberg's articles from 2007, the Adkins court's above description of the lack of evidence reflects a record that is not comparable to the one before this court. The evidence presented by Cruz here includes numerous articles and studies by Dr. Steinberg and others, as well as Dr. Steinberg's expert testimony before the court. Among other things, Dr. Steinberg testified that most of the research on adolescent brain development for late adolescents beyond age 18 did not emerge until the end of the 2000s and early 2010s. See Steinberg Tr. at 14. Therefore, it is unlikely that one article from 2007 could capture the breadth or depth of scientific evidence on late adolescence presented before this court, which includes, inter alia, research published in 2016 and 2017. See Alexandra Cohen et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temple L. Rev. 769 (2016) (introduced by Cruz at the evidentiary hearing before this court in Marked Exhibit and Witness List (Doc. No. 113)); Post-Hr'g Mem. in Supp., Ex. 1, Laurence Steinberg et al., Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation, Developmental Science 00 (2017) (Doc. No. 115-1)

Finally, the Government points to United States v. Lopez-Cabrera, No. S5-11-CR-1032 (PAE), 2015 WL 3880503 (S.D.N.Y. June 22, 2015), appeal docketed, No. 15-2220(L) (2d Cir. July 13, 2015). The court acknowledges that the Lopez-Cabrera court had before it "voluminous scientific evidence," as does the court here. See id. at *4. However, it is not clear to the court from the docket in Lopez-Cabrera whether the district court in that case also had the benefit of expert testimony. To the extent that this court's Ruling differs from Lopez-Cabrera, the court respectfully disagrees with its sister court in the Southern District of New York. The court notes that Lopez-Cabrera is now pending before the Second Circuit on appeal, but the Second Circuit has yet to issue a decision in the case.

[18] As noted in the previous footnote, the Government has identified one case currently pending before the Second Circuit, in which the Circuit will consider whether Miller should prohibit mandatory life without parole sentences for those just over the age of 18. See United States v. Lopez-Cabrera, No. S5-11-CR-1032 (PAE), 2015 WL 3880503 (S.D.N.Y. June 22, 2015), appeal docketed, No. 15-2220(L) (2d Cir. July 13, 2015). The court, in its previous Ruling on the Motion for Reconsideration, declined to stay this case pending the resolution of Lopez-Cabrera by the Second Circuit. See Ruling re: Mot. for Recons. at 9–10. In doing so, the court reasoned in part that Cruz is entitled to a prompt hearing on the evidence. See id. The court now considers this same reasoning determinative in its decision to issue this Ruling rather than stay the case pending the Second Circuit's decision. Not only has oral argument not yet been set in Lopez-Cabrera, but parts of the case itself has been stayed pending the Supreme Court's decision in Lynch v. Dimaya, No. 15-1498, and the Second Circuit's decision in United States v. Hill, No. 14-3872. See Lopez-Cabrera, Motion Order Granting Motion to Hold Appeal in Abeyance (Doc. No. 153). As the court noted in its prior Ruling, "the court will not make [Cruz] wait longer than the four years he has already waited" to have his Petition decided. See Ruling re: Mot. for Recons. at 10.

"'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." Id. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)). In its prior Ruling, the court traced the development of Eighth Amendment jurisprudence as applied to juveniles. See Ruling re: Mot. for Hr'g at 5–19. Rather than repeat its lengthy discussion of that history, the court incorporates herein the relevant discussion and focuses here on comparing the evidence relied on in Roper and the additional evidence presented to the court by Cruz.

In 2005, the Roper Court held the death penalty unconstitutional for persons under the age of 18 and, in drawing that line, stated:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality in Thompson drew the line at 16. In the intervening years the Thompson plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of Thompson extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574. The Roper Court relied on national consensus and the diminished penological justification resulting from the hallmark characteristics of youth. See id. at 567, 572–73. In Roper, the defendant was 17 years and 5 months old at the time of the murder. Id. at 556, 618.

In 2010, the Supreme Court in Graham v. Florida extended the reasoning in Roper to find that life imprisonment without parole is unconstitutional for juvenile

nonhomicide offenders. See Graham v. Florida, 560 U.S. 48, 74 (2010). Like the Roper Court, the Graham Court again considered national consensus and the fact that the characteristics of juveniles undercut the penological rationales that justified life without parole sentences for nonhomicide offenses. See id. at 62–67, 71–74. In Graham, the defendant was 16 at the time of the crime. See id. at 53. Thus, the Graham Court did not need to reconsider the line drawn at age 18 in Roper, but rather adopted that line without further analysis, quoting directly from Roper. See id. at 74–75 ("Because '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." (quoting Roper, 543 U.S. at 574)).

In 2012, as noted earlier in this Ruling, the Supreme Court in Miller further extended Graham to hold that mandatory life imprisonment without parole is unconstitutional for juvenile offenders, including those convicted of homicide. See Miller, 567 U.S. at 465. The defendants in Miller were 14 years old at the time of the crime, and the Miller Court, like the Graham Court, adopted the line drawn in Roper at age 18 without considering whether the line should be moved or providing any analysis to support that line. See id. at 465 ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'").

Because Cruz was 18 years and 20 weeks old at the time of the murders in this case, this court is now presented with a set of facts the Supreme Court has not yet had need to consider—whether the new rule in Miller can be applied to an 18-year-old. In

considering this question, the court looks to the same factors considered by the Supreme Court in Roper, Graham, and Miller—national consensus and developments in the scientific evidence on the hallmark characteristics of youth. The court notes that it need only decide whether the rule in Miller applies to an 18-year-old. On the facts of this case, it need not decide whether Miller also applies to a 19-year-old or a 20-year-old, as Cruz was 18 years old at the time of his crime. Although Cruz asks the court to draw the line at 21, the court declines to go any further than is necessary to decide Cruz's Petition.

1. National Consensus

The decisions in Roper, Graham, and Miller all address "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). In Roper, the Supreme Court identified three "objective indicia of consensus" in determining that societal standards considered the juvenile death penalty to be cruel and unusual: (1) "the rejection of the juvenile death penalty in the majority of States;" (2) "the infrequency of its use even where it remains on the books;" and (3) "the consistency in the trend toward abolition of the practice." Roper, 543 U.S. at 567. The court considers each of these indicia in turn.

a. Legislative Enactments

"[T]he 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). The Government argues that 24 states and the federal government have statutes prescribing mandatory life imprisonment without the

possibility of parole for offenders who commit murder at the age of 18 or older. See Post-Hr'g Mem. in Opp. at 22; see also id., Ex. A. The Government further claims that Congress has enacted 41 statutes with a sentence of mandatory life without parole for premeditated murder. See Post-Hr'g Mem. in Opp. at 23 (citing five examples). Based on this tally, the Government concludes that there is no national consensus that a mandatory life sentence without the possibility of parole is unconstitutional as applied to persons aged 18 or older. See id. at 22–23.

However, the Supreme Court in both Graham and Miler indicated that merely counting the number of states that permitted the punishment was not dispositive. See Graham, 560 U.S. at 66 ("The evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders."); Miller, 567 U.S. at 485 (relying on reasoning in Graham and Thompson to "explain[ ] why simply counting [the statutes] would present a distorted view"). The Miller Court specifically noted that "the States' argument on this score [is] weaker than the one we rejected in Graham." Miller, 567 U.S. at 482. In Graham, 39 jurisdictions permitted life imprisonment without parole for juvenile nonhomicide offenders, see Graham, 560 U.S. at 62, while, in Miller, 29 jurisdictions permitted mandatory life imprisonment without parole for juvenile homicide offenders, see Miller, 567 U.S. at 482. The Government has cited the court to 25 jurisdictions in this case, a lower number than that in Graham or Miller.

Moreover, the reasoning of the Court in Miller that the tally of legislative enactments is less significant than other considerations to its ultimate conclusion is also applicable to the current issue before the court. The Miller Court reasoned:

> For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in Roper or Graham. Instead, it mandates only that a sentence follow a certain process—considering an offender's youth and attendant circumstances—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of Roper, Graham, and our individualized sentencing cases that youth matters for purposes of meting out the laws' most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments.

Miller, 567 U.S. at 483. Because the issue before the court now is whether to apply Miller to an 18-year-old, the same circumstances identified above in Miller are necessarily also true here, so the court need not rely too heavily on legislative enactments. Cruz asks this court to rule that the mandatory aspect of the sentence applied to him be held to be unconstitutional. He does not seek a ruling that would prevent such a sentence from being applied in the discretion of the sentencing judge, after consideration of a number of sentencing factors, including his youth and immaturity at the time of the offense.

Additionally, Cruz argues that, beyond the context of statutes pertaining specifically to mandatory life imprisonment without parole, states have enacted a number of statutes providing greater protections to offenders ages 18 into the early 20s than to adults. For example, while the Government indicates that no state treats individuals aged 18 to 21 differently than adults for homicide offenses, see Post-Hr'g Mem. in Opp. at 23, the Government acknowledges that a number of states do recognize an intermediate classification of "youthful offenders" applicable to some other crimes. See id., Ex. A (indicating that 18-year-olds are classified as "youthful offenders"

in California, Colorado, Florida, New Mexico, and New York). Cruz also identifies 16 states that provide protections, such as expedited expungement, Youth Offender Programs, separate facilities, or extended juvenile jurisdiction, for offenders who are 18 years old up to some age in the early 20s, depending on the state. See Post-Hr'g Mem. in Supp. at 34–38; see also, e.g., Cal. Penal Code § 3051(a)(1) (providing a youth offender parole hearing for prisoners under the age of 25); Va. Code. Ann. § 19.2-311(B)(1) (permitting persons convicted of nonhomicide offenses under the age of 21 to be committed to a state facility for youthful offenders in lieu of any other penalty provided by law). Although the Government argues that these protections often do not apply to youthful offenders who commit the most serious crimes, such as the double homicide for which Cruz was convicted, see Post-Hr'g Mem. in Opp. at 23, these statutes nonetheless indicate a recognition of the difference between 18-year-olds and offenders in their mid-twenties for purposes of criminal culpability.

The Government also argues that these statutes are not persuasive of a national consensus because the question is not whether there is a national consensus that the adolescent brain is not mature until the mid-20s, but rather whether there is a national consensus about the sentencing practice at issue. See Post-Hr'g Mem. in Opp. at 26 n.10 (quoting Graham, 560 U.S. at 61 (describing the inquiry as whether "there is a national consensus against the sentencing practice at issue")). While the court agrees with the Government that the issue before it is whether a national consensus exists as to the practice of sentencing 18-year-olds to mandatory life imprisonment without parole, the court considers other evidence of line-drawing between juveniles and adults still to be relevant. In drawing the line at age 18, the Roper Court pointed to evidence

beyond the strict context of the death penalty. See Roper, 543 U.S. at 574 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."). Therefore, while the court places greater weight on national consensus about mandatory life imprisonment without parole, the court, like the Roper Court, considers "where society draws the line for many purposes between childhood and adulthood" to be a relevant consideration. Id.

b. Actual Use

In finding the government's reliance on counting to be "incomplete and unavailing," the Graham Court emphasized the importance of actual sentencing practices as part of the Court's evaluation of national consensus. Graham, 560 U.S. at 62. Along these lines, Cruz points to a 2017 Report by the United States Sentencing Commission on offenders ages 25 or younger who were sentenced in the federal system between 2010 and 2015. See Post-Hr'g Mem. in Supp., Ex. 3, United States Sentencing Commission, Youthful Offenders in the Federal System, Fiscal Years 2010 to 2015 ("Youthful Offenders") (Doc. No. 115-3).

The Sentencing Commission reported that 86,309 youthful offenders (aged 25 and under) were sentenced in the federal system during that five-year period. See id. at 2. Of those, 2,226 (2.6%) were 18 years old, 5,800 (6.7%) were 19 years old, and 8,809 (10.2%) were 20 years old. See id. at 15. Of the 86,309 youthful offenders, 96 received life sentences. See id. at 48. Of those 96, 85 were 21 years or older at the time of sentencing, 6 were 20 years old, 4 were 19 years old, and only one was 18 years old. See id. Although the Sentencing Commission's findings are imperfectly

tailored to the question before the court,[19] they nonetheless indicate the rarity with which life sentences are imposed on 18-year-olds like Cruz, at least in the federal system.

The Government argues that the court should not place weight on the Sentencing Commission's Report because it is "simply a report on statistics regarding offenders aged twenty-five or younger. It makes no recommendation to the Commission to change the Sentencing Guidelines. Nor does it establish anything about trends regarding mandatory life sentences." Post-Hr'g Mem. in Opp. at 27. In so arguing, the Government would overly restrict the type of evidence that the court may consider in determining whether a national consensus exists. Notably, the Graham

[19] The court acknowledges that these statistics are incomplete and are not perfectly tailored to the question before the court for a number of reasons. First, the Sentencing Commission reports on those that received life sentences, without distinguishing whether those sentences were with or without the possibility of parole. Nor does the Report indicate whether the life sentence was mandatory or discretionary. However, the court notes that the number of youthful offenders receiving a mandatory sentence of life without the possibility of parole is likely fewer than those reported by the Sentencing Commission as receiving a life sentence, as the category of offenders receiving life sentences also includes those receiving discretionary life sentences and those sentenced to life with the possibility of parole. As in Miller, the court's Ruling would not prohibit life imprisonment without parole for 18-year-olds, but would merely require the sentence to follow a certain process before imposing such a penalty.

Second, the Report tracks age at sentencing rather than at the time of the crime. Because the court does not have available the time between crime, plea, and sentencing, the Report is at best an approximation. Third, the Report reflects only sentencing practices in the federal system. Cruz has not provided comparable information for the states.

Finally, the Report does not indicate how many of the 86,309 offenders were eligible for life sentences, which would be the appropriate denominator for comparison with the 96 youthful offenders who received life sentences. The Report does indicate that 91.9% of the offenses were nonviolent. See Youthful Offenders at 23. Nonetheless, the Graham Court faced the same situation and stated: "Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual." Graham, 560 U.S. at 66.

Thus, while acknowledging the limitations of the Sentencing Commission's Report, this court likewise considers it relevant evidence of the infrequency of the use of life imprisonment on 18-year-old offenders.

Court also considered actual sentencing practices, as reported by a study done by the United States Department of Justice. See Graham, 560 U.S. at 62–63. The Graham Court did not mention whether the study recommended legislative changes or reported trends over time, but rather considered its findings about the infrequency of life without parole as a sentence for juvenile nonhomicide offenders to be significant evidence of a national consensus regardless. See id.; see also Roper, 543 U.S. at 567 (including as a separate indicia of consensus "the infrequency of [the punishment's] use even where it remains on the books," independent of the indicia for legislative enactments or directional trends). Thus, while certainly not dispositive of national consensus, the Sentencing Commission's Report is relevant evidence in the court's consideration on that issue. To that end, the Report clearly indicates the extreme infrequency of the imposition of life sentences on 18-year-olds in the federal system.

c. Directional Trend

Cruz additionally points to evidence of trends since Roper indicating a direction of change toward recognizing that "late adolescents require extra protections from the criminal law" and more generally that society "treats eighteen- to twenty-year-olds as less than fully mature adults." Post-Hr'g Mem. in Supp. at 38, 40. As noted previously, the Government challenges Cruz's reliance on such evidence because the issue is whether "there is a national consensus against the sentencing practice at issue," not whether there is a national consensus that adolescent brains are not fully mature until the mid-20s. Post-Hr'g Mem. in Opp. at 26 n.10 (quoting Graham, 560 U.S. at 61).

The court acknowledges that the most persuasive evidence of a directional trend would be changes in state legislation prohibiting mandatory life imprisonment without parole for 18-year-olds. Cruz has not provided evidence of this. However, the court

again looks for guidance to the Roper Court, which drew the line at age 18 based on "where society draws the line for many purposes between childhood and adulthood." Roper, 543 U.S. at 574. Thus, trends as to where society draws that line are relevant, and the court is not confined to consider only evidence in the strict context of mandatory life imprisonment without parole.

While Roper emphasized that society draws the line at age 18 for many purposes, including voting, serving on juries, and marrying without parental consent, Cruz identifies other important societal lines that are drawn at age 21, such as drinking. See Post-Hr'g Mem. in Supp. at 40–41 (citing 23 U.S.C. § 158); Roper, 543 U.S. at 569. Some lines originally drawn at age 18 have also begun to shift to encompass 18- to 20-year-olds. For example, a Kentucky state court in Bredhold v. Kentucky declared the state's death penalty statute unconstitutional as applied to those under the age of 21, based on a finding of a "consistent direction of change" that "the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21)." Post-Hr'g Mem. in Supp., Ex. 5, Bredhold v. Kentucky (Doc. No. 115-5) at 6. The Kentucky court cited the fact that, in the 31 states with a death penalty statute, a total of only 9 defendants under the age of 21 at the time of the offence were executed between 2011 and 2016.

Likewise, recognizing the same directional trend, the American Bar Association ("ABA") issued a Resolution in February 2018, "urg[ing] 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 Petitioner's Notice of Supplemental Authority, Ex. A ("ABA Resolution") (Doc. No. 121-1) at 1. In

doing so, the ABA considered both increases in scientific understanding of adolescent brain development and legislative developments in the legal treatment of individuals in late adolescence. See id. at 6–10. For example, it recognized "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.

Additionally, Cruz points out that, between 2016 and 2018, 5 states and 285 localities raised the age to buy cigarettes from 18 to 21. See Campaign for Tobacco-Free Kids, States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21, http://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf. Furthermore, as of 2016, all fifty states and the District of Columbia recognized extended age jurisdiction[20] for juvenile courts beyond the age of 18, in comparison to only 35 states in 2003. See Post-Hr'g Mem. in Supp., Ex. 8, National Center for Juvenile Justice, U.S. Age Boundaries of Delinquency 2016 (Doc. No. 115-8) at 2; Elizabeth Scott, Richard Bonnie & Laurence Steinberg, Young Adulthood as a Transitional Legal Category, 85 Fordham L. Rev. 641, 666 n.156 (2016).

[20] "Extended age boundaries are statutory provisions that indicate the oldest age a juvenile court can retain or resume jurisdiction over an individual whose delinquent conduct occurred before the end of the upper age boundary." U.S. Age Boundaries of Delinquency 2016 at 3. "The upper age boundary refers to the oldest age at which an individual's alleged conduct can be considered delinquent and under original juvenile court jurisdiction." Id. at 1. Cruz's argument focuses on extended age boundaries rather than upper age boundaries. Most upper age boundaries remain at 17, but many states that previously had upper age boundaries below 17 recently raised the age to 17. See id. at 2.

While there is no doubt that some important societal lines remain at age 18, the changes discussed above reflect an emerging trend toward recognizing that 18-year-olds should be treated different from fully mature adults.

2. Scientific Evidence

"Community consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual." Graham, 560 U.S. at 67 (internal quotation marks omitted). The court retains the responsibility of interpreting the Eighth Amendment. Id. (citing Roper, 543 U.S. at 575). To that end, "[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." Id. at 67.

The Court in Roper, Graham, and Miller thus looked to the available scientific and sociological research at the time of the decisions to identify differences between juveniles under the age of 18 and fully mature adults—differences that undermine the penological justifications for the sentences in question. See Roper, 543 U.S. at 569–72; Graham, 560 U.S. at 68–75; Miller, 567 U.S. at 471 ("Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well."). The Supreme Court in these cases identified "[t]hree general differences between juveniles under 18 and adults": (1) that juveniles have a "lack of maturity and an underdeveloped sense of responsibility," often resulting in "impetuous and ill-considered actions and decisions;" (2) that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) that "the character of a juvenile is not as well formed as that of an adult." Roper, 543 U.S. at 569–70; see also Graham, 560 U.S. at 68; Miller, 567 U.S. at 471–72.

Because of these differences, the Supreme Court concluded that juveniles are less culpable for their crimes than adults and therefore the penological justifications for the death penalty and life imprisonment without the possibility of parole apply with less force to them than to adults. See Roper, 543 U.S. at 570–71; Graham, 560 U.S. at 69–74; Miller, 567 U.S. at 472–73. Retribution is less justifiable because the actions of a juvenile are less morally reprehensible than those of an adult due to diminished culpability. See Graham, 560 U.S. at 71. Likewise, deterrence is less effective because juveniles' "impetuous and ill-considered actions" make them "less likely to take a possible punishment into consideration when making decisions." Id. at 72. Nor is incapacitation applicable because juveniles' personality traits are less fixed and therefore it is difficult for experts to "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 72–73 (quoting Roper, 543 U.S. at 572). Finally, rehabilitation cannot be the basis for life imprisonment without parole because that "penalty altogether forswears the rehabilitative ideal" by "denying the defendant the right to reenter the community." Id. at 74.

In reaching its decision, the Roper Court relied on the Court's prior decision in Thompson v. Oklahoma, 487 U.S. 815 (1988), which held that the Eighth Amendment prohibited the execution of a defendant convicted of a capital offense committed when the defendant was younger than 16 years old. See Roper, 543 U.S. at 570–71. The Roper Court pointed to the Thompson Court's reliance on the significance of the distinctive characteristics of juveniles under the age of 16 and stated, "We conclude the same reasoning applies to all juvenile offenders under 18." Id. The court now looks to

the Roper Court's reliance on these same characteristics and concludes that scientific developments since then indicate that the same reasoning also applies to an 18-year-old. See Steinberg Tr. at 70–71 (stating that he is "[a]bsolutely certain" that the scientific findings that underpin his conclusions about those under the age of 18 also apply to 18-year-olds); Alexandra Cohen et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temple L. Rev. 769 (2016); Post-Hr'g Mem. in Supp., Ex. 1, Laurence Steinberg et al., Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation, Developmental Science 00 (2017) (Doc. No. 115-1).

As to the first characteristic identified by the Roper Court—"lack of maturity and an underdeveloped sense of responsibility" as manifested in "impetuous and ill-considered actions and decisions"—the scientific evidence before the court clearly establishes that the same traits are present in 18-year-olds. See Roper, 543 U.S. at 569. Cruz's evidence consists of the expert testimony of Dr. Laurence Steinberg and scientific articles offered as exhibits. See, e.g., Cohen et al., When Does a Juvenile Become an Adult?; Steinberg et al., Around the World.[21]

In his testimony, Dr. Steinberg defined early adolescence as occurring between the ages of 10 and 13, middle adolescence between the ages of 14 and 17, and late adolescence between the ages of 18 and 21. See Steinberg Tr. at 11. He distinguished between two different decision-making processes: cold cognition, which occurs when an individual is calm and emotionally neutral, and hot cognition, which

[21] The court notes that the Government has not challenged Dr. Steinberg's expertise or his "scientific opinion on these matters." See Post-Hr'g Mem. in Opp. at 15; Steinberg Tr. at 6.

occurs when an individual is emotionally aroused, such as in anger or excitement. See id. at 9–10. Cold cognition relies mainly on basic thinking abilities while hot cognition also requires the individual to regulate and control his emotions. See id. at 10. 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. See id. at 10, 70; see also Cohen et al., When Does a Juvenile Become an Adult?, at 786 (finding that, "relative to adults over twenty-one, young adults show diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal").

Dr. Steinberg also testified that 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." Steinberg Tr. at 19. For example, he testified that impulse control is still developing during the late adolescent years from age 10 to the early- or mid-20s.[22] See id. at 20; Post-Hr'g Mem. in Supp. at 10; Cohen et al. at 780. Additionally, late adolescents are more likely to take risks than either adults or middle or early adolescents. See Steinberg Tr. at 20. According to Dr. Steinberg, risk-seeking behavior peaks around ages 17 to 19 and then declines into adulthood. See id.; Steinberg et al., Around the World, at 10 (graphing the trajectory of sensation-seeking behavior, as related to age, as an upside-down "U" with the peak at age 19). The

[22] Cruz's materials differ as to whether development in impulse control plateaus at age 21 or age 25. See Steinberg Tr. at 19 (describing a linear development in impulse control from age 10 to age 25); Post-Hr'g Mem. in Supp. at 10 (stating in one sentence that impulse control plateaus sometime after age 21 and in another sentence that it does not plateau until about age 25). The inconsistency does not impact the court's decision here, as both plateau ages are several years beyond Cruz's age at the time of his offense.

scientific evidence therefore reveals that 18-year-olds display similar characteristics of immaturity and impulsivity as juveniles under the age of 18.

The same conclusion can be drawn for susceptibility of 18-year-olds to outside influences and peer pressure, the second characteristic of youth identified in Roper. Dr. Steinberg testified that the ability to resist peer pressure is still developing during late adolescence. See Steinberg Tr. at 20–21. Therefore, susceptibility to peer pressure is higher in late adolescence than in adulthood, but slightly lower than in middle adolescence. See id. According to Dr. Steinberg's research, up until the age of 24, people exhibit greater risk-taking and reward-sensitive behavior when in the presence of their peers. See id. at 24–25. Adults after the age of 24 do not exhibit this behavior, but rather perform the same whether they are by themselves or with their peers. See id. Therefore, like juveniles under the age of 18, 18-year-olds also experience similar susceptibility to negative outside influences.

Finally, on the third characteristic of youth identified by Roper—that a juvenile's personality traits are not as fixed—Dr. Steinberg testified that people in late adolescence are, like 17-year-olds, more capable of change than are adults. See id. at 21.

Thus, in sum, Dr. Steinberg testified that he is "absolutely confident" that development is still ongoing in late adolescence. See id. at 62. In 2003, Dr. Steinberg co-wrote an article, the central point of which was that adolescents were more impetuous, were more susceptible to peer pressure, and had less fully formed personalities than adults. See id. at 22; see also Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished

Responsibility, and the Juvenile Death Penalty, 58 Am. Psychol. 1009 (2003). Although the article focused on people younger than 18, 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 same things are true about people who are younger than 21." Steinberg Tr. at 22.

The court today is not asked to determine whether the line should be drawn at age 20. Rather, the issue before the court is whether the conclusions of Miller can be applied to Cruz, an 18-year-old. To that end, Dr. Steinberg testified that he was not aware of any statistically significant difference between 17-year-olds and 18-year-olds on issues relevant to the three differences identified by the Court in Roper, Graham, and Miller. See id. at 69; see also, supra, at 48–49. When asked whether he could state to a reasonable degree of scientific certainty that the findings that underpinned his conclusions as to the defendants in Graham and Miller, who were under the age of 18, also applied to an 18-year-old, Dr. Steinberg answered that he was "[a]bsolutely certain." See id. at 70–71.

The Government does not contest Dr. Steinberg's scientific opinion or with Cruz's presentation of the scientific findings. See Post-Hr'g Mem. in Opp. at 15 ("To be clear, the Government did not, and has not, taken issue with Professor Steinberg's scientific opinion on these matters. Nor, generally, does the Government dispute the scientific findings presented by the petitioner in his brief, which largely mirror those to which Professor Steinberg testified.").[23] Rather, the Government argues only that the court

[23] The Government does note in a footnote that the science is "not as convincing for individuals aged 18 to 21 as it is for individuals younger than 18," but it does not argue that the scientific evidence

has before it the same scientific evidence that was before the Supreme Court in Miller, so the court should draw the same line at age 18 as did the Miller Court. See id. at 12–20. The Government presents a side-by-side comparison of some of the facts presented by Dr. Steinberg at the evidentiary hearing before this court and the facts presented in two amicus briefs submitted in Miller. See id. at 16–18.[24]

pertaining to 18-year-olds is insufficient to support the conclusions drawn by the court. See Post-Hr'g Mem. in Opp. at 15 n.5.

[24] The Government makes much of the fact that the Miller Court cited a 2003 scientific article authored by Professor Steinberg and two amicus briefs in support of its conclusion that "developments in psychology and brain science continue to show fundamental differences between juvenile and adolescent minds." See Post-Hr'g Mem. in Opp. at 15 (quoting Miller, 567 U.S. at 471–72); Brief for the Am. Psych. Ass'n et al., Nos. 10-9646, 10-9647, 2012 WL 174239 (Jan. 17, 2012); Brief of Amici Curiae J. Lawrence Aber et al., Nos. 10-9646, 10-9647, 2012 WL 195300 (Jan. 17, 2012). However, the court disagrees with the importance that the Government attributes to these citations in the Miller opinion and does not consider them to indicate that the Court considered whether 18-year-olds exhibit the same hallmark characteristics of youth as those under the age of 18 in Miller.

First, the court notes that the 2003 article, while authored by Steinberg, does not contain the same findings about which he testified before this court. The aim of that article was to argue that "[t]he United States should join the majority of countries around the world in prohibiting the execution of individuals for crimes committed under the age of 18." Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychol. 1009, 1017 (2003); see also Steinberg Tr. at 22 ("The focus of the article was about people younger than 18. If we were writing it today, I think we would say that the same things are true about people who are younger than 21.").

Second, where the Miller Court cites to the two amicus briefs, it cites to portions of those briefs that support the conclusions of the Roper and Graham Courts. See Miller, 567 U.S. at 472 n.5 ("The evidence presented to us in these cases indicates that the science and social science supporting Roper's and Graham's conclusions have become even stronger." (citing Brief for Am. Psych. Ass'n et al.; Brief for J. Lawrence Aber et al.)). While the Government's Memorandum identifies sentences in the briefs that refer to late adolescence or young adulthood, see Post-Hr'g Mem. in Opp. at 16–18, the Miller Court does not cite or refer to those aspects of the briefs. Indeed, the APA Brief, from which the Government draws all but one of its references to late adolescence and young adulthood, expressly states:

> We use the terms 'juvenile' and 'adolescent' interchangeably to refer to individuals aged 12 to 17. Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood; the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Roper, 543 U.S. at 574. Likewise, younger adolescents differ in some respects from 16- and 17-year olds. Nonetheless, because adolescents generally share certain developmental characteristics that mitigate their culpability, and because "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood," this Court's decisions have recognized age 18 as a relevant demarcation. Graham, 130 S. Ct. at

The Government's comparison is misguided, however, because the Supreme Court in Miller did not have occasion to consider whether the indicia of youth applied to 18-year-olds. As discussed above, the Supreme Court has historically been "reluctan[t] to decide constitutional questions unnecessarily." See Bowen, 422 U.S. at 920. In Miller, both defendants were 14 years old at the time of their crimes. See Miller, 567 U.S. at 465. The issue before the Court in Miller was whether mandatory life imprisonment without the possibility of parole was unconstitutional for juvenile offenders who committed homicides. See id. Thus, the Miller Court merely adopted without analysis the line at age 18, drawn seven years earlier by the Roper Court, because the facts before the Court did not require it to reconsider that line. See Miller, 567 U.S. at 471–80. As evidence of this, when the Supreme Court asked counsel for Miller where to draw the line, rather than pointing to any scientific evidence, counsel answered, "I would draw it at 18 . . . because we've done that previously; we've done that consistently." See Miller, Oral Argument Transcript, at 10, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/ 2011/10-9646.pdf.

A more appropriate comparison, then, would be the evidence before the court today and the evidence before the Roper Court in 2005. Dr. Steinberg testified that, in

> 2030; see Roper, 543 U.S. at 574. The research discussed in this brief accordingly applies to adolescents under age 18, including older adolescents, unless otherwise noted.

Brief for Am. Psych. Ass'n et al., 2012 WL 174239, at *6 n.3. Thus, consistent with the issue to be decided in Miller, both the briefs and the Miller opinion were primarily concerned with the scientific evidence to the extent that it corroborated the conclusions in Roper and Graham as to the immaturity and diminished culpability of those under the age of 18.

the mid- to late-2000s, "virtually no research . . . looked at brain development during late adolescence or young adulthood." Steinberg Tr. at 14. He stated:

> People began to do research on that period of time toward the end of that decade and as we moved into 2010 and beyond, there began to accumulate some research on development in the brain beyond age 18, so we didn't know a great deal about brain development during late adolescence until much more recently.

Id. Therefore, when 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.

Thus, relying on both the scientific evidence and the societal evidence of national consensus, the court concludes that the hallmark characteristics of juveniles that make them less culpable also apply to 18-year-olds. As such, 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.

The court therefore holds that Miller applies to 18-year-olds and thus that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole" for offenders who were 18 years old at the time of their crimes. See Miller, 567 U.S. at 479. As applied to 18-year-olds as well as to juveniles, "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." See id. As with Miller, this Ruling does not foreclose a court's ability to sentence an 18-year-old to life imprisonment without parole, but requires the sentencer to take into account how adolescents, including late adolescents, "are different, and how those

differences counsel against irrevocably sentencing them to a lifetime in prison." See id. at 480.

VI. CONCLUSION

For the reasons stated above, Cruz's Petition to Vacate, Set Aside, or Correct Sentence (Doc. No. 37) is **GRANTED**.

SO ORDERED.

Dated at New Haven, Connecticut, this 29th day of March, 2018.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

19-989-cr
Cruz v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of September, two thousand twenty.

PRESENT: RALPH K. WINTER,
REENA RAGGI,
DENNY CHIN,
Circuit Judges.

- -x

LUIS NOEL CRUZ, AKA Noel,
Petitioner-Appellee,

-v- 19-989-cr

UNITED STATES OF AMERICA,
Respondent-Appellant.

- -x

FOR PETITIONER-APPELLEE: TADHG DOOLEY, Wiggin and Dana LLP, New Haven, Connecticut, *and* William T. Koch, III, Niantic, Connecticut.

FOR RESPONDENT-APPELLANT:	JOHN T. PIERPONT, JR., Assistant United States Attorney (Patricia Stolfi Collins, Sandra S. Glover, Assistant United States Attorneys, *on the brief*), *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, Connecticut.
FOR AMICUS CURIAE:	John R. Mills, Phillips Black, Inc., Oakland, California.

Appeal from the United States District Court for the District of Connecticut (Janet C. Hall, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the amended judgment of the district court is **VACATED** and the case is **REMANDED** for the district court to reinstate the prior judgment and sentence.

The Government appeals from an order of the district court, entered on March 29, 2018, granting petitioner-appellee Luis Noel Cruz's successive petition brought under 28 U.S.C. § 2255 to vacate his sentence of four concurrent terms of mandatory life imprisonment and from its amended judgment, imposed on February 26, 2019 (and entered on the docket on March 18, 2019), sentencing Cruz principally to a total of thirty-five years' imprisonment. On appeal, the Government maintains that, because Cruz was eighteen years and twenty weeks old when he and another member of the Latin Kings committed the homicide crimes of conviction, the district court erred when it (1) held that *Miller v. Alabama*, 567 U.S. 460 (2012), precluded the imposition of

his mandatory life sentences and (2) failed to dismiss Cruz's successive petition for lack of jurisdiction. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

BACKGROUND

On September 29, 1995, Cruz was convicted, following a jury trial, of two counts of murder in aid of racketeering, racketeering, conspiracy to commit a drug offense, and related crimes. On January 30, 1996, the district court sentenced Cruz to, *inter alia*, four concurrent terms of life imprisonment.

On June 25, 2013, Cruz sought permission to file a fifth successive petition under 28 U.S.C. § 2255 to raise a proposed claim based on *Miller*. *See United States v. Millet (Luis Noel Cruz)*, No. 13-2457 (2d Cir.) (Doc. No. 2). This Court granted the request on July 22, 2013. *Id.* (Doc. No. 25). In *Miller*, the Supreme Court held that the Eighth Amendment's prohibition on cruel and unusual punishment barred a mandatory life sentence without parole for an individual under the age of eighteen at the time of his crime. *See Miller*, 567 U.S. at 465; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (holding that *Miller* announced a new substantive constitutional rule that was retroactive on collateral review).

Cruz filed the instant petition in the district court on August 19, 2014, and argued, *inter alia*, that *Miller*'s prohibition of mandatory life imprisonment for individuals younger than eighteen years old ("juveniles") should also apply to those

who were eighteen at the time of their offense. During a two-day evidentiary hearing, Cruz presented expert testimony to the effect that individuals aged eighteen to twenty-one are similar to juveniles with respect to brain development, impulse control, and susceptibility to peer influence.

The district court was persuaded, and, on March 29, 2018, it vacated Cruz's life sentences. It reasoned that nothing in *Miller* limits its application to defendants who were juveniles at the time of their offense, and that both scientific evidence and a national consensus supports the conclusion that the Eighth Amendment forbids a mandatory life sentence for a defendant who was eighteen at the time of his crime. The district court subsequently resentenced Cruz to thirty-five years' imprisonment. This appeal followed.

DISCUSSION

We review a district court's legal conclusions underlying a motion for relief under 28 U.S.C. § 2255 *de novo* and its factual findings for clear error. *See United States v. Hoskins*, 905 F.3d 97, 102 (2d Cir. 2018).

We are obliged to identify legal error by our decision in *United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019), *cert. denied sub nom. Beltran v. United States*, 140 S. Ct. 2540 (Mar. 23, 2020), and *cert. denied sub nom. Lopez-Cabrera v. United States*, 141 S. Ct. 2541 (Mar. 23, 2020). In that case, decided in August 2019, after the district court resentenced Cruz, this Court held that mandatory life sentences for individuals

eighteen years old or older do not violate the Eighth Amendment. As *Sierra* observes, *see id.* at 97, the Supreme Court has repeatedly drawn a bright line at age eighteen for Eighth Amendment limitations on sentencing. *See Miller*, 567 U.S. at 465, 479 ("[M]andatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments," because "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (adopting a categorical rule at the age of eighteen to implement its holding that the Eighth Amendment forbids the imposition of a life sentence without parole for a juvenile offender who did not commit homicide); *Roper v. Simmons*, 543 U.S. 551, 574, 578 (2005) (holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed" because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood"). Consequently, because the Supreme Court has "chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences," the imposition of such sentences for defendants between ages of eighteen and twenty-two does not violate the Eighth Amendment. *See Sierra*, 933 F.3d at 97.[1]

[1] Every Circuit to consider this issue has refused to extend *Miller* to defendants who were eighteen or older at the time of their offenses, albeit in circumstances distinct from those

In light of our holding in *Sierra*, we conclude that the district court erred when it held that the Eighth Amendment forbids a mandatory life sentence for a defendant who was eighteen at the time of his offense. Like the defendants in *Sierra*, Cruz was convicted of murders in aid of racketeering committed after he had turned eighteen, and he was subsequently sentenced to mandatory life terms. *See id*. Although Cruz committed his offense only five months after his eighteenth birthday, we noted in *Sierra* that the Supreme Court explicitly limited its holding in *Miller* to defendants "under the age of 18," 567 U.S. at 465, and earlier Eighth Amendment jurisprudence also drew a categorical line at age eighteen between adults and juveniles, *see Graham*, 560 U.S. at 74; *Roper*, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18 . . . . [H]owever, a line must be drawn."). Accordingly, the district court's decision to vacate Cruz's life sentences on the grounds that the Eighth Amendment forbids such a sentence for a defendant who is eighteen is inconsistent with both this Court's decision in *Sierra* and Supreme Court precedent.[2]

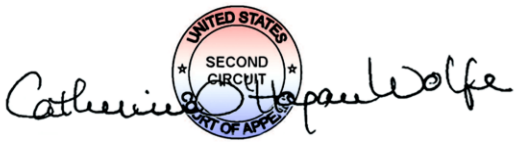
presented by this case. *See, e.g., Wright v. United States*, 902 F.3d 868, 872 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1207 (2019); *In re Frank*, 690 F. App'x 146 (5th Cir. 2017); *Melton v. Florida Dep't of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015); *United States v. Marshall*, 736 F.3d 492, 500 (6th Cir. 2013); *United States v. Dock*, 541 Fed. Appx. 242, 245 (4th Cir. 2013).

[2] Because we hold that Cruz's petition must be denied, we do not reach the Government's procedural argument that the district court erred when it failed to dismiss Cruz's successive petition for lack of jurisdiction under § 2255(h).

* * *

For the foregoing reasons, we **VACATE** the judgment of the district court and **REMAND** for the district court to reinstate the prior judgment and sentence.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand twenty.

Luis Noel Cruz, AKA Noel,

Petitioner - Appellee,

v.

United States of America,

Respondent - Appellant.

ORDER

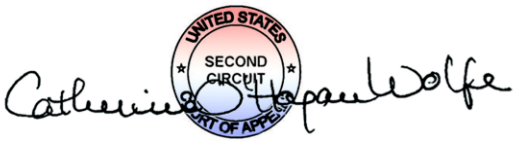
Docket No: 19-989

Appellee, Luis Noel Cruz, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



User Name: Vishal Garg
Date and Time: Saturday, April 17, 2021 11:16:00 PM EDT
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1. *In re Pers. Restraint of Monschke, 2021 Wash. LEXIS 152*

Client/Matter: -None-
Search Terms: 2021 Wash. LEXIS 152
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

In re Pers. Restraint of Monschke

Supreme Court of Washington

May 14, 2020, Argued; March 11, 2021, Filed

NO. 96772-5

Reporter
2021 Wash. LEXIS 152 *

In the Matter of the Personal Restraint of KURTIS WILLIAM MONSCHKE, *Petitioner*.*In the Matter of the Personal Restraint of* DWAYNE EARL BARTHOLOMEW, *Petitioner*.

Prior History: [*1] Appeal from Pierce County Superior Court. 03-1-01464-0. Honorable Lisa Worswick.

State v. Monschke, 133 Wn. App. 313, 135 P.3d 966, 2006 Wash. App. LEXIS 1104 (June 1, 2006)

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN1 **Fundamental Rights, Cruel & Unusual Punishment**

For some purposes, the Washington Supreme Court defers to the legislature's decisions as to who constitutes an "adult." But when it comes to mandatory life without parole sentences, Miller v. Alabama's constitutional guaranty of an individualized sentence—one that considers the mitigating qualities of youth—must apply to defendants at least as old as 19 or 20 at the time of their crimes.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN2 **Fundamental Rights, Cruel & Unusual Punishment**

Wash. Rev. Code § 10.95.030 provides that any person who is convicted of aggravated murder and not sentenced to death shall be sentenced to life imprisonment without possibility of release or parole. The Washington Supreme Court has held the death penalty unconstitutional in Washington, converting all death sentences in the state to life without parole (LWOP) and rendering LWOP the only statutorily permissible aggravated murder sentence for persons 18 and older.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > Legislation > Statute of Limitations > Time Limitations

Criminal Law & Procedure > Sentencing > Appeals > Legality Review

HN3 **Case or Controversy, Constitutionality of Legislation**

Six enumerated exceptions temper the one-year time bar. *Wash. Rev. Code § 10.73.100*. One of these exceptions allows petitioners to file a personal restraint petition without any deadline if the statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct. *Wash. Rev. Code § 10.73.100(2)*. This exception is important because convictions under unconstitutional statutes are as no conviction at all and invalidate the prisoner's sentence.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Evidence > Burdens of Proof > Allocation

HN4 **Postconviction Proceedings, Imprisonment**

A personal restraint petitioner must show actual and

substantial prejudice resulting from the alleged error.

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Penalties

Evidence > Weight & Sufficiency

HN5[] Aggravated Murder, Penalties

The aggravated murder statute is different than other sentencing statutes—it requires the State to charge and the jury (or other trier of fact) to find the defendant guilty of that very same aggravated murder charge.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Governments > Legislation > Interpretation

HN6[] Postconviction Proceedings, Imprisonment

The Washington Supreme Court has rejected a distinction between sentences and convictions in the personal restraint petition time bar context as absurd.

Criminal Law & Procedure > Appeals > Procedural Matters

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN7[] Appeals, Procedural Matters

Conviction, judgment, and sentence certainly are not interchangeable but a direct appeal from a conviction cannot be disposed of until both the conviction and sentence are affirmed and an appellate court issues a mandate terminating review of both issues.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Penalties

Constitutional Law > State Constitutional Operation

HN8[] Fundamental Rights, Cruel & Unusual Punishment

Wash. Const. art. I, § 14 of the Washington Constitution prohibits cruel punishment. It does not prohibit mandatory (or discretionary) life without parole (LWOP) sentences for all aggravated murder defendants. But it does prohibit LWOP sentences for juvenile offenders. That state constitutional bar against cruel punishment, like the Eighth Amendment bar against cruel and unusual punishments, also forbids mandatory LWOP sentences for juvenile offenders. It further requires courts to exercise complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even when faced with mandatory statutory language.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > State Constitutional Operation

HN9[] Fundamental Rights, Cruel & Unusual Punishment

The Washington Supreme Court has repeatedly recognized that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment. Specifically, the court has identified that in the context of juvenile sentencing, *Wash. Const. art. I, § 14* provides greater protection than the Eighth Amendment. In this context, where it is well established that a state constitutional provision is more protective than the United States Constitution, there is no need to conduct a Gunwall analysis each time a new question is presented. The court may assume an independent state analysis is justified and move directly to the merits.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > State Constitutional Operation

HN10[] Fundamental Rights, Cruel & Unusual Punishment

The categorical bar test that the Washington Supreme Court used in State v. Bassett and the proportionality test that the court used in State v. Fain were designed for a different purpose. The court applies them to determine when a particular punishment is categorically cruel in violation of

Wash. Const. art. I, § 14 in the first place.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

***HN11*[] Fundamental Rights, Cruel & Unusual Punishment**

And under the Washington Constitution, LWOP sentences for juveniles are impermissibly cruel.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

***HN12*[] Fundamental Rights, Cruel & Unusual Punishment**

Bright constitutional lines in the cruel punishment context shift over time in order to accord with the evolving standards of decency that mark the progress of a maturing society.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

***HN13*[] Fundamental Rights, Cruel & Unusual Punishment**

Some bright statutory lines fail to comply with the Eighth Amendment.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > State Constitutional Operation

***HN14*[] Fundamental Rights, Cruel & Unusual Punishment**

Under the Sentencing Reform Act of 1981, Wash. Rev. Code ch. 9.94A, age may well mitigate a defendant's culpability, even if that defendant is over the age of 18. The fact that the legislature did not have the benefit of psychological and neurological studies showing that the parts of the brain involved in behavior control continue to develop well into a person's 20s was one of the factors that compelled that conclusion. The same scientific developments compel the Washington Supreme Court to come to a similar conclusion under *Wash. Const. art. I, § 14*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

***HN15*[] Fundamental Rights, Cruel & Unusual Punishment**

Every individual is different, and perhaps not every 20-year-old offender will deserve leniency on account of youthfulness. But the variability in individual attributes of youthfulness are exactly why courts must have discretion to consider those attributes as they apply to each individual youthful offender. That is why mandatory sentences for youthful defendants are unconstitutional.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > State Constitutional Operation

***HN16*[] Fundamental Rights, Cruel & Unusual Punishment**

Science may assist the Washington Supreme Court's understanding of not just sexual development but also neurological development. Neuroscientists now know that all three of the general differences between juveniles under 18 and adults recognized by Roper v. Simmons are present in people older than 18. While not yet widely recognized by legislatures, the court deems these objective scientific differences between 18- to 20-year-olds on the one hand, and persons with fully developed brains on the other hand, to be constitutionally significant under *Wash. Const. art. I, § 14*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > State Constitutional Operation

***HN17*[] Fundamental Rights, Cruel & Unusual Punishment**

Wash. Rev. Code § 10.95.030 disregards many scientific indicia of youthfulness in favor of a single, relatively inconsequential number: a defendant's age. Just as an individual's intellectual functioning cannot be reduced to a single numerical score, neither can an individual's level of maturity. Though the Washington Supreme Court sometimes

allows legislative age limits which do not perfectly correspond with the capacity of minors to act as adults, the court will not hesitate to strike them down where they violate the constitution, especially where better, more scientific age limits are available.

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Penalties

Governments > Legislation > Interpretation

HN18[] **Aggravated Murder, Penalties**

The aggravated murder statute's, *Wash. Rev. Code § 10.95.030*, rigid cutoff at age 18 combined with its mandatory language creates an unacceptable risk that youthful defendants without fully developed brains will receive a cruel life without parole sentence.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN19[] **Fundamental Rights, Cruel & Unusual Punishment**

No meaningful neurological bright line exists between age 17 and age 18 or between age 17 on the one hand, and ages 19 and 20 on the other hand. Thus, sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in Miller v. Alabama and State v. Houston-Sconiers—into account for defendants younger and older than 18.

Constitutional Law > State Constitutional Operation

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Penalties

HN20[] **Constitutional Law, State Constitutional Operation**

Our aggravated murder statute's requirement of LWOP for all defendants 18 and older, regardless of individual characteristics, violates the state constitution.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN21[] **Fundamental Rights, Cruel & Unusual Punishment**

State v. Grisby held that a particularized consideration of individual circumstances is not required for an life without parole sentence for most criminal defendants. But youthful defendants have been an exception to this general rule for many years.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN22[] **Judges, Discretionary Powers**

The Washington Supreme Court does not categorically prohibit life without parole for 18- to 20-year-olds, but the court requires that courts must exercise some discretion in sentencing them.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN23[] **Fundamental Rights, Cruel & Unusual Punishment**

There is no meaningful cognitive difference between 17-year-olds and many 18-year-olds. When it comes to Miller v. Alabama's prohibition on mandatory LWOP sentences, there is no constitutional difference either. Just as courts must exercise discretion before sentencing a 17-year-old to die in prison, so must they exercise the same discretion when sentencing an 18-, 19-, or 20-year-old.

Headnotes/Summary

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Two offenders convicted of aggravated

first degree murder committed when they were 19 and 20 years old and sentenced to life imprisonment without the possibility of parole (LWOP) as mandated by RCW 10.95.030 sought relief from personal restraint, arguing that mandatory LWOP sentences were unconstitutionally cruel when applied to youthful defendants like themselves.

Supreme Court: Holding that it was unconstitutional for the offenders to receive mandatory LWOP sentences without an individualized inquiry to determine whether the mitigating qualities of youth justified a downward departure, the court *grants* the petitions, *vacates* the mandatory LWOP sentences, and *remands* the cases for resentencing.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1][] [1]

Homicide > First Degree Murder > Aggravated First Degree Murder > Punishment > Life Imprisonment Without Parole > Youthfulness of Offender > Consideration > Necessity.

When a criminal defendant is convicted of aggravated first degree murder committed at the age of 18, 19, or 20, Wash. Const. art. I, § 14 requires the sentencing court to conduct an individualized inquiry to determine whether the mitigating qualities of youth justify a downward departure from the sentence of life imprisonment without the possibility of parole mandated by RCW 10.95.030. (See lead opinion of Gordon McCloud, J., and concurring opinion of González, C.J.)

GORDON MCCLOUD, J., filed the lead opinion, in which YU, MONTOYA-LEWIS, and WHITENER, JJ., concurred. GONZÁLEZ, C.J., filed a concurring opinion. OWENS, J., filed a dissenting opinion, in which JOHNSON, MADSEN, and STEPHENS, JJ., concurred.

Counsel: Jeffrey E. Ellis (of *Law Office of Alsept & Ellis*); Timothy K. Ford (of *MacDonald Hoague & Bayless*); and *Rita J. Griffith*, for petitioners.

Mary E. Robnett, *Prosecuting Attorney*, and Kristie Barham, Teresa J. Chen, *Michelle Hyer*, *Nathaniel Block*, and *John Cummings*, *Deputies*, for respondent.

Judges: AUTHOR: Justice Sheryl Gordon McCloud. WE CONCUR: Justice Mary I. Yu, Justice Raquel Montoya-Lewis, Justice G. Helen Whitener. AUTHOR: Chief Justice Steven C. González. AUTHOR: Justice Susan Owens. WE CONCUR: Justice Charles W. Johnson, Justice Barbara A. Madsen, Justice Debra L. Stephens.

Opinion by: Sheryl Gordon McCloud

Opinion

EN BANC

¶1 GORDON MCCLOUD, J. — Dwayne Earl Bartholomew and Kurtis William Monschke were each convicted of aggravated first degree murder and sentenced to life in prison without possibility of parole—a mandatory, nondiscretionary sentence under Washington's aggravated murder statute. RCW 10.95.030. Bartholomew was 20 years old; Monschke was 19. Many years after their convictions, each filed a personal restraint petition (PRP) asking us to consider whether article I, section 14 of our state constitution or the Eighth Amendment to the United States Constitution permits a mandatory life without parole (LWOP) sentence for youthful defendants like themselves. Specifically, they ask us to decide **[*2]** whether the constitutional requirement that judges exercise discretion at sentencing,[1] which forbids such mandatory LWOP sentences for those under 18, also forbids those sentences for 18- to 21-year-old defendants.

¶2 Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood. *HN1*[] For some purposes, we defer to the legislature's decisions as to who constitutes an "adult." But when it comes to mandatory LWOP sentences, *Miller*'s constitutional guaranty of an individualized sentence—one that considers the mitigating qualities of youth—must apply to defendants at least as old as these defendants were at the time of their crimes. Miller v. Alabama, 567 U.S. 460, 469-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Accordingly, we grant both PRPs and order that Bartholomew and Monschke each receive a new

[1] *See* Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).

sentencing hearing.

FACTS

¶3 Juries convicted both petitioners of aggravated first degree murder, Bartholomew in 1981 and Monschke in 2003.

¶4 Bartholomew told his brother that he intended to rob a laundromat and "'leave no witnesses.'" *State v. Bartholomew, 98 Wn.2d 173, 177-78, 654 P.2d 1170 (1982), vacated, 463 U.S. 1203, 130 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), adhered to on remand, 101 Wn.2d 631, 683 P.2d 1079 (1984)*. He took $237 from the cash drawer and fatally shot an attendant in the course of the robbery. *Id. at 178*. He was 20 years old.

¶5 **[*3]** A jury initially sentenced Bartholomew to death. *Id. at 179*. But we vacated his death sentence, and then, on remand, a jury sentenced him to LWOP, instead. *Id. at 216*; *Bartholomew, 101 Wn.2d at 648*; *State v. Bartholomew, 104 Wn.2d 844, 710 P.2d 196 (1985)*; *see* *Wood v. Bartholomew, 516 U.S. 1, 4, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995)*.

¶6 Monschke and his friends associated themselves with the white supremacist group "Volksfront." *State v. Monschke, 133 Wn. App. 313, 333, 135 P.3d 966 (2006)*. In March 2003, the group purchased baseball bats with the goal of helping a member earn "red [shoe]laces"—a symbol "that the wearer had assaulted a member of a minority group." *Id. at 323* (alteration in original). Separated from Monschke, two members of this group located and savagely beat a homeless man with the bats, rocks, and steel-toed boots. *Id*. They then fetched Monschke, who struck the man 10 to 15 times with a bat while his friends continued to kick the man's head. *Id. at 323-24*. Monschke pondered whether "'God gives us little brownie points for this.'" *Id. at 324*. The man died in the hospital after 20 days on life support. *Id. at 320*. Monschke was 19 years old.

¶7 Monschke received a mandatory LWOP sentence. *Id. at 328*.

¶8 Both sentences were mandatory for these young men. ***HN2***[↑] *RCW 10.95.030* provides that any person who is convicted of aggravated murder and not sentenced to death[2] "shall be sentenced to life imprisonment without possibility of release or parole."

¶9 The petitioners initially filed their PRPs in the Court of Appeals. They claimed that mandatory LWOP is unconstitutionally cruel when applied to youthful **[*4]** defendants like themselves. They argued that developments in neuroscience have rendered a bright line at age 18 arbitrary and that defendants age 21 and younger should receive the benefit of the same constitutional protections that this court and the United States Supreme Court have recognized for juveniles. The Court of Appeals transferred both petitions to this court without ruling on the merits, pursuant to *RAP 16.5*.[3] We consolidated the two petitions and now grant both.

ANALYSIS

I. BECAUSE THE PETITIONS CLAIM THE AGGRAVATED MURDER STATUTE IS UNCONSTITUTIONAL AS APPLIED, THEY ARE EXEMPT FROM THE ONE-YEAR TIME BAR

¶10 Both petitioners' sentences became final long ago, and petitioners are generally barred from filing a PRP "more than one year after the judgment becomes final." *RCW 10.73.090(1)*. ***HN3***[↑] But six enumerated exceptions temper this one-year time bar. *RCW 10.73.100*. One of these exceptions allows petitioners to file a PRP without any deadline if the "statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct." *RCW 10.73.100(2)*. This exception is important because convictions under unconstitutional statutes **[*5]** "are as no conviction at all and invalidate the prisoner's sentence." *In re Pers. Restraint of Runyan, 121 Wn.2d 432, 445, 853 P.2d 424 (1993)*.

¶11 Each petitioner challenges the constitutionality of *RCW 10.95.030*, the aggravated murder statute, as applied to him. They do so for the same reason: the statute required mandatory LWOP, while the Washington State Constitution requires the court to exercise discretion at sentencing due to their age. If they are correct that the aggravated murder statute is unconstitutional as applied, then the time bar presents no obstacle to their petitions.[4] *RCW 10.73.100(2)*.

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[2] Since these cases, we have held the death penalty unconstitutional in Washington, ***State v. Gregory, 192 Wn.2d 1, 35, 427 P.3d 621 (2018)*** (plurality opinion), converting all death sentences in the state to LWOP and rendering LWOP the only statutorily permissible aggravated murder sentence for persons 18 and older.

[3] Order Transferring Pet. to Supreme Court, *In re Pers. Restraint of Monschke*, No. 52286-1-II (Wash. Ct. App. Jan. 22, 2019); Order Transferring Pet. to Supreme Court, *In re Pers. Restraint of Bartholomew*, No. 52354-0-II (Wash. Ct. App. Jan. 22, 2019).

[4] ***HN4***[↑] A PRP petitioner must also show actual and substantial prejudice resulting from the alleged error. *In re Pers. Restraint of Meippen, 193 Wn.2d 310, 315-16, 440 P.3d 978 (2019)* (petitioner

¶12 The dissent would draw a distinction between "convictions" and "sentences" and restrict the unconstitutional statute time bar exception to only unconstitutional "convictions." Dissent at 7-8. But we need not decide today whether RCW 10.73.100(2) provides a time bar exception for other unconstitutional sentencing statutes; in this case, the petitioners challenge not a regular sentencing statute but the aggravated murder statute. HN5[↑] The aggravated murder statute is different from other sentencing statutes—it requires the State to charge and the jury (or other trier of fact) to find the defendant "guilty" of that very same aggravated murder charge. In other words, petitioners' challenge to the constitutionality of **[*6]** the aggravated murder statute, which criminalizes premeditated first degree murder as aggravated murder in certain circumstances, *is* a challenge to the criminal statute that they were "convicted of violating." RCW 10.95.030; RCW 10.73.100.[5]

¶13 To be sure, petitioners challenge the section of the aggravated murder statute that requires LWOP for all convictions, RCW 10.95.030, and not the section that defines aggravated murder and lists aggravating circumstances, RCW 10.95.020. *See State v. Goldberg, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003)* ("RCW 10.95.020 defines the aggravating circumstances that make premeditated murder first degree murder punishable under that chapter rather than under the Sentencing Reform Act of 1981, chapter 9.94A RCW."), *overruled on other grounds by State v. Guzman Nuñez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012)*. But they challenge the constitutionality of the aggravated murder statute nonetheless—the statute they were each "convicted of violating," in the words of RCW 10.73.100(2).

¶14 That statutory exception to the one-year time bar thus clearly applies here. We therefore need not address the concurrence's point that RCW 10.73.100(6)'s exception to the time bar applies here, also.

II. The Aggravated Murder Statute Is Unconstitutional As Applied to Youthful Defendants Because It Denies Trial Judges Discretion To Consider the Mitigating Qualities of Youth

¶15 HN8[↑] Article I, section 14 of the Washington Constitution prohibits **[*7]** "cruel punishment."[6] It does not prohibit mandatory (or discretionary) LWOP sentences for all aggravated murder defendants. *State v. Hughes, 106 Wn.2d 176, 202, 721 P.2d 902 (1986)*; *State v. Grisby, 97 Wn.2d 493, 497-98, 647 P.2d 6 (1982)*. But it does prohibit LWOP sentences for "juvenile offenders." *State v. Bassett, 192 Wn.2d 67, 90, 428 P.3d 343 (2018)*. That state constitutional bar against "cruel punishment," like the Eighth Amendment bar against "cruel and unusual punishments," also forbids mandatory LWOP sentences for juvenile offenders. Miller, 567 U.S. at 479. It further requires courts to exercise "complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant," even when faced with mandatory statutory language. State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017).

¶16 These petitioners argue that the protection against mandatory LWOP for juveniles should extend to them because they were essentially juveniles in all but name at the

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unable to show prejudice because record indicated resentencing would be unlikely to reduce petitioner's sentence). But unlike the petitioner in *Meippen*, no judge has ever exercised any discretion in sentencing Monschke or Bartholomew. Under the aggravated murder statute, the trial court was statutorily required to sentence them each to life without parole. If petitioners are entitled to any of the discretionary protections afforded juvenile defendants, then the trial court must receive a chance to exercise that discretion. And the petitioners must receive a new sentencing proceeding that accounts for the mitigating qualities of youth and complies with article I, section 14.

[5] Petitioners' claim that RCW 10.73.100(2) reaches sentences as well as convictions is also consistent with our precedent. HN6[↑] We have rejected a distinction between "sentence[s]" and "conviction[s]" in the PRP time bar context as "absurd." ***In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 952, 162 P.3d 413 (2007)***. In *Skylstad*, we interpreted RCW 10.73.090(3)(b), which stated that a criminal "'judgment becomes final on … [t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the *conviction*.'" ***Id. at 947*** (emphasis added) (quoting RCW 10.73.090(3)(b)). The State "focuse[d] solely on one word—conviction—rather than reading the sentence and the statute as a whole." ***Id. at 953***. HN7[↑] We acknowledged that "conviction, judgment, and sentence certainly are not interchangeable" but held that a "direct appeal from [a] conviction cannot be disposed of until both [the] conviction *and sentence* are affirmed and an appellate court issues a mandate terminating review of both issues." ***Id. at 953-54*** (emphasis added).

[6] HN9[↑] We have "'repeated[ly], recogni[zed] that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment.'" ***State v. Bassett, 192 Wn.2d 67, 78, 428 P.3d 343 (2018)*** (alterations in original) (quoting ***State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000)***. Specifically, we have identified that "in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment." ***Id. at 82***. In this context, where it is "well established" that a state constitutional provision is more protective than the United States Constitution, there is no need to conduct a *Gunwall* analysis each time a new question is presented. ***State v. Mayfield, 192 Wn.2d 871, 878-79, 434 P.3d 58 (2019)***; *see* ***State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)***. We "may assume an independent state analysis is justified and move directly to the merits." ***Mayfield, 192 Wn.2d at 879***.

time of their crimes. As the discussion below shows, we agree.

¶17 Preliminarily, though, we need to clarify why we take this approach, rather than the "categorical" approach that the dissent advances. Dissent at 9 (citing *Bassett, 192 Wn.2d at 85-86*, for the categorical bar test, and *State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980)*, for the proportionality test).

¶18 ***HN10***[⬆] The categorical bar test that we used in *Bassett* and the proportionality test that we used in *Fain* were designed for a different purpose. We apply them to determine when a particular **[*8]** punishment is categorically cruel in violation of *article I, section 14* in the first place. *Bassett, 192 Wn.2d at 83*. But we already know that mandatory LWOP is unconstitutionally cruel as applied to youthful defendants. *Miller, 567 U.S. at 479-80*. We need not decide whether new constitutional protections apply in this case because the petitioners do not ask for new constitutional protections. Rather, they ask us to apply the existing constitutional protections of *Miller* to an enlarged class of youthful offenders older than 17.[7] Accordingly, instead of the categorical bar test, we scrutinize whether an arbitrary distinction between 17- and 18-year-olds for purposes of mandatory LWOP passes constitutional muster.[8]

¶19 All parties agree that neuroscience does not provide any such distinction. The petitioners have shown that many youthful defendants older than 18 share the same developing brains and impulsive behavioral attributes as those under 18. Thus, we hold that these 19- and 20-year-old petitioners **[*9]** must qualify for some of the same constitutional protections as well.

A. Constitutional Protections for Youthful Criminal Defendants Have Grown More Protective over the Years

¶20 We first look to the history of constitutional protections against cruel sentences for juveniles under the *Eighth Amendment*. While the United States Supreme Court has drawn bright lines between various ages and types of defendants, those bright lines have shifted over time.

¶21 At the time of the nation's founding, "the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7." *Stanford v. Kentucky, 492 U.S. 361, 368, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989)* (citing 4 William Blackstone,

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[7] For a fuller discussion of the need to apply the distinct *Miller* approach that we apply here, see Part III, *infra*.

[8] It is certainly true that under the categorical bar test, we would typically consider "(1) whether there is objective indicia of a national consensus against the sentencing practice at issue and (2) the court's own independent judgment based on '"the standards elaborated by controlling precedents and by the [c]ourt's own understanding and interpretation of the [cruel punishment provision]'s text, history, … and purpose."'" ***Bassett, 192 Wn.2d at 83*** (alterations in original) (quoting *Graham v. Florida, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)* (quoting *Kennedy v. Louisiana, 554 U.S. 407, 421, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008))*). The dissent errs, however, in denying that there is any national trend worthy of note for purposes of that test. There is certainly no national majority of state legislatures or courts prohibiting mandatory LWOP for 18- to 20-year-olds. But there is definitely an affirmative trend among states to carve out rehabilitative space for "young" or "youthful" offenders as old as their mid-20s. *See, e.g.*, ***Colo. Rev. Stat. § 18-1.3-407(2)(a)(III)(B)*** (defining "'[y]oung adult offender'" to mean "a person who is at least eighteen years of age but under twenty years of age when the crime is committed and under twenty-one years of age at the time of sentencing"); ***D.C. Code 24-901(6)*** (defining "'[y]outh offender'" as "a person 24 years of age or younger at the time that the person committed a crime other than murder" or several other specific crimes); *Fla. Stat. Ann. § 958.04* (permitting courts to sentence as "'youthful offenders'" defendants between 18 and 21 of a noncapital or "life" felony); ***Ga. Code. Ann. § 42-7-2(7)*** (defining "'[y]outhful offender'" to mean "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"); *Mich. Comp. Laws Ann. § 762.11(1)* (permitting sentencing courts to designate certain offenders between age 17 and 21 as "youthful trainee[s]," up to age 24 with the consent of the prosecutor); *S.C. Code Ann. § 24-19-10(d)(ii)* (defining "'[y]outhful offender'" to include persons "seventeen but less than twenty-five years of age at the time of conviction for an offense that is not a violent crime" and meets other specifications); ***Vt. Stat. Ann. tit. 33 § 5281*** (allowing "defendant[s] under 22 years of age" to move to be treated as a "youthful offender"); *see also* Connie Hayek, Nat'l Inst. of Just., Environmental Scan of Developmentally Appropriate Criminal Justice Responses to Justice-Involved Young Adults(2016) (analyzing and evaluating over 130 programs for "justice-involved young adult[s]" across the country), *https://www.ojp.gov/pdffiles1/nij/249902.pdf*[*https://perma.cc/DT9N-FRPW*]. "One rationale for young offender status is to protect young offenders from the harshness and collateral consequences of criminal prosecution and conviction." Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy, 85 Fordham L. Rev. 641, 660 n.123 (2016)* (citing *Raines v. State, 294 Ala. 360, 317 So. 2d 559, 561 (Ala. 1975)*; *People v. Perkins, 107 Mich. App. 440, 309 N.W.2d 634, 636-37 (Mich. Ct. App. 1981))*; *see also* Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 4 Wis. L. Rev. 669, 682-88 (2018) ("Broader trends seek to treat a larger group of young adult offenders as a distinct category.").

COMMENTARIES *23-24; MATTHEW HALE, PLEAS OF THE CROWN 24-29 (1800)), *overruled in part by Roper v. Simmons, 543 U.S. 551, 574-75, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*; *State v. J.P.S., 135 Wn.2d 34, 37, 954 P.2d 894 (1998)* (recognizing the same original common law ages and that "Washington codified these presumptions, changing the age of incapacity to 7 and younger and the age of presumed capacity to 12 and older").

¶22 The United States' "age of majority" was largely set at 21, until it changed to 18 "for reasons quite unrelated to capacity." Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TULANE L. REV. 55, 57 (2016). Twenty-one had been the "near universal" age **[*10]** of majority in the United States from its founding until 1942 when "wartime needs prompted Congress to lower the age of conscription from twenty-one to eighteen, a change that would eventually lead to the lowering of the age of majority generally." *Id. at 64*; *Pub. L. No. 77-772, 56 Stat. 108, 1019 (1942)* (changing selective service registration age to 18). The linking of military obligation and political participation led to the *Twenty-Sixth Amendment*; in 1971, it lowered the voting age to 18. *Id. at 64-65*; U.S. CONST. States across the country—including Washington—quickly followed suit, lowering the "age of majority" to 18 for many purposes.[9] *RCW 26.28.010*; LAWS OF 1971, 1st Ex. Sess., ch. 292, § 1.

¶23 The age at which the *Eighth Amendment* prohibits imposition of capital punishment on a youthful defendant has also changed with time. In two plurality opinions in the late 1980s, the United States Supreme Court held that capital punishment was unconstitutional for a 15-year-old offender, but permissible for 16- or 17-year-old offenders. *Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988)* (plurality opinion); *Stanford, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306*. Justice O'Connor, the determinative fifth vote in each case, based the difference on her understanding that "no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers" **[*11]** as distinct from 15-year-olds. *Stanford, 492 U.S. at 381* (O'Connor, J., concurring in part and concurring in the judgment). She recognized that "[t]he day may come when there is such a general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed," but she did not believe that day had arrived in 1989. *Id. at 381-82*.

¶24 Sixteen years later, it had. In *Roper*, the Court held that executing a defendant under 18 was categorically unconstitutional. The court based this change on "[t]hree general differences between juveniles under 18 and adults." *Roper, 543 U.S. at 569*. First, "'[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young,'" resulting in "'impetuous and ill-considered actions and decisions.'" *Id*. (alteration in original) (quoting *Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)*). Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id*. (citing *Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)*). And third, "the character of a juvenile is not as well formed as that of an adult." *Id. at 570*. *Roper* recognized that the "qualities that distinguish juveniles from adults do not disappear when an individual turns **[*12]** 18" but held that "a line must be drawn." *Id. at 574*. Because "[t]he logic of *Thompson* extends to those who are under 18" and because "18 is the point where society draws the line for many purposes between childhood and adulthood," the Court made it "the age at which the line for death eligibility ought to rest." *Id. at 574-75* (citing *Thompson, 487 U.S. at 833-38*).

¶25 As *Eighth Amendment* jurisprudence forbidding the execution of adolescent offenders developed, the law regarding intellectually disabled defendants followed a parallel track.[10] The United States Supreme Court had allowed execution of the intellectually disabled in 1989, *Penry v. Lynaugh, 492 U.S. 302, 340, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)* (plurality portion), *abrogated by Atkins v. Virginia, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*. As in *Stanford*, the majority recognized that "a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society'" but did not believe such a consensus existed in 1989. *Id*.

¶26 That consensus had arrived by 2002. As *Roper* signaled a

[9] Several states continue to recognize an age of majority older than 18. *See, e.g., MISS. CODE ANN. § 1-3-27* (defining "minor" as "any person, male or female, under twenty-one years of age"); *Ala. Code § 26-1-1* (setting age of majority at 19); *Neb. Rev. Stat. § 43-245* ("Age of majority means nineteen years of age."). As we discuss in further detail below, the statutory "age of majority" is riddled with exceptions.

[10] For many years the Supreme Court spoke of the intellectually disabled as "mentally retarded." *Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)*, *abrogated by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*. It has since recognized and approved a change in terminology to "intellectually disabled" to "describe the identical phenomenon." *Hall v. Florida, 572 U.S. 701, 704, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)*. We use the term "intellectually disabled" throughout this opinion.

change from *Stanford*, so *Atkins* signaled a change from *Penry, 536 U.S. at 321* (holding that execution of the intellectually disabled violates the *Eighth Amendment*). Indeed, *Roper* relied in part on *Atkins* as an example of "society's evolving standards of decency." *543 U.S. at 563*. *Atkins* provided an example **[*13]** of changing standards, even though the "rate of change in reducing the incidence of the juvenile death penalty" had been much slower than the pace at which states abolished capital punishment for the intellectually disabled. *Id. at 565*.

¶27 The changes from *Stanford* and *Penry* to *Atkins* and *Roper* resulted from a perceived change in direction across the country. Recognizing the shift, the Court observed that "[i]t is not so much the number of these States [that forbade execution of the intellectually disabled] that is significant, but the consistency of the direction of change."[11] *Atkins, 536 U.S. at 315*; *see Bassett, 192 Wn.2d at 86* (quoting *Atkins* for this same proposition).

¶28 Clearly, ***HN12***[⬆] bright constitutional lines in the cruel punishment context shift over time in order to accord with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)* (plurality opinion).

B. The Court Will Not Necessarily Defer to Legislative Bright-Line Drawing When Determining What Constitutes Cruel Punishment

¶29 *Roper* set a bright constitutional line based on "where society draws the line for many purposes between childhood and adulthood." *543 U.S. at 574*. ***HN13***[⬆] But some bright statutory lines fail to comply with the *Eighth Amendment*.

¶30 In *Hall v. Florida, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)*, for example, a Florida court sentenced a defendant **[*14]** to death, despite his unchallenged evidence of an intellectual disability. The record contained ample evidence of this intellectual disability. *Id.* But a Florida statute required that "as a threshold matter, Hall show an IQ [intelligence quotient] test score of 70 or below before presenting any additional evidence of his intellectual disability." *Id. at 707*.

¶31 In evaluating the constitutionality of this rigid bright line of an IQ of 70, the Court first reiterated that the intellectually disabled "may not … receive the law's most severe sentence." *Id. at 709* (citing *Atkins, 536 U.S. at 318*). The Court then stated the issue presented: "how intellectual disability must be defined in order to implement the[ ] principles and the holding of *Atkins*." *Id. at 709-10*. To analyze the cutoff rule, the Court considered "psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*"—it was "proper to consult the medical community's opinions." *Id.* Though "[i]t is the Court's duty to interpret the Constitution … it need not do so in isolation." *Id. at 721*. "The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical **[*15]** community's diagnostic framework." *Id.*

¶32 Considering three criteria by which the medical community defines intellectual disability,[12] "Florida's rule disregard[ed] established medical practice in two interrelated ways. It [took] an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence" and it "relie[d], on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id. at 712*. By failing to account for other factors, "and setting a strict cutoff at 70, Florida '[went] against the unanimous professional consensus.'" *Id. at 722*. "An IQ score is an approximation, not a final and infallible assessment of intellectual functioning." *Id.*

¶33 Though IQ was "of considerable significance," state use of IQ scores to determine death eligibility "must afford these test scores the same studied skepticism that those who design and use these tests do, and understand that an IQ test score represents a range rather than a fixed number." *Id. at 723*. It was unconstitutional "to execute a man because he scored 71 instead of 70 on an IQ test." *Id. at 724*.

¶34 Like the Florida statute at **[*16]** issue in *Hall*, our

[11] To be sure, the shift that led to *Roper* and *Atkins* concerned the cruelty of capital punishment. But since those cases, the United States Supreme Court and our court have recognized the similarities between capital punishment and LWOP. *Graham, 560 U.S. at 69-70* (an LWOP sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days'" (alteration in original) (quoting *Naovarath v. State, 105 Nev. 525, 526, 779 P.2d 944 (1989)*)); ***Bassett, 192 Wn.2d 87-88*** (same). ***HN11***[⬆] And under the Washington Constitution, LWOP sentences for juveniles are impermissibly cruel. ***Bassett, 192 Wn.2d at 91***.

[12] These criteria were "significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Hall, 572 U.S. at 710* (citing *Atkins, 536 U.S. at 308 n.3*).

aggravated murder statute sets a flat cutoff line in determining a defendant's sentence: age 18. RCW 10.95.030(3)(a)(ii). Yet many other statutes draw lines at many other ages between 8 and 26. We next turn to these statutes to get a sense of how our legislature has defined the "age of majority."

C. The Concept of an "Age of Majority" Is Inherently and Necessarily Flexible

¶35 *Roper* set 18 as a constitutional bright line for death eligibility because it "is the point where society draws the line for many purposes between childhood and adulthood." 543 U.S. at 574. Washington calls that general line the "age of majority": "[e]xcept as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years." RCW 26.28.010.[13] But as it turns out, areas "otherwise specifically provided by law" abound.

¶36 The Washington Criminal Code itself draws lines between many distinct ages besides 17 and 18. It renders children under 8 incapable of committing crime. RCW 9A.04.050. And children between 8 and 12 are presumed incapable of committing crime. *Id*. The Juvenile Justice Act of 1977 defines "juvenile," "youth," and "child" all synonymously to mean "any individual who is under the chronological **[*17]** age of eighteen years and who has not been previously transferred to adult court." RCW 13.40.020(15). But individuals transferrable to such adult court may be as young as 15 if charged with a serious violent offense—or any age if charged with murder or custodial assault while already under sentence.[14] RCW 13.40.110(1)(a), (b). When a child remains in juvenile court, that juvenile court may, in some scenarios, maintain "residual" jurisdiction until the child reaches age 25. RCW 13.04.030(1)(e)(v)(C)(II).

¶37 Other criminal statutes draw the line between "childhood" and "adulthood" at other ages. *See, e.g.*, RCW 9A.44.079(1) (setting oldest possible age of a victim of the crime, "Rape of a child," at 15); RCW 66.44.290(4) (making it a misdemeanor for persons under 21 to purchase liquor). Plenty of examples outside the criminal law context exist as well. *See, e.g.*, RCW 46.20.031(1) (setting minimum age to receive a driver's license at 16), .265(2) (suspending juvenile driving privileges until various ages between 17 and 21); RCW 70.24.110 (allowing those 14 or older to obtain medical care for sexually transmitted diseases without parental consent); RCW 74.13.031(12) (providing government authority for "adoption support benefits, or relative guardianship subsidies on behalf of youth ages eighteen to twenty-one years" who meet certain **[*18]** conditions), (16) (providing government authority to "provide independent living services to youths, including individuals who have attained eighteen years of age, and have not attained twenty-three years of age"); *see also* 42 U.S.C. § 18014(d)(2)(E) (providing Affordable Care Act medical coverage to "adult children" through age 26).

¶38 These numerous meanings of "child" and "adult" located throughout the code do not reflect inconsistency. They reflect the need for flexibility in defining the nebulous concept of "adulthood" or "majority." Accordingly, dividing lines are set at different ages in different contexts. Among these many ages of "majority" that Washington chooses for various contexts, the age at which our legislature has required mandatory LWOP for defendants convicted of aggravated murder sits at 18.[15] RCW 10.95.030(3).

D. No Meaningful Developmental Difference Exists between the Brain of a 17-Year-Old and the Brain of an 18-Year-Old

¶39 *Roper* considered juveniles' lack of maturity and responsibility, their vulnerability to negative influences, and their transitory and developing character when it increased the minimum age for death eligibility from 16 to 18. 543 U.S. at 569-70. All three of these factors **[*19]** weigh in favor of offering similar constitutional protections to older offenders, also, because neurological science recognizes no meaningful distinction between 17- and 18-year-olds as a class.

¶40 ***HN14***[⬆] We have already concluded that under the Sentencing Reform Act of 1981, ch. 9.94A RCW, "age may well mitigate a defendant's culpability, even if that defendant

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[13] Some specific enumerated "purposes" for which age 18 is relevant include allowing 18-year-olds to "enter into any marriage contract without parental consent," "execute a will," "vote in any election if authorized by the Constitution," and "enter into any legal contractual obligation and to be legally bound thereby." RCW 26.28.015(1)-(4). Many of these purposes also include the tautological qualification "if otherwise qualified by law." RCW 26.28.015(1)-(3).

[14] Until 2018, transfer to adult court was mandatory for 16- and 17-year-olds who committed class A felonies, as well as 17-year-olds who committed various other crimes. LAWS OF 2018, ch. 162, § 4.

[15] It was initially the United States Supreme Court, and not the Washington Legislature, who set this line at 18. Until *Miller*, RCW 10.95.030 required LWOP for all defendants without taking age into account at all. LAWS OF 2014, ch. 130, § 9. That statute was updated in 2014 with what has been referred to as the "*Miller*-fix": it brought Washington statutory law into compliance with the constitutional principles of *Miller*. *See, e.g.*, ***Bassett, 192 Wn.2d at 77***.

is over the age of 18." *State v. O'Dell, 183 Wn.2d 680, 695, 358 P.3d 359 (2015)*. The fact that the legislature "did not have the benefit of psychological and neurological studies showing that the '"parts of the brain involved in behavior control"' continue to develop well into a person's 20s" was one of the factors that compelled that conclusion. *Id. at 691-92* (footnote omitted) (quoting *Miller, 567 U.S. at 472* (quoting *Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*)). The same scientific developments compel us to come to a similar conclusion under *article I, section 14*.

¶41 *O'Dell* cited articles discussing neurological science extensively. *Id. at 692 n.5* (citing Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, *85 Notre Dame L. Rev. 89, 152* & n.252 (2009); *MIT Young Adult Development Project: Brain Changes*, MASS. INST. OF TECH., *http://hr.mit.edu/static/worklife/youngadult/brain.html* (last visited Mar. 8, 2021); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANN. N.Y. ACAD. SCI. 77 **[*20]** (2004)). The parties bring additional, more recent studies, to our attention. *See, e.g.*, Pet'r's Suppl. Br. (Bartholomew) at 9-10 (citing, e.g., Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, *44 Crime & Just. 577, 582 (2015)*; Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, *88 Temple L. Rev. 769 (2016)*; Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, *85 Fordham L. Rev. 641 (2016)*). The overarching conclusion compelled by these sources is clear: "biological and psychological development continues into the early twenties, well beyond the age of majority." *Scott, supra, at 642*.

¶42 The State does not dispute this conclusion. Rather, it contends that *Miller* is not about "brain science" at all and it cites experts who resist the use of neuroscience in legal decision-making altogether. Suppl. Br. of Resp't at 12-13. While all three articles cited by the State emphasize the difficulty of analyzing *individual* adolescent brains, they support the petitioners' position that there is no distinctive scientific difference, in general, between the brains of a 17-year-old and an 18-year-old. Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: **[*21]** Adolescent Brain Research & the Law*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 158, 161 (2013) ("So far, neuroscience research provides group data showing a developmental trajectory in brain structure and function during adolescence and into adulthood."); *Maroney, supra, at 94* ("Rather than raising deep and likely unsolvable questions about human agency, [neuroscience] simply reinforces the (once) noncontroversial idea that, as a group, young people differ from adults in systematic ways directly relevant to their relative culpability, deterability, and potential for rehabilitation."); B.J. Casey & Kristina Caudle, *The Teenage Brain: Self Control*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 82 (2013) (discussing overgeneralizations of adolescent brains but never mentioning what age is meant by "adolescence"). Maroney criticizes the way courts have used neuroscience to justify their conclusions and argues that "the impact of adolescent brain science on juvenile justice has been strongly cabined by the extrinsic reality of legal doctrine." *Maroney, supra, at 144-45*.

¶43 The State's conclusion from these articles appears to be that because there is no accounting for the brain development and maturity of particular individuals, we may as well **[*22]** give up and let the legislature draw its arbitrary lines—because they will necessarily be arbitrary no matter where they are drawn. But giving up would abdicate our responsibility to interpret the constitution. The State is correct that ***HN15***[⬆] every individual is different, and perhaps not every 20-year-old offender will deserve leniency on account of youthfulness. But the variability in individual attributes of youthfulness are exactly why courts must have discretion to consider those attributes as they apply to each individual youthful offender. That is why mandatory sentences for youthful defendants are unconstitutional. *Miller, 567 U.S. at 477-80* (requiring consideration of the specific youthful characteristics of each individual defendant); *Houston-Sconiers, 188 Wn.2d at 23* (requiring consideration at sentencing of defendant's individual youthful characteristics and many other individual factors related to culpability).

¶44 In fact, this court has already invalidated age 18 as an arbitrary bright line in the context of capacity to consent to abortion. In *State v. Koome, 84 Wn.2d 901, 530 P.2d 260 (1975)* (plurality opinion), we evaluated the constitutionality of a statute that required pregnant women under 18 to get parental consent to obtain an abortion. We held that such an abridgment of the young **[*23]** woman's right to make this decision about her reproductive health was unconstitutional. *Id. at 909-10*.[16] We noted that "[p]arental authority wanes gradually as a child matures; it does not suddenly disappear at adulthood. Similarly, the ability to competently make an important decision, such as that to have an abortion, develops

[16] The lead opinion received four votes. ***Koome, 84 Wn.2d at 914***. The concurrence, which provided the fifth vote, agreed that it would "reach the same result as the [lead] opinion regarding the constitutional infirmities of the present statute." *Id.* (Finley, J., concurring). It added that while the State could conceivably draft an abortion restriction consistent with the constitution, the age-related parental consent requirement considered by the court was unconstitutional. ***Id. at 915-17***.

slowly and at different rates in different individuals." *Id. at 910-11*. While we acknowledged that the State may "create age limits which do not perfectly correspond with the capacity of minors to act as adults," we held that "a subjective inquiry into the maturity of each individual minor is a practical impossibility, and any flat age limit is necessarily arbitrary." *Id. at 911*. "In such circumstances imprecision in age classifications may be permissible, perhaps even where important rights are affected, because it is inevitable." *Id*. But, in the abortion context, "these reasons for setting arbitrary age requirements [were] not present" because "[t]he age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for a legal one." *Id.* (citing *Ballard v. Anderson, 4 Cal. 3d 873, 883, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971))*.

¶45 ***HN16***[↑] Science may assist our understanding of not just sexual development but also neurological development. Neuroscientists now **[*24]** know that all three of the "general differences between juveniles under 18 and adults" recognized by *Roper* are present in people older than 18. *543 U.S. at 569*. While not yet widely recognized by legislatures, we deem these objective scientific differences between 18- to 20-year-olds (covering the ages of the two petitioners in this case) on the one hand, and persons with fully developed brains on the other hand, to be constitutionally significant under *article I, section 14*.

E. Our Constitution's Protection against Life without Parole Sentences Extends to Youthful Defendants Older Than 18

WA[1][↑] [1] ¶46 Much like the Florida IQ cutoff in *Hall*, ***HN17***[↑] *RCW 10.95.030* disregards many scientific indicia of youthfulness in favor of a single, relatively inconsequential number: a defendant's age. Just as "an individual's intellectual functioning cannot be reduced to a single numerical score," neither can an individual's level of maturity. *Hall, 572 U.S. at 713*. Though we sometimes allow legislative "age limits which do not perfectly correspond with the capacity of minors to act as adults," we will not hesitate to strike them down where they violate the constitution, especially where better, more scientific age limits are available. *Koome, 84 Wn.2d at 911*. ***HN18***[↑] We hold that the aggravated murder statute's rigid **[*25]** cutoff at age 18 combined with its mandatory language creates an unacceptable risk that youthful defendants without fully developed brains will receive a cruel LWOP sentence.

¶47 But we also recognize that every individual is different. *See, e.g.*, Bonnie & Scott, *supra*, at 161 ("[T]he research does not currently allow us to move from that group data to measuring the neurobiological maturity of an individual adolescent because there is too much variability within age groups and across development. Indeed, we do not currently have accurate behavioral measures of maturity." (citation omitted)). Though a categorical constitutional rule may be appropriate prohibiting LWOP sentences for offenders younger than 18, *Bassett, 192 Wn.2d at 90*, the petitioners have neither argued nor shown that LWOP would be *categorically* unconstitutional as applied to older defendants.

¶48 What they have shown is that ***HN19***[↑] no meaningful neurological bright line exists between age 17 and age 18 or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand. Thus, sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in *Miller* and *Houston-Sconiers*—into account for defendants younger and older than 18. **[*26]** Not every 19- and 20-year-old will exhibit these mitigating characteristics, just as not every 17-year-old will. We leave it up to sentencing courts to determine which individual defendants merit leniency for these characteristics. ***HN20***[↑] Our aggravated murder statute's requirement of LWOP for *all* defendants 18 and older, regardless of individual characteristics, violates the state constitution.[17]

¶49 Because the aggravated murder statute that petitioners were convicted of violating is unconstitutional as applied to their conduct, the one-year time bar for collateral attacks does not apply. *RCW 10.73.100(2)*.[18]

III. We Do Not Abandon the Categorical Bar Analysis; Our Decision "Flows Straightforwardly from Our Precedents" as Did the Decision in *Miller*

¶50 The dissent accuses us of manufacturing a "false distinction to sidestep *Bassett*" by applying *Miller* to a new class of defendants without invoking *Fain*'s proportionality test or *Bassett*'s categorical bar test. Dissent at 10-11. But this

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[17] Contrary to the dissent's accusation, we do not overrule *Grisby*. ***HN21***[↑] *Grisby* held that a "particularized consideration" of individual circumstances is not required for an LWOP sentence for most criminal defendants. *97 Wn.2d at 497*. But youthful defendants have been an exception to this general rule for many years. *See, e.g., Miller, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407*; *Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409*. Today's ruling only expands the class of defendants who qualify for that existing exception.

[18] Petitioners suggest that they also meet the time bar exceptions for sentence in excess of jurisdiction and retroactive change in the law under *RCW 10.73.100(5)* and *(6)*. Am. PRP (Monschke) at 24-25; Pet'r's Suppl. Br. (Bartholomew) at 18-19; *see* concurrence. Because we hold the unconstitutional statute exception applies, we need not rule on these other exceptions to the statutory time bar.

distinction (between cases subject to the categorical bar analysis and cases subject to a different analysis) is not new.

¶51 Contrary to the dissent's characterization, dissent at 10, *Miller* itself expressly declined to apply a categorical **[*27]** bar analysis. It did not "categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Supreme Court] did in *Roper* or *Graham*." *567 U.S. at 483*. Instead, *Miller* "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id*. This made *Miller* "different from the typical [case] in which we have tallied legislative enactments"—in other words, different from *Bassett* and other categorical rule cases.[19] *Id*.

¶52 In fact, *Miller* explicitly clarified that it "flow[ed] straightforwardly" from "the principle of *Roper*, *Graham*, and our *individualized sentencing* cases that youth matters for purposes of meting out the law's most serious punishments." *Id*. (emphasis added). It did not flow from a tallying of legislative enactments across the country; it did "not scrutinize[ ] or rel[y] in the same way on legislative enactments." *Id*. (citing *Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987)*; *Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*; *Eddings, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1*).

¶53 As the discussion above shows, neither do we.

¶54 Instead our decision today, like the *Miller* decision, draws from the line of cases that *Miller* cited for its "individualized sentencing" principle. Those decisions all relied on **[*28]** the rule, first announced in *Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)* (plurality opinion), that "consideration of the character and record of the individual offender and the circumstances of the particular offense" are "a constitutionally indispensable part of the process of inflicting the penalty of death." And those decisions all applied that rule to invalidate a state death penalty sentencing scheme, irrespective of any national consensus for or against the specific statute or sentencing practice. *Sumner, 483 U.S. at 83-85* (striking down a Nevada statute requiring the death penalty for defendants convicted of murder while serving a life sentence without possibility of parole); *Lockett, 438 U.S. at 608* (striking down an Ohio statute that limited mitigating circumstances a trial court could consider before imposing death); *Eddings, 455 U.S. at 113* (requiring sentencing courts to consider mitigating evidence, even where that mitigating evidence did not support a legal excuse from criminal liability). *Miller* then applied that principle of "individualized sentencing," developed in the death penalty context, to the juvenile LWOP context. *567 U.S. at 483* (citing *Sumner, 483 U.S. at 66*; *Lockett, 438 U.S. at 602-08*; *Eddings, 455 U.S. at 110-17*).

¶55 As the discussion above also shows, so do we.[20] In fact, we repeat the *Miller* approach today. Our decision that individual youthful characteristics **[*29]** may mitigate the sentences of these two young petitioners "flows straightforwardly from our precedents." *Id*. No *Fain* or categorical bar analysis is necessary to reach this decision.

CONCLUSION

¶56 ***HN23***[↑] There is no meaningful cognitive difference between 17-year-olds and many 18-year-olds. When it comes to *Miller*'s prohibition on mandatory LWOP sentences, there is no constitutional difference either. Just as courts must exercise discretion before sentencing a 17-year-old to die in prison, so must they exercise the same discretion when sentencing an 18-, 19-, or 20-year-old. We grant Monschke's and Bartholomew's PRPs and vacate their mandatory LWOP sentences. We remand each case for a new sentencing hearing at which the trial court must consider whether each defendant was subject to the mitigating qualities of youth.

YU, MONTOYA-LEWIS, and WHITENER, JJ., concur.

Concur by: Steven C. González

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[19] The dissent characterizes *Bassett* as "'enlarg[ing]'" the *Miller* class to include "'permanent[ly], incorrigibl[e]'" youths. Dissent at 11 (quoting *Bassett, 192 Wn.2d at 72, 88-89)*. But *Miller* and *Bassett* are not equivalent rulings about different classes—they differ in kind. *Bassett* categorically prohibited LWOP for defendants 18 and younger. *192 Wn.2d at 91*. *Miller* disavowed categorical rules, instead, mandating only "a certain process" be followed "before imposing a particular penalty." *567 U.S. at 483*. In this regard, our decision today is like *Miller* and not like *Bassett*. ***HN22***[↑] We do not categorically prohibit LWOP for 18- to 20-year-olds, but we require that courts must exercise some discretion in sentencing them.

[20] Our decision in *Houston-Sconiers* took that same *Miller* approach of valuing "individualized sentencing" and applying it to juveniles who were not sentenced to LWOP. *188 Wn.2d at 20*. Although the Supreme Court had "not applied the rule that children are different and require individualized sentencing consideration of mitigating factors" in the exact situation before the court, we applied the *Miller* principle—the "requirement to treat children differently, with discretion and with consideration of mitigating factors"—to that non-LWOP situation. *Id*. We did not analyze statutes from other states, nor did we turn to *Fain*'s proportionality test. Our decision flowed naturally from *Miller* and applied its principles in a new context.

Concur

¶57 [1]GONZÁLEZ, C.J. (concurring) — I concur with the lead opinion that the petitioners are entitled to a new sentencing hearing to determine whether their ages at the time of their crimes is a mitigating factor **[*30]** justifying a downward departure from the standard sentence. I part company, however, with its analysis of the retroactivity of *State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015)*. As the dissent properly notes, *RCW 10.73.100(2)* applies to violations of substantive criminal statutes that have been found unconstitutional, not sentencing statutes. However, I continue to believe that *O'Dell* is a significant change in the law that applies retroactively when material. *In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 338-39, 422 P.3d 444 (2018)* (GONZÁLEZ, J., concurring) (citing *RCW 10.73.100(6)*). Accordingly, I concur.

Dissent by: Susan Owens

Dissent

¶58 OWENS, J. (dissenting) — Kurtis Monschke and Dwayne Bartholomew committed brutal murders decades ago. At the time, they were 19 and 20 years old, respectively. They were not children. Under Washington law, when an individual turns 18 years old, they are empowered to make a range of life-altering decisions: suddenly, they can form contracts, drop out of school, get married, work a hazardous job, and serve in the military. But at this same moment, they also obtain the full responsibilities and consequences of adulthood, and the court will no longer intervene on their behalf on the basis of age. Nonetheless, the lead opinion holds today that we must create an exception in treating these **[*31]** individuals as adults when they commit aggravated murder between the ages of 18 and 20. Mandatory life without parole (LWOP) sentences are now prohibited for this age category. The lead opinion crafts this new rule by filtering our state constitution's "cruel punishment" prohibition through a handful of scientific studies and circumvents the reality that no legislatures or courts in the other 49 states have ever recognized such a protection. *Wash. Const. art. I, § 14*. As the final arbiters of what "cruel" means under *article I, section 14 of our state constitution*, this court must use a disciplined and evenhanded approach in evaluating its meaning. If we do not, we risk transforming our protection against "cruelty" into whatever is supported by a smattering of studies and five concurring members of this court.

¶59 At the heart of this case is the important question of when a person should be held fully accountable as an adult. This is a question that requires a meticulous examination of a number of scientific, moral, ethical, and practical considerations. Our court is not a legislature, and it is insufficiently equipped to decide this issue on selectively presented evidence put forth by limited parties on a constrained schedule. The lead opinion broadly seeks **[*32]** to protect against the "unacceptable risk that youthful defendants without fully developed brains will receive a cruel LWOP sentence." Lead opinion at 29. But I struggle to identify at what precise age we will stop redrawing these lines based on this brain development evidence, be it 20, 22, 25, or even older. I further caution that today's decision may eventually compel us to revisit and invalidate a staggering number of LWOP and Sentencing Reform Act of 1981 (SRA), *ch. 9.94A RCW*, sentences for this growing group under our recent decisions in *State v. Bassett*[21] and *State v. Houston-Sconiers*.[22] This task would tremendously burden the State's resources and the victims' families. I respectfully dissent.

ANALYSIS

I. *The Legislature's Determination of the Age of Majority Encapsulates More Considerations Than When a Youth's Brain Is Fully Developed*

¶60 The lead opinion today announces a broad new constitutional safeguard protecting "youthful defendants [ages 18 to 20] without fully developed brains." Lead opinion at 29. In doing so, the lead opinion extends a protection to convicted murderers that may shield these individuals from the full legal consequences of their actions. I note that once an individual turns **[*33]** 18 years old in Washington, he or she can form contracts, drop out of school, enter into marriage, vote in an election, obtain a driver's license, work a hazardous job, and enlist in the military. Upon turning 18, individuals receive all of these rights of adulthood, regardless of whether their brains are fully developed. At 18, the court will no longer interfere with the exercise of these rights on the basis of age. Additionally, these rights are accompanied by the responsibilities and consequences of adulthood.

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[21] ***192 Wn.2d 67, 428 P.3d 343 (2018)*** (holding that all LWOP sentences for juveniles are unconstitutionally cruel under the Washington Constitution).

[22] *188 Wn.2d 1, 391 P.3d 409 (2017)* (holding that courts have full discretion to depart from juvenile SRA sentences based on "youthfulness").

¶61 Children are different, certainly. But Monschke and Bartholomew were not children when they brutally murdered their victims. When a child becomes an adult is a question that necessarily involves significant input from a variety of disciplines. The lead opinion today casts aside this long-standing deference to the legislature because it believes that the current line at 18 is "arbitrary." Lead opinion at 24-25. The lead opinion contends the line at 18 is arbitrary because there is "no distinctive scientific difference, in general, between the brains of a 17-year-old and an 18-year-old"; and it notes that at 18, these youths' brains are not fully developed, which leads to decision-making **[*34]** based on immaturity and impulsivity. Lead opinion at 25. But the lead opinion assumes that the legislature did not already know or account for this when it enacted the age of majority. For example, the legislature may have set the age of majority based on when an individual has *sufficient* brain development, experience, and legal autonomy to make important life decisions, like deciding to commit a crime. Today's reasoning ignores the possibility that the age of majority is based less on scientific exactitude, and more on "society's judgments about maturity and responsibility." *Davis v. Dep't of Licensing, 137 Wn.2d 957, 974, 977 P.2d 554 (1999)*.

¶62 In prohibiting mandatory LWOP, the lead opinion now requires courts to exercise discretion in imposing LWOP sentences on 18-20 year olds, as it asserts that we must provide individualized sentencing for defendants "at least as old as [20]." Lead opinion at 2, 29-30 (citing *Miller v. Alabama, 567 U.S. 460, 469-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*).

¶63 I first note that nowhere does *Miller* require that we draw a line at 20. Lead opinion at 2. Further, the lead opinion's requirement of "individualized sentenc[ing]," conflicts with our precedent, *State v. Grisby, 97 Wn.2d 493, 497, 647 P.2d 6 (1982)*, which held that adults are not entitled to such a "'particularized consideration'" under our state constitution's cruel punishment prohibition. Lead opinion **[*35]** at 2, 30 n.17 (quoting *Grisby, 97 Wn.2d at 497*). Thus, the court today overrules precedent that dictates that adults are not entitled to individualized sentencing, despite the fact that petitioners failed to make the requisite showing that *Grisby* is incorrect or harmful. *State v. Barber, 170 Wn.2d 854, 863, 248 P.3d 494 (2011)*.

¶64 I further note the surprising optimism about the courts' ability to exercise discretion in imposing an LWOP sentence now that mandatory LWOP is prohibited. This requires distinguishing young defendants whose crimes reflect "transient immaturity" from those whose crimes reflect "irreparable corruption." *Miller, 567 U.S. at 479-80*. This optimism is negated by our recent holding in *Bassett* where we invalidated all LWOP sentences for juveniles, reasoning that courts are incapable of accurately making this determination. *Bassett, 192 Wn.2d at 89* (quoting *Roper v. Simmons, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*). Given the difficulty even "expert psychologists" have in making this determination, I do not foresee the courts adequately exercising discretion this time around. *Id*.

¶65 I additionally highlight our recent rulings in *Bassett, 192 Wn.2d 67, 428 P.3d 343*, and *Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409*, and their potential implications in light of the court's holding today. These cases respectively invalidated all LWOP sentences and effectively eliminated the SRA's mandatory sentencing requirements for juveniles based on **[*36]** *Miller, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407* (holding mandatory LWOP for juveniles is cruel). As today's holding almost identically mirrors *Miller*, I believe the lead opinion today paves a path for the court to invoke the same logic underlying *Houston-Sconiers* and *Bassett* to revisit and invalidate a staggering number of LWOP and SRA sentences, particularly in light of the retroactive nature of *Houston-Sconiers* established in *In re Personal Restraint of Ali, 196 Wn.2d 220, 226, 242, 474 P.3d 507 (2020)*.

¶66 As the consequences of today's decision are potentially severe, I would exercise restraint in interpreting our state constitution. I believe that the people of Washington and their representatives are fully capable of enacting laws that reflect the "'evolving standards of decency that mark the progress of a maturing society.'" *Miller, 567 U.S. at 494* (quoting *Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*). And if the legislature is not up to this task, we nonetheless have sufficient constitutional doctrine to guide us in addressing these matters, as I later address.

II. *The Limitations of Personal Restraint Petitions Are Eroded by Invoking The "Constitutionality" Exception to the Time Bar under RCW 10.73.100(2)*

¶67 Under Washington law, Bartholomew and Monschke as convicted murderers do not have unlimited attempts to appeal their sentences. Rather, convicted appellants are limited to one direct **[*37]** appeal as of right and discretionary review as granted by this court through a petition for review. After that, appellants have one year to bring additional postconviction challenges to a valid judgment through a personal restraint petition (PRP), unless subject to an exception. *RCW 10.73.090*, *.100*. These limitations help manage the flow of postconviction relief, protect the judiciary's time and resources, and foster respect for the finality of judicial decisions.

¶68 The lead opinion today relies on *RCW 10.73.100(2)* as an

exception to the time bar to give the petitioners another shot at crafting a new constitutional rule and overturning precedent. Lead opinion at 5, 30. This exception reads, in part, "The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds: … [t]he statute that the defendant *was convicted of violating* was unconstitutional on its face or as applied to the defendant's conduct." RCW 10.73.100(2) (emphasis added).

¶69 This "constitutionality" exception is inapplicable according to the very plain language of the statute. This exception limits the challenge to the *statute* that the defendant "*was convicted of violating*." *Id.* (emphasis added). This exception **[*38]** is inapplicable because the petitioners were not convicted of violating the mandatory LWOP sentencing statute, RCW 10.95.030. They were convicted of aggravated murder—RCW 10.95.020. The legislature clearly distinguishes between sentences and convictions in the collateral attack statute. *See* RCW 10.73.100(5), (6). But the lead opinion altogether bypasses the plain language of the statute and, instead, erroneously relies on *In re Personal Restraint of Runyan* to justify its position—quoting that "*convictions* under unconstitutional statutes … 'are as no *conviction* at all and invalidate the prisoner's *sentence*.'" Lead opinion at 5 (emphasis added) (quoting *121 Wn.2d 432, 445, 853 P.2d 424 (1993)*). This quote only further solidifies that this exception applies to *convictions* and not *sentences*, and that it is wholly inapplicable to the petitioners.

¶70 By forcing these PRPs through this exception, the court now permits virtually all challenges to sentences while also, and most notably, avoiding the retroactivity analysis required for changes in the law. *See* RCW 10.73.100(5), (6); *RAP 16.4(c)(4)*.

¶71 Retroactivity analysis is important because not every procedural technicality merits overturning a valid sentence or conviction. Yet, the lead opinion nonetheless shoehorns the petitioners' claims through this exception, **[*39]** and in doing so, bypasses this important barrier that safeguards the State's resources and the families of victims from having to endure another trial or sentencing hearing.

¶72 Monschke and Bartholomew have been incarcerated for decades. They had their day in court to challenge their convictions and assert novel legal theories. Their time expired, and they must now wait to see if other challengers are able to mount a successful legal challenge that is material to their cases. *See* RCW 10.73.100(6). Today, the lead opinion stretches the "constitutionality" exception beyond credulity to address the merits of Monschke's and Bartholomew's petitions. In doing so, it greatly expands the scope of personal restraint petitions in Washington. The people of Washington are entitled to their day in court. Monschke and Bartholomew had theirs. I am concerned that the rights of others will be diluted as courts must stretch thin resources even thinner to address this new class of collateral attacks.

III. *The Court Must Apply Bassett To Determine What a "Cruel" Punishment Is Because Prohibiting Mandatory LWOP Is a Categorical Bar under* Ali

¶73 In deciding what punishments are prohibited under article I, section 14 of our state constitution, we must determine what "cruelty" **[*40]** is. To do this, the court has previously applied the *categorical bar*[23] test outlined in *Bassett, 192 Wn.2d at 85-86*. The *Bassett*[24] test provides a balanced approach for evaluating whether a punishment is cruel under the state constitution as applied to a certain class of persons by (1) analyzing whether this punishment is barred by other states through their legislatures and judiciaries and (2) exercising our independent judgment in determining the culpability of the group when considering the crime and if the punishment serves legitimate penological goals. *Id. at 85-87*.

¶74 We are bound to apply *Bassett* based on our recent decision in *In re Personal Restraint of Ali*, where we held that Miller, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407, was a *categorical bar on punishment* when *Miller* prohibited imposing mandatory LWOP sentences on juveniles. *196 Wn.2d at 231-32, 238-39 n.5*. There, we based our reasoning on Montgomery v. Louisiana, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). In assessing *Miller*'s retroactivity, *Montgomery* held that *Miller*'s rule was retroactive because *Miller* categorically barred mandatory LWOP by "render[ing] 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." Montgomery, 136 S. Ct. at 734 (quoting Penry v. Lynaugh, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)).

¶75 As *Montgomery* clarifies, *Miller* was a case **[*41]** involving a categorical bar. This case is directly analogous to *Miller* and should also be analyzed under *Bassett*'s categorical

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[23] Our other approach to cruelty, not applicable here, is the *Fain* proportionality test and it addresses sentences that are disproportionate to the crime. *Bassett, 192 Wn.2d at 82* (citing *State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980)*).

[24] The lead opinion expressly does not apply the categorical bar test of *Bassett* because it claims the petitioners did not argue for a categorical bar. Lead opinion at 29.

bar approach. To make a very plain comparison, *Miller* barred imposing mandatory LWOP sentences on juveniles. Here, the lead opinion prohibits imposing mandatory LWOP sentences on defendants between the ages of 18 and 20. The *only difference* between this case and *Miller* is that we substitute "juveniles" with "defendants age 18 to 20." Accordingly, because *Miller* was a categorical bar case, this case is as well. Therefore, we must apply *Bassett* to determine whether mandatory LWOP is cruel punishment for this particular class.

¶76 But instead of simply applying *Bassett*, the lead opinion crafts a false distinction to sidestep *Bassett* by reasoning that it is not actually creating a *new class* but, rather, is only "enlarg[ing]" the class of "youthful defendants" who were protected in *Miller*. Lead opinion at 10, 30 n.17. This distinction is empty and of little help to the lead opinion because *Bassett* also merely "enlarged" *Miller*'s initial class.

¶77 *Miller* defined the initial class[25] of juveniles protected from LWOP as all "but the rarest of juvenile offenders, those whose crimes reflect **[*42]** permanent incorrigibility." *Montgomery, 136 S. Ct. at 734*. In *Bassett*, we "enlarged" this class to include those defendants originally excluded from *Miller*—those whose crimes could have been said to have reflected "permanent incorrigibility." *Bassett, 192 Wn.2d at 72, 88-89*. *Bassett* was an extension of a class in the same sense that petitioners here are "extending" the class. Thus, even if petitioners are merely extending the class as the lead opinion claims, they do not get to create a new and less rigorous test. They must apply our precedent of "extending" a class, which is *Bassett*.

¶78 And while we could easily get lost in the semantical forest of distinguishing "enlarging" a class from defining a proximate yet distinctive class, common sense provides a sufficiently clear solution that should dictate the result. If we were to decide *Miller* again today under our state constitution, those juveniles would be subject to the categorical bar test, pursuant to *Bassett* and *Ali*. And had Monschke and Bartholomew brought their claims alongside those juveniles, they would be subject to the same exacting standard. I see no reason to require any less of the petitioners here today.

IV. *Applying Bassett, We Should Find That No States Have Expressly* ***[*43]*** *Exempted This Age Group (18-20 from Mandatory LWOP and That Young Adults Are More Responsible for Their Actions*

¶79 If the lead opinion applied *Bassett*, it would conclude that there are no states that have expressly exempted 18-20 year olds from mandatory LWOP through the legislative or judicial process. The lead opinion concedes there is "no national majority" of states with such a rule and, furthermore, fails to show there are *any such states* with such a rule. Lead opinion at 10 n.8. But nonetheless, the lead opinion would apparently rewrite the national trend inquiry to include evaluation of factors such as legislation that "carve[s] out rehabilitative space for 'young' or 'youthful' offenders as old as their mid-twenties." *Id*. But this approach vastly departs from our holding in *Bassett*, which expressly directs us to look at the national trends as applied to the "*sentencing practice at issue*." *Bassett, 192 Wn.2d at 83* (emphasis added) (citing *Graham v. Florida, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*). While the lead opinion provides support for treating young adults with the leniency of the juvenile system in limited circumstances, none of their authorities address the *sentencing practice at issue*, i.e., mandatory LWOP for aggravated murder.

¶80 But even assuming we could broaden **[*44]** our inquiry, there is still insufficient evidence to find that the sentence is *unconstitutional beyond a reasonable doubt*. *Bassett, 192 Wn.2d at 77* (citing *State v. Hunley, 175 Wn.2d 901, 908, 287 P.3d 584 (2012)*). The lead opinion relies on laws in Washington D.C., Florida, and South Carolina, among others, as states that create classes of "young adults" who may be treated with leniency under the juvenile system. Lead opinion at 9-10 n.8.

¶81 But even these laws do not provide the support that the lead opinion claims for an "affirmative trend" that is relevant to the petitioners, as many of these statutes *expressly exempt* those young adults who commit murder or other violent crimes from being treated with more leniency. *Id. at 10 n.8*. For example, Washington D.C. carves out a "rehabilitative space" as the lead opinion asserts, but this "rehabilitative space" applies only to "person[s] [who have] committed a crime other than murder." *D.C. CODE 24-901(6)*. Florida, likewise, permits lenient treatment as "youthful offender[s]" only for those who did not commit a capital or life felony. *Fla. Stat. Ann. § 958.04(1)(c)*. And South Carolina treats as "youthful offenders" only those who have not been convicted for a "violent crime." *S.C. Code Ann. § 24-19-10(d)(ii)*.

¶82 The lead opinion further erroneously relies on support from our state's laws when it notes that our juvenile **[*45]** court system can retain jurisdiction over juveniles in limited

[25] *Miller* further never exempted a vague class of "youthful defendants" as the lead opinion claims. Lead Opinion at 10. *Miller*'s holding expressly applied to "juveniles" under age 18: "[w]e therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the *Eighth Amendment's* prohibition on 'cruel and unusual punishments.'" *Miller, 567 U.S. at 465*; *U.S. Const. amend. VIII*.

circumstances until the age of 25. Lead opinion at 21 (citing RCW 13.04.030(1)(e)(v)(C)(II)). Notably, however, our juvenile courts have no jurisdiction over 16-and 17-year-old juveniles who are charged with murder. RCW 13.04.030(1)(e)(v)(A), (C)(I); *see also* RCW 13.40.300(5) (subject to only a few exceptions, "the juvenile court has no-jurisdiction over any offenses alleged to have been committed by a person eighteen years of age or older").

¶83 Thus, not only is there almost no evidence that there is a national trend of carving out a "rehabilitative space" for young adult murderers, but our own legislature has expressly spoken on this issue: young murderers are to be treated the same as adults under our laws.

¶84 But the lead opinion unnecessarily analyzes these statutes in the first place because the petitioners—required to prove the unconstitutionality of their sentences *beyond a reasonable doubt*—have put forth no such evidence of *any* legislative or judicial trend. *Bassett 192 Wn.2d at 77* (citing *Hunley, 175 Wn.2d at 908*); *see* lead opinion at 29 ("[T]he petitioners have neither argued nor shown that LWOP would be *categorically* unconstitutional as applied to older defendants."). The lead opinion far exceeds the confines of judicial restraint when it finds **[*46]** these authorities on its own accord and argues them on behalf of the petitioners. The petitioners have plainly put forth no evidence of a legislative trend, and this factor should weigh heavily against the petitioners.

¶85 Next, applying our independent judgment under the second prong of *Bassett*, the petitioners are fundamentally different from juveniles—they can get jobs, quit school, get married, form contracts, and drive cars—all without the permission of their parents. No longer juveniles with subordinate rights, these adults have the legal ability to "'extricate'" themselves from "'criminogenic setting[s].'" *Roper, 543 U.S. at 569* (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). Aggravated murder is undoubtedly one of the most serious crimes on the books, and permanently isolating murderers like Monschke and Bartholomew serves the legitimate penological goals of retribution, deterrence, and incapacitation. As the *Bassett* test does not weigh in this new class's favor, I would hold that mandatory LWOP is not unconstitutionally cruel.

CONCLUSION

¶86 The lead opinion's **[*47]** ruling contains three critical flaws when it requires courts to exercise discretion in imposing LWOP sentences for 18-20 year olds. First, the lead opinion improperly strips the legislature's role in defining the age of majority and replaces it with a handful of scientific studies. The court's second guessing of the legislature is questionable as this court is inferior to the legislature in both time and resources to adequately consider the issue. Second, the lead opinion improperly applies the "constitutionality exception" under RCW 10.73.100(2) and circumvents the necessary retroactivity analysis. This will potentially flood courts with petitions, deprive courts of resources, and weaken protections against overturning finalized convictions and sentences on technicalities. Third, the lead opinion ignores our Washington "cruel" punishment jurisprudence by ignoring *Bassett*. By doing this, the lead opinion circumvents the reality that no states have extended such a protection, and jeopardizes our balanced approach to assessing "cruelty." The lead opinion's monumental rule today entails severe consequences that may lead to extending prohibitions of mandatory LWOP and SRA sentences to this new group under **[*48]** *Houston-Sconiers* and *Bassett*. This deserves a much more cautious approach, and I respectfully dissent.

JOHNSON, MADSEN, and STEPHENS, JJ., concur with OWENS, J.

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