No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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JOSÉ SUAREZ,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

_____

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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Question Presented

Does a mandatory life sentence without parole for an individual who was twenty at the time of the offense, who was without a criminal record, who had been found guilty of accessorial participation in a murder, violate the Eighth Amendment?

List of Parties

In addition to José Suarez, the following individuals were named in the indictment in the district court proceeding.:

Edwin Amaya-Sanchez, AKA Strong, William Castellanos, AKA Dizzy, AKA Satanico, Jhonny Contreras, AKA Reaper, AKA Conejo, Reynaldo Lopez-Alvarado, AKA Mente, Elmer Alexander Lopez, AKA Alex, AKA Smiley, AKA Little Smiley, Selvin Chavez, AKA Flash, German Cruz, AKA Bad Boy, Jonathan Hernandez, AKA Travieso, AKA Kraken, Enrique Portillo, AKA Oso, AKA Turkey, Alexi Saenz, AKA Blasty, AKA Big Homie,Jairo Saenz, AKA Funny, Jerlin Villalta, Mario Aguilar-Lopez, AKA Cuchumbo,Jeffrey Amador, AKA Cruel, Alexis Hernandez, Santos Leonel Ortiz-Flores, Omar Antonio Villalta, Anticristo, Edwin Diaz, Nelson Argueta-Quintanilla, AKA Mendigo, Wilber Adalberto Fernandez-Vasquez, AKA Asiatico, Ever Flores, AKA Negro, AKA Grone, Eduardo Portillo, AKA Firuli, AKA Tito, Marlon Serrano, AKA Flaco, AKA Little Extrano, Kevin Torres, AKA Quiento, AKA Inquieto, Alexander Frank Ventura-Ramirez, AKA Olvidado, Ruendy Jhonatan

Hernandez-Vasquez, AKA Solido, Santo Fernandez-Benitez, AKA Pelon, Ronald Catalan, AKA Stranger.

List of Related Proceedings

United States of America v. Amaya-Sanchez (Ronald Catalan)
2d Cir. docket no. 21-1639

United States v. Amaya-Sanchez *et al.*
E.D.N.Y. docket no. 2:16-cr-403-16

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No. _____

In the

Supreme Court of the United States

October Term, Suarez

JOSÉ SUAREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Petitioner José Suarez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated April 28, 2023.

Opinion Below

The decision of the Court of Appeals is an unpublished summary affirmance

and is set forth at App. 3, infra.[1]

Jurisdiction

The district court's jurisdiction over Mr. Suarez's criminal trial was established by 28 U.S.C. §3231. The court of appeals had jurisdiction over his appeal pursuant to 28 U.S.C. §1291.

The Court of Appeals opinion in this case was filed on April 28, 2023. . This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The basis for subject matter jurisdiction in district court was 18 U.S.C. § 3231 (jurisdiction over offenses against the United States). The basis for the jurisdiction of the court of appeals was 28 U.S.C. § 1291 (appeals from final judgments of district courts), Rule 4(b), Fed. R. App. Proc. (appeals from criminal convictions), 18 U.S.C.§ 3557 and 18 U.S.C. § 3742 (appeals from sentences).

Constitutional and Statutory Provisions Involved

UNITED STATES CONSTITUTION, AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

UNITED STATES CONSTITUTION, AMENDMENT VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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[1]In this petition, "App." refers to the Appendix to this Petition for Certiorari, which follows the petition. "A" refers to the appendix filed by the petitioner in the Court of Appeals.

TITLE 18, UNITED STATES CODE, §1959(A)

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

Statement of the Case

José Suarez had a criminal history score of 1 and fell into criminal history category I under the Federal Sentencing Guidelines. PSR ¶ 74. He was a friend of a gang member and was viewed by other gang members as an "associate" of the gang. The jury found that when he was 22-years-old, he had driven a getaway car to and from a restaurant where a member of an opposing gang had been murdered and an innocent bystander wounded.[2] He had also been found guilty of participating in a brawl at an after-hours place during which two men who had disrespected the gang were seriously injured.

He was found guilty on nine counts:

> conspiracy to commit assault resulting in serious bodily injury to Jose Maldonado and Isaac Contreras, in aid of

[2]It also found that he had piled on in a drunken barroom brawl in which one victim suffered serious injuries and another had been hurt.

racketeering, in violation of 18 U.S.C. §1959(a)(6) and 3551, *et seq.* (count one);

assault resulting in serious bodily injury to Jose Maldonado, in aid of racketeering, in violation of 18 U.S.C. §1959(a)(3), 2 and 3551, *et seq.* (count two);

conspiracy to commit murder rival gang members, in aid of racketeering, in violation of 18 U.S.C. §1959(a)(5) and 3551, *et seq.* (count three);

murder of Esteban Alvarado-Bonilla, in aid of racketeering, in violation of 18 U.S.C. §1959(a)(1), 2, and 3551, *et seq.* (count four);

brandishing and discharging a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i),924(c)(1)(A)(ii), 924(c)(1)(A)(iii), 2 and 3551 et seq.) (counts five and eight)

causing the death of another, Estaban Alvarado-Bonilla, through the use of a firearm, in violation of 18 U.S.C. § 924(j)(1) (count six);

assault of Maria Lazima with a dangerous weapon, in aid of racketeering, in violation of 18 U.S.C. §§1959(a)(3), 2, and 3551 *et seq.* (count seven);

and being an accessory after the fact to the crimes charged in counts Three through Eight, in violation of 18 U.S.C. § 3 (count nine).

A-002-003.[3]

The district court sentenced José Suarez as follows:

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[3]For reasons that are not germane to this petition, various versions of the indictment were presented during the course of the trials below, each with its counts numbered differently. For the purposes of the sentencing and the judgment, the district court and parties below referred to the counts of the "Sixth Superseding Trial Version Indictment," which is the version that will be discussed during the course of this petition.

Count 1: 3 Years (concurrent with Counts 2, 3, 6, 7, and 9);

Count 2: 20 Years (concurrent with Counts 1, 3, 6, 7, and 9);

Count 3: 10 Years (concurrent with Counts 1, 2, 6, 7, and 9);

Count 4: Life Imprisonment (concurrent with Counts 1, 2, 3, 6, 7, and 9);

Count 5: 10 Years (consecutive to all other counts);

Count 6: 20 Years (concurrent with Counts 1, 2, 3, 7, and 9);

Count 7: 20 Years (concurrent with Counts 1, 2, 3, 6, 7, and 9);

Count 8: 10 Years (consecutive to all other counts); and

Count 9: 15 Years (concurrent on Counts 1, 2, 3, 6, and 7).

The total effective sentence, then, was life plus ten years. Of significance to this petition is the sentence on count 4 (mandatory life imprisonment).

The defense did not dispute that the crimes for which he was convicted were serious, deserving of severe punishment. The defense did dispute that the purposes of the federal sentencings were advanced by the sentence of life plus ten years that the district court was required to impose. It pointed out that co-defendants, who had actually murdered by pulling the trigger, but who had chosen to accept a plea bargain and plead guilty, had not been required to be sentenced to mandatory life sentences, and had not been.

During the course of the sentencing, the district court observed:

> With respect to [defense counsel's] point about the mandatory life sentence. Although I [have been] pointing to obviously what I see as extreme aggravating factors, I am not suggesting that in the absence of a mandatory life sentence the court would be imposing life. That is not my

> reason for going through those factors. I am suggesting that this conduct would warrant an extremely high sentence for all of those reasons. Congress has decided that for this particular crime on count Four that the sentence should be life, and that is the sentence obviously that the court intends to impose.

12/2/2020 Tr. 21-22, App. 34-35.

On appeal, Suarez contended that a mandatory life sentence for aiding and abetting murder in aid of racketeering -- given that he was twenty-two years old, the driver of a getaway car, and in Criminal History Category I -- would violate the Eighth Amendment's prohibition against cruel and unusual punishment. Young and without criminal history points, he did not actually kill anyone. He was compelled on appeal, however, to recognize that his argument was precluded by previous Second Circuit precedent. The Court of Appeals had already rejected a similar argument in *United States v. Sierra*, 933 F.3d 95, 97–99 (2d Cir. 2019), *cert. denied sub nom. Beltran v. United States*, 140 S.Ct. 2540 (2020), basing its decision on this Court's decision on its own precedent, constrained by *Miller v. Alabama*, 567 U.S. 460 (2012), which held that juvenile offenders (i.e., individuals under eighteen years old), but not adult offenders (i.e., individuals over eighteen) are protected from mandatory life-without-parole sentences.

Reason for Granting the Petition

This Court should grant certiorari because a mandatory life sentence without parole for an individual twenty-two years old at the time of the offense, without a criminal record, who has been found guilty of accessorial participation in a murder, violates the Eighth Amendment.

At the outset, we must be recognize that our argument -- that it is unconstitutional to subject to amandatory life sentences offenders who are 22-years-old or younger, without criminal records, who have been found guilty of accessorial liability for a murder – faces a tough row to hoe.

Those circuits that have considered the issue have refused to extend *Miller* to defendants who were eighteen or older at the time of their offenses, albeit in circumstances distinct from those 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); *Cruz v. United States,* docket no. 19-989-cr (September 11, 2020) (summary affirmance) (2d Cir. 2020),

This Court has denied a number of petitions similar to this one, petitions from which this petition heavily draws. *See, e.g., United States v. Frank*, 832 Fed.Appx. 764, 765 (2d Cir.), *cert. denied sub nom*. *Roye v. United States*, 142 S.Ct. 474 (2021); *Cruz v. United States*, 826 Fed.Appx. 49 (2d Cir. 2020), *cert. denied*, 141 S.Ct. 2692 (2021); *United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019); *United States v. Sierra*, 782 F. App'x 16 (2d Cir. 2019) (summary order), *cert. denied sub nom. Beltran v. United States*, 140 S.Ct. 2540 (2020).

Why, then, is granting certiorari appropriate in José Suarez's case?

Review is appropriate because judicial decisions since *Miller* suggest that

the bright-line rule of *Miller*, establishing eighteen as the age below which mandatory life sentences are unconstitutional, should be raised.

Review is appropriate because with each passing year, the scientific research that so animates the *Miller* (research that established that normal human brain development manifests itself in "the diminished culpability and heightened capacity for change" in children, *Miller*, 132 S.Ct. at 2469), has demonstrated that this normal brain development, and its consequential influence over a youth's judgment and culpability, continues into the mid-20s.

Review is appropriate because of the societal recognition of the validity and force of this research, in the form of legislative and regulatory provisions.

Review is appropriate because the issue presented is one of exceptional importance, with dramatic sentencing consequences for the youngest of adult defendants: Whether Supreme Court precedent prohibiting mandatory life imprisonment, and severely restricting non-mandatory life imprisonment, for juveniles, applies to young adults (here a twenty-two-year-old) with no criminal record, who have been found guilty as accessories (here, to driving a getaway car to and from a murder committed by another). It is unwise to draw a bright-line at 18 as the age beyond which it is constitutional for young people to face mandatory life sentences, particularly in the context of this case. The understandable impetus for a bright-line rule should give way to individualized determinations when dealing with young people whose brains have not yet reached adult maturity, *Miller*, a decision based on scientific evidence, should be applied in a way that

incorporates developing research and takes into account evolving standards.

Decisional law: Few matters of constitutional criminal procedure have engaged this Court's attention as frequently over the past forty years as the constitutionality of imposing terminal sentences on young offenders.

In *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982), this Court reversed a death sentence imposed upon a 16-year old defendant where the sentencing court erroneously believed it could not consider the defendant's violent family background as a relevant mitigating factor. The Court explained, "Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults." *See id*. at 115–16.

Six years later, in *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988), a plurality of this Court found that imposing the death penalty for any defendant below the age of 16 at the time of the offense violated the Eighth Amendment.

The following year, a majority of this Court agreed, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), that imposing the death penalty on defendants who were 16 or 17 years old at the time of the offense did not violate the Eighth Amendment.

The *Stanford* holding was overruled, however, in *Roper v. Simmons*, 543 U.S. 551, 578 (2005), which held that the Eighth and Fourteenth Amendments did indeed proscribe the imposition of the death penalty for defendants who were under 18 at the time of the offense conduct. *Roper* identified "three general differences between juveniles under 18 and adults" that diminish the culpability of juvenile defendants: their "lack of maturity and . . . underdeveloped sense of

responsibility"; their greater susceptibility to "negative influences and . . . peer pressure"; and their "more transitory" personality. *See id*. at 569–70. As a result of such diminished culpability, this Court explained, "it is evident that the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults." *Id*. at 571.

Graham v. Florida, 560 U.S. 48, 82 (2010), followed, holding that the Eighth Amendment also prohibits sentencing juvenile defendants to life without the possibility of parole in non-homicide cases.[4]

In *Miller v. Alabama*, *supra*, 567 U.S. at 460, this Court held that sentencing juvenile defendants to mandatory sentences of life-without-parole, without permitting a sentencing court to consider the defendant's individual characteristics and culpability, violates the Eighth Amendment's proportionality principle. *Miller*, 567 U.S. at 489. Juveniles, the *Miller* Court explained, are "constitutionally different" from fully-formed adult defendants, both insofar as their age reflects their diminished capacity and culpability for the crime and also insofar as their youth provides "greater prospects for reform." *Id*. at 471. *Miller*'s conclusion rested not merely on "common sense," but on biological and social science. *Id*. at 471–72. As the Court explained, "developments in psychology and

[4] In 2002, this Court also held that the Eighth Amendment prohibits the death penalty for mentally impaired defendants, who "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." See Atkins v. Virginia, 536 U.S. 304, 318, 321 (2002).

brain science continue to show fundamental differences between juvenile and adult minds — for example, in parts of the brain involved in behavior control." *Id*. (quoting *Graham*, 560 U.S. at 68) (internal quotation marks omitted). These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id*. at 472.

Finally, in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Court provided extensive insight into the meaning and scope of the *Miller* decision.

At issue in *Montgomery* was whether *Miller*'s holding, "that a juvenile convicted of a homicide could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing," should apply retroactively to juvenile offenders whose convictions and sentences were final before *Miller* was decided. 136 S.Ct. at 725. The Court addressed the central question of "[w]hether *Miller*'s prohibition on mandatory life without parole for juvenile offenders announce[d] a new substantive rule that, under the Constitution, must be retroactive." *Id*. The Court held that the rule announced in *Miller* was substantive. The Court explained that *Miller* created a class of defendants who may not, consistent with the Eighth Amendment, be sentenced to life without parole, even in homicide cases. The class consists of juveniles whose crimes reflect "transient immaturity," and excludes juveniles who are found, following an evidentiary hearing, to be "irreparably corrupt" and "permanently

incorrigible."

The Court noted that "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment," and that the "'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles." *Id*. (quoting *Miller,* 132 S.Ct. at 2464, n. 4). These precedents, of course, included *Graham v. Florida*, *supra*, 560 U.S. at 48), which bars life without parole for juveniles convicted of non-homicide offenses, and *Roper v. Simmons*, *supra*, 543 U.S. at 551, which prohibits capital punishment for those under 18 at the time of their crimes. *Id*.

These precedents provide *Miller*'s "starting premise," the principle that "'children are constitutionally different from adults for purposes of sentencing,'" due to "children's 'diminished culpability and greater prospects for reform.'" *Id*. (quoting *Miller*, *supra*, 132 S.Ct. at 2464).

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

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well-formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievable depravity."

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

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

Thus, the *Montgomery* Court found, as in *Miller*, that mandatory sentences of life without parole present "'too great a risk of disproportionate punishment," and that, before imposing such a sentence on a juvenile, a court must "take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id*. (quoting *Miller*, 132 S.Ct. at 2469). The Court said *Miller* made clear that, "in light of 'children's diminished culpability and heightened capacity for change,'" the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 733-34 (quoting *Miller*, 132 S.Ct. at 2469).

The Court explained

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

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

Because it created a class of defendants -- juveniles whose crimes reflect transient immaturity, who cannot constitutionally receive life without parole – "*Miller* announced a substantive rule of constitutional law," which applies retroactively to defendants on state collateral review. *Id*. at 736.

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

To be sure, like *Miller, Montgomery* deals with "juveniles." But, of greater significance in *Montgomery*, juveniles possess attributes that define a class of defendants who cannot receive a specific punishment - life without parole - and it

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

Because it is this group of attributes that really defines the class, there is no rational basis to exclude from the class other people who possess the same attributes but who are over the age of 18. This is especially true because *Miller* relied upon scientific studies showing these attributes are caused by normal brain development, which continues into the mid-twenties. There is even less reason to exclude individuals from the class when they not only exhibit the same attributes as members of the class, but also possess those attributes for the same reasons as members of the class –*i.e.*, normal brain development.

Because the class of those who cannot be sentenced to life imprisonment is defined by these distinctive attributes, rather than mere chronological age, there is no rational basis to exclude youthful defendants such as the 22- under the age of 21 who share the same attributes from the class, especially since the scientific evidence relied upon in *Miller* – and more recent research - shows young

people possess these attributes generally into their mid-20s.

Since *Miller*, many courts, in a variety of situations, have recognized that young adults are different than fully formed adults for purposes of sentencing. *See, e.g.*, *United States v. Walters*, 253 F. Supp. 3d 1033, 1036 (E.D. Wisc. 2017) (below-guidelines sentence appropriate for 19 year old in part because "[c]ourts and researchers have recognized that given their immaturity and undeveloped sense of responsibility, teens are prone to doing foolish and impetuous things"); *In re Poole*, 24 Cal. App. 5th 965, 982-83 (2018) (vacating denial of parole because parole board gave insufficient weight to the youth of a 19-year-old offender); *People v. House*, 2019 IL App (1st) 110580-B, ¶ 65, 142 N.E.3d 576 (2019) appeal allowed, 140 N.E.3d 231 (Ill. 2020) (mandatory life sentence for 19 year old violated the State Constitution because it precluded trial court from considering youthfulness as a mitigating factor).

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

In non-death penalty sentencing, courts have increasingly relied on *Miller*, and developments in the neuroscience on which it is based, to treat late

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

At least one district court has reached a similar conclusion, although its decision was subsequently reversed by the Court of Appeals. *See Cruz v. United States*, No. 11-cv-787, 2018 U.S. Dist. LEXIS 52924 (D. Conn. Mar. 29, 2018) (*Miller*'s reasoning compels the conclusion that imposing a sentence of

life-without parole to an 18-year-old defendant violates the Eighth Amendment). As the *Cruz* opinion explains, nothing about applying *Miller*'s reasoning to an 18-year-old contradicts *Miller*, because while *Miller* holds that mandatory life sentences for those under 18 are categorically unconstitutional, it contains no parallel finding that a mandatory life sentence for a defendant over 18 must be deemed categorically constitutional. *See id.* at *37–41. "In drawing the line at 18, then, Roper, Graham, and *Miller* drew lines . . . protecting offenders that fall under the line while remaining silent as to offenders that fall above the line." Id. at *41.[5]

Courts have begun to shift lines originally drawn at age 18 upwards to encompass 18- to 21-year-old individuals. For example, the Supreme Court of Washington has extended *Miller*'s constitutional protections to young adults aged 19 and 20 at the time of their offenses. *In re Monschke*, 197 Wash. 2d 305, 306 (2021). That court ruled that the state constitutional bar against cruel punishment prohibited mandatory life-without-parole sentences for these young adults because it deprived the trial judge of the discretion to consider the mitigating qualities of youth. *Id*. at 306, 311. ("*Miller*'s constitutional guarantee 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.").

In reaching this conclusion, the court relied primarily on three factors, each of which is applicable to this petition. First, "bright constitutional lines

[5]Although the Court of Appeals for the Second Circuit reversed, the district court subsequently granted Cruz's request for compassionate release.

[established by the United States Supreme Court] 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" and those constitutional protections for youthful criminal defendants have grown more protective over the years. *Id.* at 313-17 (internal quotation marks and citation omitted). Second, there is a "need for flexibility in defining the nebulous concept of 'adult' or 'majority'" as evidenced by the fact that the Washington Criminal Code draws the line between "childhood" and "adulthood" at different ages depending on the context. *Id.* at 320-21. Finally, "neurological science recognizes no meaningful distinctions between 17- and 18-year-return to Old Saybrook as a class" in terms of maturity, vulnerability to negative influences, and the transitory nature of their character at that time. *Id.* at 321.

Similarly, the Sixth Circuit indicated that it might "extend [*Miller*'s] reasoning to individuals over the age of 18" in light of evolving standards of decency. *Sherrill*, 972 F.3d at 774. The court acknowledged that "[m]embers of [the Sixth Circuit] have already begun to consider whether the line separating childhood and adulthood has shifted due to society's recognition that young adults between the ages of eighteen and twenty-one are mentally more like children than adults, [by] pointing to various contexts in which we consider twenty-one the age of majority, as well as scientific and social research indicating that those under twenty-one retain the defining characteristics of youth." *Id.* (*citing Pike v. Gross*, 936 F.3d 372, 385 (6th Cir. 2019)) (Stranch, J. concurring) ("I believe that

society's evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense."); *People v. Ruiz*, 2020 IL App (1st) 163145, ¶ 34, 2020 WL 2731929 ("[T]he Illinois Constitution prohibits a mandatory life sentence for a young adult offender who was 19 at 14 the time of the offense.").

Several United States courts of appeals have interpreted *Miller* in terms of its practical, "de facto" consequences. Thus, in *United States v. Grant*, 887 F.3d 131, 142 (3d Cir. 2018), the Third Circuit held that *Miller*'s rule applies not only where a juvenile defendant has specifically been sentenced to life without the possibility of parole (LWOP), but also to term-of-years sentences that act as "de facto" LWOP sentences because the length of the sentence matches or exceeds the defendant's life expectancy. The Seventh, Ninth, and Tenth Circuits have also reached a similar conclusion. *See McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013); *Budder v. Addison,* 851 F.3d 1047, 1056 (10th Cir. 2017). The Fourth Circuit in *Grant* court justified its holding, in part, on the rationale that extending *Miller*'s holding beyond its most narrow holding was necessary to give effect to the opinion's broader penological concerns about constitutionally disproportionate sentencing:

> We reach this conclusion for three reasons. First, *Miller* reserves the sentence of LWOP only for juvenile homicide offenders "whose crimes reflect permanent incorrigibility." Second, the Supreme Court's concerns about the diminished penological justification for LWOP sentences for juvenile offenders apply with equal strength to de facto LWOP sentences. Third, de facto LWOP is irreconcilable with Graham and *Miller*'s

> mandate that sentencing judges must provide non-incorrigible juvenile offenders with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

887 F.3d. at 142).

Insofar as federal courts have already adopted a de facto approach to defining which kinds of sentences are covered by *Miller*, the obvious corollary is to ask why such a de facto approach should not be equally guide the definition of which kinds of defendants are covered by *Miller*.

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

The instant petition should be granted because it represents the logical next step in the evolution of this jurisprudence, asking in sum and substance: what does

it mean to be a "juvenile" for Eighth Amendment purposes? Is being a "juvenile" merely a formal semantic designation, arrived at through arbitrary line drawing, such as the line presently drawn at 18 years of age? Or, rather, may slightly older defendants also possess the relevant qualities of a "juvenile" that define, for constitutional purposes, whether such a defendant may be sentenced to die in prison absent a finding of permanent incorrigibility or irreparable corruption?

Scientific research: Neurological research conducted in the years since *Miller* establishes that the "hallmark features" of those below eighteen such as lack of impulse control, less-than-fully formed judgment, and susceptibility to peer influence, continue after the age of eighteen because "biological and psychological development continues into the early twenties[.]" Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 642 (2016). It is now become well-established that he prefrontal cortex, the area of the brain responsible for maintaining impulse control, continues developing until a person is at least 21, and probably beyond. Kathryn Monahan *et al*., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 582 (2015) (discussing myelination process).

In this petition, we rely upon scientific research following *Miller* that has continued to demonstrate that this normal brain development continues into the mid-20s. See, *e.g*., *The Teenage Brain*, special issue, 22 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE no. 2 (2013); Fair, D., *et al*., *Functional Brain Networks*

Develop from a "Local to Distributed" Organization, 5 PLOS COMPUTATIONAL BIOLOGY 1 (2009); Hedman A., et al., *Human brain changes across the life span: A review of 56 longitudinal magnetic resonance imaging studies*, 33 HUMAN BRAIN MAPPING 1987 (2012); Simmonds, D., Hallquist, M., Asato, M., & Luna, B., *Developmental Stages and Sex Differences of White Matter and Behavioral Development through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*, 92 NEUROIMAGE 356 (2014); Somerville, L., Jones, R., & Casey, B.J., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues,* 72 BRAIN & COGNITION 124 (2010); Casey, B. J., *et al*. *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 225 (2010); Steinberg, L., *A Social Neuroscience Perspective on Adolescent Risk-taking*, 28 DEVELOPMENTAL REVIEW 78 (2008); Van Leijenhorst, L., et al., *Adolescent Risky Decisionmaking: Neurocognitive Development of Reward and Control Regions,* 51 NEUROIMAGE 345 (2010); Cohen, A. *et al*., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-emotional Contexts*, 4 PSYCHOLOGICAL SCIENCE 549 (2016); Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AMERICAN PSYCHOLOGIST 583 (2009); Cauffman, E., Shulman, E., Steinberg, L., Claus, E., Banich, M., Graham, S., & Woolard, J., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46

DEVELOPMENTAL PSYCHOLOGY (2010); Braams, B., van Duijvenvoorde, A., Peper, J., & Crone, E., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior,* 35 JOURNAL OF NEUROSCIENCE 7226 (2015); Shulman, E., & Cauffman, E. *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEVELOPMENTAL PSYCHOLOGY 167 (2014); Lebel, C. & Beaulieu, C., *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10943 (2011); Pfefferbaum. A. et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 Neuroimage 176, 176-193 (2013); Monahan, K. et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUSTICE 577, 582-83 (2015); Dosenbach, N.U.F. et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI 1358, 1358-59 (2010).

In particular, research shows areas of the brain related to impulse control and susceptibility to peer pressure continue to develop well past the age of eighteen. *See*, *e.g*., Cohen, A.O. et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMPLE L. REV. 769, 786-87 (2016); Scott, E.S., et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 644 (2016); Steinberg, L., et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 (2009); Weingard, A., et al., *Effects of Anonymous Peer Observation on*

Adolescents' Preference for Immediate Rewards, 17 DEVELOPMENTAL SCI. 71 (2013); Icenogle, *et al*., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample ("Maturity Gap")*, 43 L. & HUMAN BEHAVIOR 69 (2019); Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139 (2016).

As a result of extensive research since *Miller*, "[n]euroscientists now know that all three of the general differences between juveniles under 18 and adults recognized by Roper are present in people older than 18." *In re Monschke*, *supra*, 197 Wash. 2d at 324 (internal quotation marks and citation omitted).

Just as the "logic of Thompson extend[ed] to those who are under 18," *Roper*, 543 U.S. at 574, so too does the logic of *Miller* extend to those who are under 25. There is no rational basis for excluding those individuals from the constitutional protections outlined in *Miller*. Neurologically there is no bright line and there should be none legally: "[S]entencing courts must have discretion to take the mitigating qualities of youth . . . into account for defendants younger and older than 18." *In re Monschke*, *supra*, 197 Wash. 2d at 326.

Like juveniles, young adults are "more likely than somewhat older adults to be impulsive, sensation seeking, and sensitive to peer influence in ways that influence their criminal conduct." Icenogle, et al., *supra*, at 83. Additionally, like juveniles, young adults tend to lack the capacity to control their behavior when in

an emotionally aroused state. Cohen, *et al*., *supra* at 786.

In sum, valid and thorough scientific research conducted since the *Miller* decision establishes that when compared to the fully mature, young adults are "more like adolescents in their behavior, psychological functioning, and brain development." Scott, *et al*., *supra* at 645.

Legislative and regulatory enactments: Recognition that young adults should be treated differently than fully mature adults is shown by state and federal legislation in a variety of different areas.

On December 20, 2019, the president signed legislation raising the national age to purchase cigarettes to 21, effective immediately; prior to this, nineteen states, Washington D.C., and at least 540 localities had raised the age to purchase cigarettes from 18 to 21[6]. The national drinking age is 21.[7] Individuals under the age of 23 are considered legal dependents of their parents for purposes of the Free Application for Federal Student Aid (FAFSA), and those under the age of 24 are dependents for tax purposes.[8] Individuals may remain on their parents' health

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[6] *See* Campaign for Tobacco-Free Kids, *States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21*, https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_ localities_MLSA_21.pdf (last visited February 5, 2020)

[7] *See* 23 U.S.C.A. § 158 (2012).

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

insurance until age 26 under the Affordable Care Act.[9] Typically, people must be 20 or 21 to rent a car and are usually assessed higher rental fees if they are under the age of 25.[10] More than 45 states have extended the eligibility for foster-care services to youth over the age of 18, and the Individuals with Disabilities Education Act (IDEA) permits eligible students to receive services through age 21 if they have not earned a high school diploma.[11]

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

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[9] 42 U.S.C.A. § 300gg-14 (2010); The Ctr. for Consumer Info. & Ins. Oversight, *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Families and Businesses*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/CCIIO/Resources/Files/adult_child_fact_sheet.html (last visited February 5, 2020).

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

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

should be required before a young person with a still-developing brain is sentenced to die in prison.

A similar trend can be found in the enactment of state legislation providing greater protection to young adults in the criminal justice system than to their adult counterparts. Numerous states have passed youthful offender laws that extend special protections to individuals between 18 and 21. *See, e.g.*, ALA. CODE § 15-19-1; COLO. REV. STAT. ANN. §§ 18-1.3-407; 18-1.8-407.5; FLA. STAT. ANN. §§ 958.011-.15; HAW. REV. STAT. § 706-667; VA. CODE § 19.2-311. Similarly, California and Illinois have expanded parole eligibility for young adults under the ages of 26 and 21 respectively. *See* CA PENAL CODE §§ 3051, 3051.1; 730 ILC 5/5-4.5-110.

Recognizing that young adults are developmentally similar to juveniles in ways that bear on their ability to exercise good judgment, many other areas of the law have raised the age for exercising adult rights to twenty-one.[12] For example, in December 2019, Congress raised the age for tobacco purchase from 18 to 21. See 21 U.S.C. § 387f(d)(5). Individuals under the age of 21 cannot obtain a credit card without a co-signer, 15 U.S.C. § 1637(c)(8)(B), nor can they purchase handguns. 21 U.S.C. § 922(b)(1). Young adults may remain in foster care until their twenty-first birthdays, 42 U.S.C. § 6751(8)(A)-(8)(B)(i)(II), and they can receive

[12]The age of majority in the United States was 21 from the time of this nation's founding until 1942 when "wartime needs prompted Congress to lower the age of conscription from twentyone to eighteen." Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TULANE REV. 55, 64 (2016). This led to the lowering of the voting age to eighteen in 1971. *Id.* at 65.

their parents' health care coverage until the age of 26, 42 U.S.C. § 300gg-14. If we recognize that young adults require greater protections in these seemingly less consequential areas because they possess the same "transient rashness, proclivity for risk, and inability to assess consequences [as juveniles]," *Miller*, 567 U.S. at 472 (internal citation omitted), surely, the sentencing judge must have discretion to consider these same traits before condemning a young adult to die in prison.

There is little that renders the voting age a more appropriate dividing line between childhood and adulthood than the drinking age. It is simply an arbitrary choice – as is any rule that disregards the significant body of scientific research concerning adolescent brain development relied upon in *Miller* and *Montgomery*. Bright line rules may be necessary in certain circumstances, and may be appropriate where there are no compelling countervailing considerations. However, they are neither necessary nor appropriate in deciding whether it is constitutional to sentence young people with still-developing and unformed brains to die in prison, especially where sentencing courts are capable of making an individualized determination as to the appropriateness of such a penalty for a particular defendant. At the very least, where the Court has relied upon scientific evidence showing that adolescent brains continue to develop in ways relevant to sentencing into the mid-twenties, any line drawn should accord with that evidence.

Conclusion

Establishing a bright-line at 18 and excluding marginally-older but similarly-situated defendants from the benefits of *Miller*'s rule is substantially

underinclusive, resulting in an unacceptable risk that young offenders will be disproportionately sentenced to die in prison absent any finding that they are permanently incorrigible. By assuming that *Miller* condoned the constitutionality of sentencing to mandatory life without parole young adults who may be developmentally indistinguishable from youth, even those whose offense may be significantly different from the principal and from the heartland violator of the statute, the Court of Appeals reached a conclusion that, we contend, is contrary to this Court's Eighth Amendment jurisprudence, developing research, and legislative and regulatory enactments. The Court should grant certiorari in this case to establish that a 22-year-old offender, particularly one with no criminal record and convicted of being an accessory, cannot constitutionally be subjected to mandatory life without parole and that the trial courts should be granted discretion, in the appropriate circumstances, to impose a lesser sentence upon defendants, such as Jose Suarez, who were younger than 25 at the time they committed their offenses, and who otherwise possess the distinctive aspects of youth with respect to their psychological and neurological development.

For the reasons set forth above, the petitioner, José Suarez,

respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Date: July 17, 2023

No. _____

In the

Supreme Court of the United States

October Term, 2023

JOSÉ SUAREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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