No. 95263-9
(Consolidated with Nos. 95510-7 & 96061-5)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ANTHONY A. MORETTI,
HUNG VAN NGUYEN, and
FREDERICK ORR,

Petitioners.

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The statement of identity and interest of amicus is set forth in the Motion for Leave to File submitted contemporaneously with this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

But for strikes committed when they were between 18 and 21 years old, Mr. Moretti, Mr. Nguyen, and Mr. Orr would not be serving life without parole sentences under the Persistent Offender Accountability Act (POAA).[1] This Court could accept the artificial boundary of the eighteenth birthday and decide that because the strike offenses occurred when Mr. Moretti, Mr. Nguyen, and Mr. Orr were over 18 years of age, these individuals must serve life without parole—the harshest punishment under Washington's criminal law. Or, this Court could again embrace emerging science to apply justice and recognize, as it did in *State v. O'Dell*, that the intrinsic nature of youth extends beyond the eighteenth birthday. 183 Wn.2d 680, 358 P.3d 359 (2015). Because at least one of the strike offenses occurred when they were less culpable and therefore "less deserving of the most severe punishments," *Graham v. Florida*, 560 U.S. 48, 58, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), Petitioners ask the

[1] RCW 9.94A.555, 570; *see also* RCW 9.94A.030(35) (defining offender), (38) (defining persistent offender).

Court to determine that their punishment is disproportionate and therefore cruel, in violation of article I, section 14.

Amicus presents three points highlighting that under article I, section 14, a categorical bar of youthful strikes—strike offenses committed between the ages of 18 and 21—is doctrinally sound. First, courts and legislatures around the nation have responded to a growing body of science that the mitigating qualities of youth extend to at least 21 years old,[2] and this trend should inform the Court's understanding of the categorical bar analysis. Second, just as individual proportionality review of persistent offender punishment under article I, section 14 encompasses all strikes, so must categorical proportionality review of persistent offender punishment—making salient Petitioners' youth at the time of *each* strike. Third, characterization of recidivist schemes as punishment for only the last strike is inapposite in the context of proportionality review. Amicus discusses an inconsistency within this Court's article I, section 14 persistent offender proportionality jurisprudence that reviews all strikes, yet characterizes recidivist schemes as punishment for only the last strike by citing *State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976). The cases on which *Lee* relies for this rule are not grounded in proportionality

[2] *See generally* Br. of Amici Curiae Washington Association of Criminal Defense Lawyers, et al.

analysis, and are instead decisions upholding early habitual offender statutes against challenges based on double jeopardy, due process, and ex post facto protections.

ARGUMENT

I. COURTS AND LEGISLATURES ACROSS THE COUNTRY ARE ACKNOWLEDGING THAT THE MITIGATING QUALITIES OF YOUTH EXTEND TO AT LEAST 21 YEARS OF AGE, AND THIS TREND SHOULD INFORM THE COURT'S CATEGORICAL BAR ANALYSIS.

Proportionality analysis asks whether the punishment is disproportionate to either the crimes or the class of offender. *State v. Bassett*, 192 Wn.2d 67, ¶ 28, 428 P.3d 343 (2018); *Graham*, 560 U.S. at 59. While individual proportionality "weighs the offense with the punishment," *Bassett*, 192 Wn.2d ¶ 28, categorical proportionality analysis "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.* (citing *Graham*, 560 U.S. at 67). Here, the Petitioners ask the court to consider the categorical proportionality of the class of offenders[3] serving life without parole based on one or more strike

[3] The State contends in its supplemental briefs that the class of offenders is ill-defined. Supp. Br. of Resp't in *Moretti* at 15-16; Supp. Br. of Resp't in *Nguyen* at 18; Supp. Br. of Resp't in *Orr* at 9-10. Petitioner Moretti defines the class as those serving life without parole based on one more strikes committed between the ages of 18 and 21. Supp. Br. of Moretti at 12-13, 19.

offenses committed as a youth, from ages 18-21.[4]

A categorical analysis consists of two prongs. *Bassett*, 192 Wn.2d ¶ 27. First, the Court considers national consensus with respect to the specific sentencing practice at issue. *Id.* Second, it requires this Court to exercise its 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.'" *Id.* (quoting *Graham*, 560 U.S. at 61) (alternations in original). In these cases, that 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,' and 'whether the challenged sentencing practice serves legitimate penological goals.'" *Id.* ¶ 34 (quoting *Graham*, 560 U.S. at 67). Because the parties' supplemental briefs cover the independent judgment prong in detail, amicus has taken care to not repeat those arguments, and instead provides additional argument on the national consensus prong.

While the issue before the Court is the constitutionality of youth strikes (18-21) rather than juvenile strikes (under 18), the consensus against juvenile adjudications and juvenile strikes is relevant, as the brain

[4] These three cases were stayed pending *State v. Bassett*, making the inclusion of the categorical challenge appropriate in supplemental briefing.

science demonstrates that the same deficits are present in both age groups. *See generally* Br. of Amici Curiae Washington Association Criminal Defense Lawyers, et al. (explaining the emerging consensus in the scientific community that there are no meaningful psychological or neurobiological distinctions between those who fit the current definition of juvenile, and those who are between 18 and 21). Professor Beth Caldwell's recent analysis of whether states with harsh recidivist statutes (allowing sentences from 15 years to life) permit the use of juvenile adjudications as prior convictions to enhance sentences under recidivist statutory schemes determined that such a national consensus exists. Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. Rev. 581, 617-25 (2012).[5]

While states' approaches to the use of adult convictions of juvenile offenders as strikes vary more than the use of juvenile adjudications, Caldwell notes that there may be an "emerging national consensus against using adult convictions of juvenile offenders for sentencing

[5] As of 2012, ten states, including Washington, RCW 9.94A.030(35), (38), have legislation that explicitly excludes the use of juvenile adjudications as prior convictions for three strikes sentencing. Caldwell, *supra*, at 619 n.240 (citing jurisdictions). Ten additional jurisdictions' statutes "most likely prohibit the use of juvenile adjudications as strikes." *Id.* at 619 n.241. Thirteen additional states appear to prohibit the use of juvenile adjudications as strikes through case law. *Id.* at 620 n.244. In total, as of 2012, thirty-three states most likely prohibit the use of juvenile adjudications to count as "strikes."

enhancements." *Id.* at 628; *see also Roper v. Simmons*, 543 U.S. 551, 566 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (it is the "consistency of the direction of change" rather than a static examination of the law at any particular point that is relevant (quoting *Atkins v. Virginia*, 536 U.S. 304, 315, 122 S. Ct. 2442, 153 L. Ed. 2d 335 (2002))). In 2012, Caldwell identified at least eight jurisdictions that "prohibit or limit the circumstances under which convictions of juvenile offenders in adult court may be used for future sentencing enhancement under three strikes laws." Caldwell, *supra*, at 628 n.282.[6] Since then, at least one state, Wyoming, as part of its *Miller*[7] fix statute, not only eliminated juvenile life without parole, but also excluded convictions of juveniles in adult court from counting as strike offenses under its habitual offender statute. Wyo. Stat. Ann. § 6-10-201(b)(ii) (permitting life without parole for three strikes only after three or more previous convictions for "offenses committed after the person reached the age of eighteen (18) years of age."); *see also* 2013

[6] These eight jurisdictions break down into two categories. Kentucky, New Jersey, New Mexico, North Dakota, and Oregon expressly limit or exclude the use of juvenile convictions as strikes. Ky. Rev. Stat. Ann. § 532.080(2)(b), 3(b); N.J. Stat. Ann. § 2C:44-7; N.M. Stat. Ann. § 31-18-23(C); N.D. Cent. Code § 12.1-32-09; Or. Rev. Stat. Ann. § 161.725. Alabama, New York, and Wisconsin do not allow the use of youthful offender convictions of juveniles in adult court as strikes. N.Y. Penal Law § 60.10; *Ex parte Thomas*, 435 So. 2d 1324, 1326 (Ala. 1982); *State v. Geary*, 95 Wis. 2d 736, 289 N.W.2d 375, 1980 WL 99313 (Ct. App. 1980).

[7] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 138 L. Ed. 2d 407 (2012).

Wyo. Sess. Laws 75 (showing *Miller* fix along with revision to habitual offender statute).[8] When *Graham* was decided, only six jurisdictions had prohibited JLWOP categorically, and another seven jurisdictions allowed JLWOP but only for homicide crimes. *Graham*, 560 U.S. at 62.

In conducting the categorical bar analysis, amicus also encourages the Court to take note of significant court decisions and legislative action across the country that acknowledge that youth continues to diminish culpability through the early twenties. *See, e.g.*, *Cruz v. United States*, No. 11-CV-787 (JHC), 2018 WL 1541898 (D. Conn. Mar. 29, 2018) (granting defendant's habeas petition on the ground that *Miller* applies with equal force to 18-year-olds and rendered his mandatory life sentence unconstitutional); *United States v. Walters*, 253 F. Supp. 3d, 2017 WL 2362644 (E.D. Wis. 2017) (imposing sentence of time served on 19-year-old offender, which was below federal guidelines, in recognition of underlying brain science); *In re Poole*, 24 Cal. App. 5th 965 (Cal. Ct. App. 2018) (vacating a parole board's decision denying parole in light of inadequate consideration of age of 19-year-old offender); Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 (Fayette Circuit Court, 7th

[8] http://legisweb.state.wy.us/2013/Session Laws.pdf.

Div. Aug. 1, 2017) (Scorsone, J.), *review granted*, No. 2017-SC-436 (Ky. Feb. 15, 2018) (declaring death penalty unconstitutional for those under 21 years of age at the time of the offense, and relying on brain-science-related testimony of Dr. Laurence Steinberg, as individuals under 21 are categorically less culpable in the same way that *Roper* describes under 18 year olds as less culpable); *State v. Norris*, No. A-3008-15T4, 2017 WL 2062145 (N.J. Super. Ct. App. Div. May 15, 2017) (relying on *Miller* to support its decision to remand for resentencing a de facto life sentence imposed for murder committed by 21-year-old defendant); *State v. Reyes*, No. 9904019329, 2016 WL 358613 (Del. Super Ct. Jan. 27, 2016), *reversed on other grounds by State v. Reyes*, 155 A.3d 331 (Del. 2017) (on collateral review, vacating death sentence for trial counsel's failure to explore and present the mitigating evidence concerning the qualities of 18 year-old defendant's youth).

Legislative reform also reflects recognition of the diminished culpability of youthful offenders. California has provided youthful offender parole. A.B. 1308 (Cal. 2017) (amending Cal. Penal Code § 3051, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1308 (extending youth offender parole eligibility to those who committed offenses before age 25). Alabama, Florida, Hawaii, and Virginia provide special status and resentencing relief to youthful

offenders. Ala. Code §§ 15-9-1 to 15-19-7 (permitting courts to designate certain offenders under the age of 21 as "youthful offenders," entitling them to a suspended sentence, a period of probation, a fine, and/or a term of incarceration not to exceed 3 years); Fla. Stat. § 958.04 (permitting alternative sentences for those under 21 at time of sentencing for any felony offense other than those carrying capital or life sentence, including supervision on probation, community custody, or incarceration not to exceed 6 years); Haw. Rev. Stat. § 706-667 (defining young adult defendant as under 22 that has not previously been convicted of a felony, and providing for specialized correctional treatment, community custody, individualized rehabilitative treatment, and/or sentencing to no more than 8 years); Va. Code § 19.2-311 (providing for relief of those convicted of certain first-time offenses occurring before age 21, including giving courts discretion to sentence to an indeterminate period of incarceration of four years). And Washington has joined Vermont in expanding juvenile court jurisdiction. S. 234, 2017-2018 Sess. (Vt. 2018), https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT201/ACT201%20As%20Enacted.pdf. As of February, four other jurisdictions had bills pending to expand juvenile court jurisdiction. Campaign for Youth Justice, 2019 Legislation on Youth Prosecuted As Adults in the States (Feb. 4, 2019), http://cfyj.org/2019/item/2019-legislation-on-youth-prosecuted-as-

adults-in-the-states.

Importantly, the determination of a national consensus is not dispositive. *Bassett*, 193 Wn.2d ¶ 33. And a consensus must always begin with one.

II. PROPORTIONALITY REVIEW UNDER ARTICLE I, SECTION 14 ENCOMPASSES ALL STRIKES THAT FORM THE BASIS FOR RECIDIVIST PUNISHMENT.

This Court must consider whether age categorically diminishes the culpability of the offenders at the time of *each of the strikes* in conducting a categorical proportionality analysis, as part of the exercise of its independent judgment. The consideration of all strikes is—and has been—central to proportionality review of persistent offender punishment under article I, section 14 since *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).[9] In *Fain*, this Court considered the proportionality of a life sentence under the habitual offender statute in effect in 1980 by looking at the nature of "*each of the crimes that underlies his conviction as a habitual offender*" in determining whether Mr. Fain's sentence violated the more protective article I, section 14. *Id.* at 397-98 (emphasis added) (citing *Rummel v. Estelle*, 445 U.S. 263, 295, 100 S. Ct. 1133, 63 L. Ed.

[9] If this Court does not adopt the categorical approach to Petitioners' claims, *amicus* urges the Court to expand the *Fain* factors to encompass the characteristics of the offender, as articulated in the ACLU amicus brief.

2d 382 (1980) (Powell, J., dissenting) (considering each of the victimless crimes underlying a life without parole sentence)).

This Court's more recent decisions in *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996), and *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014), also reflect that proportionality analysis under article I, section 14 subjects each of the strike offenses to scrutiny, as well as the "qualifying" strike, in reviewing a sentence under the POAA. In *Manussier*, this Court's proportionality analysis under article I, section 14[10] explicitly considered the two prior strikes in addition to the third strike before determining that the sentence was not disproportionate. 129 Wn.2d at 485 (considering "*each of the offenses underlying his conviction* as a 'persistent offender" and that *all three* of his offenses were serious crimes (emphasis added)).

In *Witherspoon*, before concluding that the life sentence was not disproportionate, the Court looked at the nature of the first two strike offenses (first degree burglary and residential burglary with a firearm). 180 Wn.2d ¶ 27 (relying on the analysis in *Manussier* and *Lee*, where the

[10] This Court also considered the prior strikes under its Eighth Amendment proportionality analysis. *Id.* at 484 (contrasting Mr. Manussier's strike offenses as "far more serious" than the petitioners in *Solem* and *Rummel*, where the strike offenses were nonviolent property offenses (citing *Solem v. Helm*, 463 U.S. 277, 299, 103 S. Ct. 3001, 3013, 77 L. Ed. 2d 637 (1983); *Rummel*, 445 U.S. at 284-85)).

Court had considered the prior strikes in conducting proportionality analysis of prior persistent offender punishments). The *Witherspoon* Court also suggested that the "differences between children and adults" recognized in *Graham* and *Miller* might have application in proportionality analysis under article I, section 14, based on the offender's age at commission of "*all three* of his strike offenses." *Id.* ¶¶ 29-31 (emphasis added) (declining to apply *Graham* and *Miller*, because Mr. Witherspoon was an adult at the time of all three of his strike offenses).[11]

While the substance of the individual proportionality analysis in these three cases is inapplicable to the categorical challenge here, *Fain*, *Witherspoon*, and *Manussier* demonstrate more generally that proportionality analysis under article I, section 14 encompasses *all* of the conduct that forms the basis for the life without parole sentence. The third strike is not considered in a vacuum.

Federal decisions conducting proportionality analysis under the Eighth Amendment in persistent offender contexts also scrutinize all strike offenses.[12] *Solem v. Helm*, 463 U.S. 277, 296–97, 303, 103 S. Ct. 3001,

[11] The opinion does not state whether any of Witherspoon's strike offenses were committed between the ages of 18-21.

[12] The Fourth Circuit—the only circuit to date that has meaningfully considered the import of *Graham* and *Miller* on federal recidivist schemes under the federal sentencing guidelines—determined that a life sentence imposed under the de facto career offender provision of the federal sentencing guidelines was substantively unreasonable, where the majority of the predicate convictions

3013, 77 L. Ed. 2d 637 (1983) (life without parole imposed to punish the relatively minor criminal conduct underlying all strike offenses was disproportionate: "Helm's status [as a recidivist]. . .*cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor*"); *Rummel*, 445 U.S. at 284 (persistent offender

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occurred when the petitioner was a juvenile. *United States v. Howard*, 773 F.3d 519, 531-32 (4th Cir. 2014). The *Howard* court conducted a substantive reasonableness review, requiring courts to consider the "totality of the circumstances" by "proceed[ing] beyond a formalistic review of whether the district court recited and reviewed the 3553(a) factors [federal sentencing guidelines] and ensur[ing] that the sentence caters *to the individual circumstances of a defendant.*" *Id.* at 531 (citation omitted). The *Howard* court determined the district court erred by "focusing too heavily on Howard's juvenile criminal history in its evaluation of whether it was appropriate to treat Howard as a career offender." *Id.*; *see also id.* at 532 (relying on *Graham* and *Miller* to support its conclusion, given the diminished culpability of juvenile offenders).

The other federal cases relied on by the State to argue that the age of the offender in earlier strike offenses is not material either did not engage in substantive reasonableness review, and/or simply avoided the issue of youth altogether by concluding that sentencing took place at the time the offender was an adult. *See United States v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013) (declining to consider youth under substantive reasonableness review, because *Roper* and *Miller* did "not deal specifically—or even tangentially—with sentence enhancement" (internal quotations omitted)); *United States v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010) (rejecting individual proportionality argument, declining to engage in substantive reasonableness review, and declining to acknowledge the import of *Roper* and *Graham*, instead relying on *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002)—a case decided before *Roper*—that permitted juvenile court adjudications to enhance subsequent sentences for adult convictions); *United States v. Graham*, 622 F.3d 445, 457-64 (6th Cir. 2010) (declining to consider totality of circumstances in conducting reasonableness review and unpersuasively determining that *Graham v. Florida* does not apply because defendant was an adult at the time of the commission of the third strike offense); *United States v. Mays*, 466 F.3d 335 (5th Cir. 2006) (no substantive reasonableness review; declining to acknowledge applicability of *Roper* because there was no national consensus that sentencing enhancement based in part upon juvenile conviction contravenes modern standards of decency).

punishment is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes," but declining to find a life sentence based on nonviolent, petty property crimes constituted cruel and unusual punishment); *Rummel*, 445 U.S. at 300 (Powell, J., dissenting)[13] (engaging in an individual proportionality analysis by analyzing each of the three crimes in concluding that "a mandatory life sentence for the commission of three nonviolent felonies is unconstitutionally disproportionate").[14]

III. THE STATE'S RELIANCE ON *THORNE*, *LEE*, AND *LEPITRE* TO FORECLOSE CONSIDERATION OF PREVIOUS STRIKES IGNORES THE CONTEXT AND DOCTRINAL ROOTS OF THE CITED LANGUAGE.

There is, admittedly, a tension that exists in the language used by

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[13] Justice Powell's *Rummel* dissent foreshadowed his majority opinion in *Solem.*

[14] Further, the availability of proportionality review under article I, section 14 in the persistent offender context is material to factor 4 of the parties' *Gunwall* analysis. The preexisting Washington law demonstrates that the Court has subjected persistent offender punishment to proportionality analysis under article I, section 14, even where Eighth Amendment proportionality jurisprudence has, at times, restricted itself to apply only to capital punishment. *Rummel*, 445 U.S. at 272 ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."); *Rummel*, 445 U.S. at 274 ("[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative."). *But see Solem*, 463 U.S. at 286-90 (comprehensively discussing the Court's proportionality jurisprudence to reaffirm that the Eighth Amendment guarantees proportionality between the crime and any criminal sentence, not just capital punishment).

this Court in its past decisions in POAA and other habitual offender statute cases. Specifically, this Court has simultaneously recognized that proportionality review encompasses *all strikes*, *Fain*, 94 Wn.2d at 397-98 (discussing each of the underlying crimes), while also pronouncing that Washington's recidivist schemes punish the last strike only, *State v. Thorne*, 129 Wn.2d 736, 776, 921 P.2d 514 (1996) ("The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime" (quoting *Lee*, 87 Wn.2d at 937)).[15] Importantly, the context for this pronouncement in *Thorne* is the Court's application of *Fain* factor 4 to determine if, as applied to Mr. Thorne, his punishment was disproportionate. The Court considered all of Mr. Thorne's previous convictions. 129 Wn.2d at 775. In *Lee*, the Court likewise considered all of Mr. Lee's offenses. 87 Wn.2d at 937, 937 n.4 (discussing Mr. Lee's prior convictions and finding sentence not disproportionate, and unlike the disproportionate sentence of a person whose "prior crimes were writing a check for insufficient funds and transporting a forged check across state lines"). These cases demonstrate that the Court examined not just the last offense but also the previous

[15] This Court cited the identical language from *Lee* in *Rivers*, *Manussier*, and, more recently, in *Witherspoon*. *State v. Rivers*, 129 Wn.2d 697, 714-15, 921 P.2d 495 (1996) (quoting *Lee*, 87 Wn.2d at 937); *Manussier*, 129 Wn.2d at 677 (quoting *Lee*, 87 Wn.2d at 937); *Witherspoon*, 180 Wn.2d ¶¶ 23-28 (quoting *Rivers*, 129 Wn.2d at 714-15 (quoting *Lee*, 87 Wn.2d at 937)).

offenses in order to determine disproportionality. Thus, the State's reliance upon *Thorne* and *Lee* to foreclose consideration of the previous strikes for Mr. Moretti, Mr. Nguyen, and Mr. Orr is misplaced.[16]

Instead, the import of the language in *Thorne* and *Lee* referring to recidivist statutes as punishing only the last strike becomes apparent when one follows the citation chain. The *Lee* Court, citing *State v. Miles*, 34 Wn.2d 55, 61-62, 207 P.2d 1209 (1949), rejected the proportionality argument in one sentencing, stating "[t]he life sentence…is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime," *Lee*, 87 Wn.2d at 239 (citing *Miles*, 34 Wn.2d at 61-62).

However, a close examination of the Court's sparse decision in *Miles* shows that the *Miles* Court conducted no proportionality analysis and upheld the habitual offender statute, citing the rules that habitual offenders "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier

[16] The State focuses on the language quoted in *Lee* without placing it in context, in an effort to contract the scope of proportionality review to only the last strike. Supp. Br. of State in *Moretti* at 14 (citing *State v. Thorne*, 129 Wn.2d 736, 776, 921 P.2d 514 (1996) (quoting *Lee*, 87 Wn.2d at 937)); Supp. Br. of State in *Nguyen*, at 15 (citing identical rule from *Lee*) (quoting *Thorne*, 129 Wn.2d at 776 (quoting *Lee*, 87 Wn.2d at 937))); Supp. Br. of State in *Orr* at 6, 18 (citing a rule similar to the language quoted in *Lee* in *State v. Le Pitre*, 54 Wash. 166, 103 P. 27 (1909)).

penalties when they are again convicted," 34 Wn.2d at 62 (citing *Graham v. W. Virginia*, 224 U.S. 616, 623, 32 S. Ct. 583, 56 L. Ed. 917 (1912)), and that "punishment is for the new crime only," *id.* (citing *McDonald v. Commonwealth of Massachusetts*, 180 U.S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901)). The two cases cited by the *Miles* Court for this rule involved challenges to early habitual criminal offender statues under double jeopardy, due process, and ex post facto challenges. *McDonald*, 180 U.S. 311 (rejecting a challenge to Massachusetts's habitual criminal statute based on the double jeopardy and ex post facto provisions because the "punishment is for the new crime only, but is the heavier if he is an habitual criminal"; no Eighth Amendment challenge brought); *Graham*, 224 U.S. at 623 (citing *McDonald*, 180 U.S. at 312-13) (rejecting a challenge to West Virginia's habitual criminal offender statute under due process and double jeopardy, reasoning that habitual criminal offenders "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted").[17]

[17] While the petitioner in *Graham* apparently argued that his sentence was cruel and unusual punishment, *Graham*, 224. U.S. at 623, the Court resolved it in one sentence, again relying on cases that did not involve Eighth Amendment proportionality challenges: "Nor can it be maintained that cruel and unusual punishment has been inflicted," *id.* at 631 (citing *Re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890) (rejecting challenge to New York's statute authorizing capital punishment by electric shock); *McDonald*, 180 U.S. 311; and

Similarly, in an even earlier challenge to a habitual criminal statute, *LePitre*, 54 Wash. 166, 03 P. 27 (1909), the Court summarily dismissed claims based on double jeopardy, ex post facto, jury trial rights, or cruel and unusual punishment with a single sentence: "It [the habitual criminal statute] merely provides an increased punishment for the last offense." *Id.* at 168 (citing secondary sources and *In re Miller*, 110 Mich. 676, 68 N.W. 990 (1896)). The decision *LePitre* relies on, *In re Miller*, a two paragraph opinion, dismissed an ex post facto challenge to a Michigan statute providing that convicts with prior criminal history would not be entitled to a reduction in sentence for good behavior, whereas those without prior criminal history would. *Id.* at 676. The *Miller* Court found no ex post facto violation. *Id.* at 677.

Thus, tracing the origins of the *Lee* and *LePitre* pronouncement reveals that these cases do not foreclose consideration of previous strike offenses. Instead, the context and history of *Lee* and *LePitre* simply reaffirm that recidivist statutes do not run afoul of due process protections or guarantees against double jeopardy or ex post facto laws. And more

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Moore v. Missouri, 159 U.S. 673, 676-77, 16 S. Ct. 179, 40 L. Ed. 301 (1895) (rejecting challenge to habitual criminal statute based on double jeopardy, reasoning that "[t]he increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense, and rejecting the challenge based on cruel and unusual punishment in one sentence)).

fundamentally to Petitioners' cases, it is improper to rely on this pronouncement, as it has no place in proportionality review under article I, section 14.

CONCLUSION

Amicus asks this Court to apply what it recognized in *O'Dell*—that the same deficits of the juvenile brain are present beyond the artificial boundary of the eighteenth birthday. The culpability of those who commit strike offenses in their youth is inherently diminished, and therefore cannot be the basis for imposition of the harshest sentence now available in Washington. The most just and practical solution is to categorically bar strike offenses committed between the ages of 18 and 21 from counting as strikes under the POAA.

RESPECTFULLY SUBMITTED this 18th day of April, 2019.

s/ Jessica Levin

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on April 18, 2019, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 18th day of April, 2019.

s/ Jessica Levin

Jessica Levin
Counsel for Amicus Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

No. 95263-9
(Consolidated with Nos. 95510-7 & 96061-5)

GR 14.1 Appendix to Brief of Fred T. Korematsu Center for Law and Equality as Amicus Curiae in Support of Petitioners

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Luis Noel CRUZ, Petitioner,
v.
UNITED STATES of America, Respondent.

CIVIL ACTION NO. 11-CV-787 (JCH)
|
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RULING RE: SUCCESSIVE PETITION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

Janet C. Hall, United States District Judge

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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.

***2** 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.

[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.

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 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).

***3** 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.") (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).

[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.

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).

***4** 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.Appx. 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.Appx. 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.

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.

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 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.

[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** 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]

[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 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.

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 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.

***6** 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.

***7** 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.Appx. 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.Appx. 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.

***8** 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.

[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.

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 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).

***9** 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.

[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.

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.

***10** 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 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)).

[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 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).

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, gatekeeping 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 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]

[9] The Government argues to the contrary that whether Miller applies to Cruz is a preliminary gatekeeping 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.

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:

> ***11** 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 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).

[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)).

***12** 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 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]

[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.

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, 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]

[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.

***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 (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.

***14** 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]

[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.

***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 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.

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

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 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.

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.

***17** 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 " '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.' ").

***18** 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:

> ***19** 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

***20** 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.

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.

***21** 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 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.

***22** 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.

***23** 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]

[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.

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

[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.

***24** 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 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]

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 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 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.

***25** 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 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.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Markita A. NORRIS, a/k/a Markita Anita Norris and Makita A. Norris, Defendant–Appellant.

DOCKET NO. A–3008–15T4
|
Submitted February 27, 2017
|
Decided May 15, 2017

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 10–07–0774.

Attorneys and Law Firms

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Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Cynthia L. Ritter, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Before Judges Sabatino, Nugent and Haas.

Opinion

PER CURIAM

***1** Defendant Markita A. Norris appeals from her judgment of conviction on resentencing for murder and attempted murder. We previously affirmed defendant's convictions, *State v. Markita A. Norris*, No. A–1561–12 (App. Div. Nov. 30, 2015), *certif. denied*, 226 *N.J.* 213 (2016), but remanded for resentencing. *Id.* (slip op. at 2).

On remand, after finding one less aggravating factor on the murder count, and two fewer aggravating factors on the attempted murder count, the court imposed the same consecutive sentences it had previously imposed.[1] The court did not explain why, on remand, the elimination of the most serious aggravating factors it had considered in its original sentence did not affect the resentence. For this and the reasons that follow, we are constrained to remand again for further sentencing proceedings. In doing so, we reject defendant's suggestion that the sentencing was a product of the sentencing court's intransigence.

[1] The aggravating factors set forth in *N.J.S.A.* 2C:44–1(a), relevant to this appeal, include: (1) The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner; (2) The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance; (3) The risk that the defendant will commit another offense; (6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted; and, (9) The need for deterring the defendant and others from violating the law.

The facts underlying defendant's conviction are detailed in our previous opinion and need not be repeated in their entirety. Rather, we recount the facts relevant to defendant's sentence. The State established at trial that following a fundraiser at the Black United Fund in Plainfield, defendant and her uncle instigated a verbal altercation with the surviving victim and the decedent. *Id.* (slip op. at 3–4). During the verbal altercation, defendant's uncle punched the surviving victim, and a fight ensued. *Id.* (slip op. at 4). Although the trial witnesses were not entirely consistent as to the sequence of events, their testimony, considered collectively, established that while defendant's uncle fought with the surviving victim, defendant stabbed the surviving victim twice in the left arm and once in the back. The surviving victim suffered a collapsed lung and other injuries. *Id.* (slip op. at 4–5, 8).

The testimony of witnesses also established that defendant fought with and stabbed the decedent, who collapsed on the sidewalk. Defendant walked away but returned and kicked the victim, once or repeatedly, according to differing witness accounts. *Id.* (slip op. at 5–8). After stabbing the decedent and then attacking him a second time, defendant danced in the middle of the street before she and her uncle drove away in his car. *Id.* (slip op. at 5). The autopsy revealed the cause of decedent's death to be multiple stab wounds to the chest, abdomen, and right arm. *Id.* (slip op. at 8).

***2** When the trial court sentenced defendant the first time, the court did not distinguish between the aggravated assault and murder counts when it considered aggravating and mitigating factors. The court explained the basis for finding aggravating factors one and two:

> In this matter, supporting those factors, by the facts on this case, the [c]ourt finds the cruel manner in the attack as this person attacked two individuals, both separately, two separate victims with a knife, one of which she was having a dispute, and then when finishing with one, turned her attentions to the other, stabbing one from the back.
>
> Next, the excessive force. There were multiple stab wounds involved in this case.
>
> Next supporting factor, the brutal and senseless nature. The victims were attacked in this matter after a fund raiser dance. This was at a place in Plainfield called the BUF. It was there for a youth sports night. This whole incident appeared to occur due to a bump on the dance floor, it spilled over to the streets outside, after people were leaving. Brutal and senseless.
>
> Overall, the nature of this case is horrific, the acts depraved, and the dancing over the victim uncalled for, showing this [c]ourt a lack of remorse, and in a review of the papers, the [c]ourt believes demonstrates lack of remorse in this case.
>
> [*Id.* (slip op. at 27–28).]

In our opinion affirming defendant's convictions, we remanded for resentencing, explaining:

> There are several problems with the trial court's finding of factors one and two. First, the trial court's opinion does not include for each factor "a distinct analysis of the offense for which the court sentences the defendant." *State v. Lawless*, 214 *N.J.* 594, 600 (2013).
>
> Second, the trial court referred to the "cruel" manner of the attack on the victims without any discussion or finding as to whether defendant inflicted pain or suffering gratuitously, as an end in itself, rather than merely as a means of committing the crimes. [*State v. O'Donnell*, 117 *N.J.* 210, 217–18 (1989)]. If the trial court intended to make this distinction, it did not explain the facts upon which it relied.
>
> Third, the trial court's emphasis on two crimes and two attacks was central to its determination to impose consecutive sentences under *Yarbough*. Thus, it appears the court considered the same factors in sentencing defendant to consecutive sentences and in sentencing defendant to upward ranges of the consecutive sentences.
>
> We have other concerns as well. For example, the court cites the use of "excessive force," but does not explain how the force used in this case is different from any other first-degree murder or first-degree aggravated assault committed with a knife. In fact, it appears the excessive force—multiple stab wounds—caused decedent's death, thereby subjecting defendant to a sentence for murder. And though the court found the attacks to be brutal and senseless, the question is whether there is something about what occurred here that is more brutal and senseless than any other first-degree murder or first-degree aggravated assault.
>
> In short, it appears from this record that the court double-counted aggravating factors one and two. Accordingly, we vacate defendant's sentence and remand for resentencing. In view of this disposition, we need not address whether the eighty-year aggregate sentence of the twenty-one-year-old defendant—in effect, a sentence to life imprisonment without any likelihood of parole—shocks the judicial conscience.
>
> ***3** [*Id.* (slip op. at 28–29.]

When the remand hearing commenced, the court stated that it would not consider aggravating factors one and two in resentencing defendant. During the course of oral argument, however, the court was apparently persuaded by the State's contention that, though aggravating factor two was without "a solid justification," aggravating factor one was at least applicable as to the decedent.

Before imposing sentence, the court confirmed defendant's eligibility for a discretionary extended term under *N.J.S.A.* 2C:44–3(a), the persistent offender statute. Defendant, age twenty-one when she committed the murder and attempted murder, had been convicted of four previous adult offenses: third-degree resisting arrest and fourth-degree criminal trespass, both committed when she was eighteen years old; and third-degree possession of a weapon for an unlawful purpose and third-degree possession of a controlled dangerous substance, both committed when she was nineteen years old. Defendant thus qualified as a persistent offender. She had "been convicted of a crime of the first, second or third degree

[when] [twenty-one] years of age or over, [and had] been previously convicted on at least two separate occasions of two crimes, committed at different times, when [she] was at least eighteen years of age, ... within [ten] years of the date of the crime for which [she was] being sentenced." *N.J.S.A.* 2C:44–3(a).

Next, as to the crime of murder, the court found aggravating factor one, the nature and circumstances of the offense. The court found that defendant left the decedent lying face down on the sidewalk after she stabbed him, and "returned ... to attack him about the face, head and chest."

The court also found aggravating factor number three, the risk of re-offense. The court based its determination on defendant's record, including her "lack of success" on probation and parole. She served two probationary terms resulting in two violations of probation. The court pointed out "[s]he had four New Jersey State Prison terms and four parole violations[.]" The court also noted defendant's juvenile record.

The court found aggravating factor six, defendant's prior criminal record. The court explicitly stated it was considering factor six only insofar as it was a consideration as to the extended-term sentence.

Lastly, the court found aggravating factor number nine based on defendant's criminal record, the need to protect the public, and the need to deter others by sending a message that such conduct will not be tolerated. The court added that defendant demonstrated a lack of remorse by dancing in the street after stabbing the victims. The court found no mitigating factors.

After explaining the reasons for imposing consecutive sentences, the court made clear it was applying aggravating factors three and nine to defendant's sentence for attempted murder, and aggravating factors one, three and nine to her sentence for murder. In both instances, the court found that the aggravating factors substantially outweighed the non-existent mitigating factors.

***4** In summary, when the court first sentenced defendant, it appeared to find aggravating factors one, two, three and nine on both counts, giving great weight to aggravating factors one and two. In contrast, on resentencing, the court found only aggravating factors one, three and nine on the murder count, and only three and nine on the remaining count. Yet, notwithstanding this significant quantitative and qualitative difference in aggravating factors, the court imposed the same sentence.

The court imposed its original sentence of fifty-years on the murder count. Applying NERA, the court determined defendant must serve forty-two years, six months and two days before becoming eligible for parole. As to the attempted murder count, the court again imposed the same sentence, thirty years subject to NERA. Thus, on the attempted murder count, defendant must serve twenty-five years, six months and two days before becoming eligible for parole. The court imposed the sentences consecutively, resulting in an aggregate eighty year term with sixty-eight years of parole ineligibility. Defendant will become eligible for parole when she is eighty-nine years old. In effect, the court imposed a life sentence on the twenty-one-year-old defendant.

On the resulting judgment of conviction, under a printed directive to include all aggravating and mitigating factors, the judgment states: "The [c]ourt finds that aggravating factors 1, 2, 3 and 9 substantially outweigh the non-existent mitigating factors as originally noted." Defendant appealed from the judgment of conviction entered after resentencing.

On appeal, defendant raises the following arguments:

POINT I

THE 80 YEAR SENTENCE IMPOSED AT THE RESENTENCING—THE SAME AS THAT PREVIOUSLY IMPOSED—IS MANIFESTLY EXCESSIVE.

A. Because The Court Reimposed The Same Sentence As Previously Imposed After Eliminating Significant Aggravating Factors, The Case Should Be Remanded For Sentencing.

B. The Sentencing Court Erred In Finding That Aggravating Factor One Applied To The Murder Conviction, After The Appellate Division Remanded For Resentencing For Impermissible Double–Counting.

C. Defendant's Aggregate Sentence Of 80 Years Subject To NERA, Which Will Make Her Eligible For Parole When She Is 89 Years Old, Shocks The Judicial Conscience.

We agree that the trial court, having eliminated significant

aggravating factors, should not have imposed the same sentence, at least in the absence of a compelling explanation—something we cannot discern from the record.

Our review of a trial court's sentencing determination is deferential. *State v. Fuentes*, 217 *N.J.* 57, 70 (2014). Reviewing courts must not substitute their judgment for that of the sentencing court. *O'Donnell*, *supra*, 117 *N.J.* at 215. Nonetheless, "[a]ppellate courts are 'expected to exercise a vigorous and close review for abuses of discretion by the trial courts.' " *Lawless*, *supra*, 214 *N.J.* at 606 (citations omitted). Thus, for example, when a trial court fails to provide a qualitative analysis of the relevant sentencing factors on the record, or considers an aggravating factor that is inappropriate to a particular defendant or to the defense at issue, an appellate court may remand for resentencing. *Fuentes*, *supra*, 217 *N.J.* at 70.

Moreover, "[a] clear explanation 'of the balancing of aggravating and mitigating factors with regard to imposition of sentences and periods of parole ineligibility is particularly important.' " *Id.* at 73 (quoting *State v. Pillot*, 115 *N.J.* 558, 565–66 (1989)). "That explanation should thoroughly address the factors at issue." *Ibid.*

***5** In short, "a trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." *O'Donnell*, *supra*, 117 *N.J.* at 215. In cases such as the one before us, where on remand the sentencing court has substantially eliminated the most serious aggravating factors underlying the original sentence, the sentencing court must explain its rationale for nonetheless imposing an identical sentence. Imposing the identical sentence after eliminating the most serious aggravating factors, without explaining how eliminating those factors has had no impact on the sentence, raises the specter of capriciousness and does not instill confidence that the sentence has been imposed only after careful consideration of the relevant criteria in the New Jersey Code of Criminal Justice.

Here, although the sentencing court on remand initially announced it would not consider aggravating factors one or two, it went on to consider aggravating factor one nonetheless. That aggravating factor is supported by the record. After stabbing the decedent and walking away, defendant returned and gratuitously inflicted additional pain, either by kicking the dying decedent once or kicking him repeatedly. The sentencing court eliminated, however, aggravating factor two.

Of greater significance is the sentencing court imposing on the attempted murder count the identical sentence despite eliminating aggravating factors one and two, which appeared to have driven the lengthy extended term the court originally imposed. These circumstances raise concerns about the propriety of the resentence imposed on the attempted murder count.

We note the sentencing court had already exercised its discretion to impose both an extended term and a consecutive sentence on the attempted murder count. As our Supreme Court has noted, "the decision whether sentences for different counts of conviction should run consecutively or concurrently often drives the real-time outcome at sentencing." *State v. Zuber*, 227 *N.J.* 422, 449 (2017). We also note the United States Supreme Court's recognition of "the mitigating qualities of youth" and the need for courts to consider at sentencing a youthful offender's "failure to appreciate risks and consequences" as well as other factors often peculiar to young offenders. *Miller v. Alabama*, 567 *U.S.* 460, 476–77, 132 *S. Ct.* 2455, 2467–68, 183 *L. Ed.* 2d 407, 422–23 (2012). Our Supreme Court noted "that the same concerns apply to sentences that are the practical equivalent of life without parole[.]" *Zuber*, *supra*, 227 *N.J.* at 429.

That is not to say that defendant in the case before us, who was twenty-one-years old when she committed murder and attempted murder, should be given the same consideration as a juvenile offender. But certainly the real life consequences of a consecutive, extended-term sentence should be considered, particularly under circumstances such as these, where on the attempted murder charge the most serious aggravating factors had been eliminated and the two that remained were somewhat ubiquitous.

For the foregoing reasons, we again remand this matter for resentencing. We do not retain jurisdiction.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

State of Delaware,
v.
Luis Reyes, Defendant.

Cr. I.D. No. 9904019329
|
Final Submission: November 24, 2015
|
Decided: January 27, 2016

***Upon Defendant's Motion for Postconviction Relief* GRANTED**

Attorneys and Law Firms

Patrick J. Collins, Esquire, Collins & Associates, Wilmington, DE, Attorney for Defendant.

Elizabeth R. McFarlan, Esquire, and Maria T. Knoll, Esquire, Department of Justice, Wilmington, DE, Attorneys for the State of Delaware.

MEMORANDUM OPINION

Rocanelli, J.

I. *INTRODUCTION AND PROCEDURAL HISTORY*

***1** The bodies of Brandon Saunders and Vaughn Rowe were discovered in a wooded area of Rockford Park in Wilmington, Delaware, on January 21, 1996. Nearly four years later, on December 6, 1999, Luis Reyes ("Reyes") and Luis Cabrera ("Cabrera") were indicted as co-defendants for the murders of Saunders and Rowe ("Rockford Park Murders").[1] The State sought the death penalty for both Reyes and Cabrera in connection with the Rockford Park Murders. Counsel was appointed for both defendants.[2] The trials of Cabrera and Reyes were severed by the Trial Court.[3]

1 At the time they were indicted for the murders of Rowe and Saunders, Reyes and Cabrera were serving sentences imposed for the January 1995 murder of Fundador Otero. Cabrera was serving a life sentence for Murder First Degree. Reyes was serving a twenty-year sentence for Murder Second Degree (Level V time suspended after twelve years for decreasing levels of community-based supervision).

2 "Reyes Trial Counsel" was Jerome M. Capone, Esquire, and Thomas A. Pedersen, Esquire. Reyes Trial Counsel also represented Reyes on direct appeal.

3 The "Trial Court" refers to the presiding judge to whom this case was assigned until September 2013.

A. Reyes Rockford Park Trial and Direct Appeal

Cabrera was tried first and convicted of all counts by a jury, which recommended by a vote of 11–1 that the death sentence be imposed. Reyes' trial for the Rockford Park Murders took place thereafter ("Reyes Rockford Park Trial"): jury selection started on September 18, 2001; the guilt phase began on October 2, 2001; jury deliberations began on October 18, 2001; and, on October 19, 2001, the jury returned a verdict finding Reyes guilty of two counts of First Degree Murder, two counts of Possession of a Firearm During the Commission of a Felony, and two counts of Conspiracy in the First Degree.

During the guilt phase, Reyes moved for a mistrial on grounds of juror misconduct. The Trial Court denied the motion, concluding that the jurors were able to continue in an unbiased manner. The penalty phase began on October 23, 2001, and ended on October 26, 2001. The jury recommended that Reyes receive the death sentence for each of the two murders by a vote of 9–3. By decision and Order dated March 14, 2002, the Trial Court sentenced both Reyes and Cabrera to death.[4]

4 *State v. Cabrera*, 2002 WL 484641, at *5–8 (Del.Super. Mar. 14, 2002) *aff'd and remanded sub nom Reyes v. State*, 819 A.2d 305 (Del.2003) (hereinafter *Reyes Sentencing*).

An automatic, direct appeal was filed with the Delaware Supreme Court,[5] which addressed several issues: (i) the Trial Court's denial of individual *voir dire* during jury selection; (ii) the admission into evidence of Reyes' testimony during cross-examination in the Otero trial;[6] (iii) the admission into evidence of two statements attributed to co-defendant Cabrera; (iv) the admission into evidence of testimony about the victims' state of mind on the night of the Rockford Park Murders; (v) alleged juror

misconduct; (vi) whether jury deliberations were tainted by consideration of information not in evidence; (vii) the constitutionality of the 1991 Delaware Death Penalty Statute; and (viii) an independent review of the death sentence, including statutory aggravators, and whether the imposition of the death penalty was arbitrary or capricious. The Supreme Court affirmed Reyes' convictions and death sentences by Opinion and Order dated March 25, 2003.[7]

5 *See* 11 *Del. C.* § 4209(g) ("Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the recommendation on and imposition of that penalty shall be reviewed on the record by the Delaware Supreme Court"); Reyes' direct appeal to the Delaware Supreme Court was filed on March 21, 2002.

6 *See supra* n.1.

7 *Reyes v. State*, 819 A.2d 305 (Del.2003) (hereinafter *Reyes Direct Appeal*).

B. Appointment of Rule 61 Counsel and Postconviction Motions

***2** By letter dated March 8, 2004, Reyes notified the Trial Court that Reyes intended to pursue postconviction relief and requested appointment of counsel. The Trial Court appointed counsel to represent Reyes in the postconviction proceedings ("Rule 61 Counsel").[8] Reyes' Rule 61 motion filed in March 2004—amended in 2005, 2007, in 2009, and as briefed in 2014, and 2015—is now pending before this Court for decision.[9]

8 Various lawyers have been appointed to Reyes since 2004: first, Kevin J. O'Connell, Esquire and Jan T. Van Amerongen, Esquire; second, Jan T. Van Amerongen, Esquire and Andrew J. Witherell, Esquire; third, Jan T. Van Amerongen, Esquire and Joseph Gabay, Esquire; fourth, Jan T. Van Amerongen, Esquire and Jennifer–Kate Aaronson, Esquire; fifth, Jennifer–Kate Aaronson, Esquire; sixth Jennifer–Kate Aaronson, Esquire and Michael Modica, Esquire; seventh, Jennifer–Kate Aaronson, Esquire and Natalie Woloshin, Esquire; eighth, Natalie Woloshin, Esquire and Patrick J. Collins, Esquire; ninth, Patrick J. Collins, Esquire and Albert J. Roop, V, Esquire; and tenth, Patrick J. Collins, Esquire.

9 On March 19, 2004, Reyes filed his first motion for postconviction relief. On April 28, 2005, Reyes filed a supplemented motion for postconviction relief. On March 16, 2007, Reyes filed an amended motion for postconviction relief. On October 13, 2009, Reyes filed a second amended motion for postconviction relief. On April 1, 2013, the Trial Court began an evidentiary hearing pursuant to Superior Court Criminal Rule 61(h). The Trial Court held evidentiary hearings in May and August 2012 and April 2013. The presiding judge retired from the Superior Court in May 2013. The matter was reassigned by then-President Judge Vaughn in September 2013. Reyes filed a post-evidentiary hearing brief on April 30, 2014. The State filed a response on October 7, 2014. Reyes replied on November 10, 2014. On January 29, 2015, this Court entered an Order staying Reyes' postconviction proceedings pending the outcome of Cabrera's postconviction proceedings. On June 17, 2015, this Court issued its decision with respect to Cabrera's motion for postconviction relief and issued a revised opinion on June 22, 2015. The Court requested supplemental briefing, which was submitted on August 24, 2015, November 6, 2015, and November 24, 2015.

There was little physical evidence presented at the Reyes Rockford Park Trial that connected Reyes to the Rockford Park Murders. Rather, most of the evidence presented at the Reyes Rockford Park Trial tied Cabrera to the Rockford Park Murders. With little physical evidence linking Reyes to the Rockford Park Murders and with the possibility of a sentence of death, it was essential to a fair trial and sentencing that Reyes Trial Counsel use all available evidence and "make timely and appropriate objections to the admission of evidence going to the heart of the State's case."[10] Therefore, it was especially important that Reyes Trial Counsel use all available exculpatory evidence and make appropriate objections to challenge the State's minimal case. This Court's review of the record leads the Court to conclude that mistakes were made that undermine this Court's confidence in the Reyes Rockford Park Trial conviction and sentencing.

10 *Starling v. State*, 2015 WL 8758197, at *1 (Del.2015).

First, Reyes' decision to invoke his Fifth Amendment right during the guilt phase was not knowing, intelligent, and voluntary. Second, the Trial Court's delay in sentencing Cabrera rendered Cabrera unavailable as a witness in the Reyes Rockford Park Trial, denying access to important exculpatory evidence. Third, the testimony of Roderick Sterling was the most significant evidence against Reyes; however, it was highly suspect and because Sterling did not have personal knowledge of the claims he made, Reyes was deprived of his Sixth

Amendment Right to Confrontation. Fourth, Reyes has established various claims of ineffective assistance of counsel in both the guilt and penalty phases of the Reyes Rockford Park Trial that cumulatively prejudiced Reyes.

***3** There is a reasonable probability that the outcome of the Reyes Rockford Park Trial verdict and sentencing would have been different absent these errors. Therefore, Reyes' judgments of conviction and death sentence imposed by Order dated March 14, 2002 must be vacated.

II. *CONSIDERATION OF PROCEDURAL BARS*

Superior Court Criminal Rule 61 governs Reyes' motion for postconviction relief.[11] Postconviction relief is a "collateral remedy which provides an avenue for upsetting judgments that have otherwise become final."[12] To protect the finality of criminal convictions, the Court must consider the procedural requirements for relief set out under Rule 61(i) before addressing the merits of the motion.[13]

11 Super. Ct.Crim. R. 61 has since been amended. All references to Rule 61 refer to the version of the Rule in place in 2004, when Reyes filed his motion for postconviction relief.

12 *Flamer v. State*, 585 A.2d 736, 745 (Del.1990).

13 *Younger v. State*, 580 A.2d 552, 554 (Del.1990).

Rule 61(i)(1) bars a motion for postconviction relief if it is filed more than three years from the final judgment; this bar is not applicable as Reyes' first postconviction motion was filed in a timely manner.[14] Rule 61(i)(2) bars successive postconviction motions;[15] this bar is not applicable as Reyes has not filed successive postconviction motions. Rule 61(i)(3) bars relief if the motion includes claims not asserted in prior proceedings leading to the final judgment; this bar will be addressed in the discussion of the claims to which it applies. Rule 61(i)(4) bars relief if the motion includes grounds for relief formerly adjudicated in any proceeding leading to the judgment of conviction, in an appeal, or in a postconviction proceeding; this bar will be addressed in the discussion of the claims to which it applies.

14 Rule 61(i)(1) (barring a motion for postconviction relief unless filed within three years after the judgment of conviction is final); *Bailey v. State*, 588 A.2d 1121, 1127 (Del.1991).

15 Super. Ct.Crim. R. 61(i)(2) (barring successive postconviction motions if the motion includes grounds for relief not asserted in a prior postconviction proceeding).

This Court rejects the State's contention that certain claims set forth in the pending Rule 61 Motion should not be considered because those claims were not presented in prior Rule 61 Motions. This is Reyes' *first* Rule 61 Motion because the prior motions were not adjudicated. Moreover, the Trial Court allowed postconviction evidentiary hearings that further developed the record. There have been numerous changes in Reyes' postconviction counsel since Reyes first filed his Rule 61 Motion in 2004. The Trial Court permitted successive, amended, and supplemental motions to be filed on Reyes' behalf. To consider claims barred after the Court permitted amendments and supplements would render the expanded record superfluous, Rule 61 Counsel's efforts futile, and would violate Reyes' rights to full and fair consideration of whether Reyes' death penalty trial and sentencing was conducted in a manner consistent with Reyes' due process rights. Accordingly, this Court will consider the claims presented in the briefing without regard to whether claims were presented in Rule 61 motions were not adjudicated.

***4** The procedural bars to postconviction relief under Rule 61(i)(3)[16] can be overcome if the motion asserts a colorable claim that there has been a "miscarriage of justice" as the result of a constitutional violation that undermined the fundamental fairness of the proceedings.[17] Likewise, the procedural bar under Rule 61(i)(4)[18] can be overcome if consideration of the claim on its merits is warranted in the "interest of justice."[19]

16 This exception is also applicable to procedural bars to postconviction relief under Rule 61(i)(1) and (2), but those bars are not relevant here.

17 Super. Ct.Crim. R. 61(i)(5); *see also Younger*, 580 A.2d at 555; *State v. Wilson*, 2005 WL 3006781, at *1 n.6 (Del.Super. Nov. 8, 2005).

18 This exception is also applicable to procedural bars to postconviction relief under Rule 61(i)(2), but that bar is not relevant here.

19 Super. Ct.Crim. R. 61(i)(5).

Finally, Reyes' postconviction motion asserts multiple claims of constitutional violations, including claims of ineffective assistance of counsel. The Delaware Supreme Court has declined to hear claims of ineffective assistance of counsel on direct appeal.[20] Therefore, the first opportunity for Reyes to assert such claims is in an application for postconviction relief.

20 *Flamer*, 585 A.2d at 753; *State v. Gattis*, 1995 WL 790961, at *3 (Del.Super. Dec. 28, 1995).

III. *THERE ARE COLORABLE CLAIMS OF MISCARRIAGE OF JUSTICE IN THE REYES ROCKFORD PARK TRIAL.*

Pursuant to Rule 61(i)(5), procedural bars to postconviction claims are not applicable to a "colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[21] Not every constitutional violation merits relief under the "miscarriage of justice" exception.[22] Rather, a criminal defendant must establish a colorable claim of a constitutional violation, which requires the criminal defendant show "some credible evidence which takes the claim past the frivolous state."[23]

21 Super. Ct.Crim. R. 61(i)(5).

22 *See* *Webster v. State*, 604 A.2d 1364, 1366 (Del.1992).

23 *State v. Ducote*, 2011 WL 7063381, at *1 n. 4 (Del.Super. Dec. 29, 2011) (citing *State v. Wharton*, 1991 WL 138417, at *5 (Del.Super. June 3, 1991)).

Moreover, pursuant to Rule 61(i)(4), the Court must address any postconviction claim that has been formerly adjudicated if "reconsideration is warranted in the interest of justice." A criminal defendant may trigger the interest of justice exception by presenting legal or factual developments that have emerged subsequent to the conviction.[24] The interest of justice exception is narrow in scope; however, the Court must also preserve the purpose of Rule 61(i) procedural bars: achieving finality of judgments.[25]

24 *Flamer*, 585 A.2d at 746; *Weedon v. State*, 750 A.2d 521, 527 (Del.2000) (discussing witness recantation as a factual development for purposes of the exception).

25 *State v. Rosa*, 1992 WL 302295, at *7 n.10 (Del.Super. Sept. 29, 1992).

Upon consideration of the entire record, this Court finds there was a miscarriage of justice pursuant to Rule 61(i)(5), that reconsideration of otherwise procedurally barred claims is warranted in the interest of justice pursuant to Rule 61(i)(4). Legal developments have emerged subsequent to the convictions, Reyes was deprived of his constitutional rights, and the integrity of the Reyes Rockford Park Trial was compromised.

A. Reyes' Fifth Amendment rights were violated.

1. Reyes' decision to invoke his Fifth Amendment right at the guilt phase was not knowing, intelligent, and voluntary.

***5** The decision of whether or not to testify is a fundamental right.[26] In making that decision, Reyes should have had the opportunity to consider that evidence regarding his involvement with the Otero murder would be admitted during the penalty phase as an aggravating factor. In his allocution during the penalty phase of the Reyes Rockford Park Trial, Reyes professed his innocence. Specifically, Reyes stated: "[O]n everything that I love and on the Word of God, I did not kill Brandon and Vaughn. I did not take their life. No matter how bad things may look, the evidence that was presented, I'm not the murderer of them two."[27] Reyes explained to the jury that he had wanted to testify to profess his innocence during the guilt phase, but he did not do so because Reyes did not want the jury to hear about Reyes' role in the Otero murder.[28]

26 *See* U.S. CONST. amend. V; DEL. CONST. art. 1, § 7.

27 Penalty Phase Tr. Oct. 25, 2001 at 94:20–95:1.

28 *Id.* at 96:3–11.

A criminal defendant alone must make the fundamental decision whether to testify on his own behalf.[29] The decision regarding whether to testify must be made by a

criminal defendant and cannot be made by defense counsel[30] because such a choice "implicate[s] inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant."[31] Furthermore, waiver of the right to testify on one's own behalf must be knowing, intelligent, and voluntary.[32] Whether a waiver of a constitutional right is knowing, intelligent, and voluntary depends upon the facts and circumstances of each case.[33] A waiver of a constitutional right is knowing, intelligent, and voluntary "if the defendant is aware of the right in question and the likely consequences of deciding to forego that right."[34]

29 *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *United States v. Lively*, 817 F.Supp. 453, 461 (D.Del.1993) *aff'd,* 14 F.3d 50 (3d Cir.1993); *Taylor v. State*, 28 A.3d 399, 406 (Del.2011).

30 *Lively*, 817 F.Supp. at 461.

31 *Cooke v. State*, 977 A.2d 803, 841 (Del.2009) (internal citations omitted).

32 *See Hall v. State*, 408 A.2d 287, 288 (Del.1979); *see also State v. Taye*, 2014 WL 785033, at *5 (Del.Super. Feb. 26, 2014) *aff'd,* 2014 WL 4657310 (Del. Sept. 18, 2014).

33 *Lewis v. State*, 757 A.2d 709, 714 (Del.2000).

34 *Davis v. State*, 809 A.2d 565, 569 (Del.2002); *Richardson v. State*, 2015 WL 5601959, at *2 (Del.Super. Sept. 22, 2015).

Although the Trial Court conducted an appropriate colloquy with Reyes and Reyes stated in open court that his decision was voluntary and not a product of a threat or promise,[35] Reyes' waiver of his right to testify was predicated on the mistaken understanding that, if he did not testify, then information regarding his involvement in the Otero murder would not be presented to the jury. During his allocution, Reyes explained: "I didn't get on the stand during trial because I didn't want what I was presently incarcerated for to come up. I felt that by that coming out, you, the jury, would automatically think I was guilty. Therefore, I chose not to take the stand."[36]

35 Guilt Phase Tr. Oct. 16, 2001 at 19:1–21:14.

36 Penalty Phase Tr. Oct. 25, 2001 at 96:3–8.

Despite this very significant step taken by Reyes, *i.e.* not testifying in his own defense to profess his innocence, the jury heard about the Otero murder in great detail—not only from the State, but also from Reyes' own lawyers. For example, during the penalty phase, the State started its opening statement with a photograph of Otero and told the jury that the Rockford Park Murders were not the first time that Reyes had committed murder. The Otero murder was the central focus of the State's arguments in favor of death. In addition, Reyes Trial Counsel introduced the transcript from Reyes' sentencing for the Otero murder. Highlighting the prior murder, in introducing the transcript to the jury,[37] Reyes Trial Counsel stated:

> ***6** I'm going to skip the niceties. I'm going to get right to the heart of the matter and I want to tell you that this—and I'm going to tell you that this is the sentencing transcript of September 25th, 1988 of Luis Reyes who was being sentenced on a murder second charge for the murder of Fundador Otero.[38]

37 The transcript included statements from Reyes' Otero trial counsel that Reyes only participated in the Otero murder because of Cabrera's influence and that Reyes cooperated in the investigation of Cabrera for the Otero murder. *Id.* at 6:21–7:17. The transcript also included statements from Reyes' Otero counsel and the State that Reyes, after learning that the police were looking for him, turned himself in, and gave a detailed confession to the murder of Otero. *Id.* at 7:11–13; 9:23–10:2. The transcript included the State's reference to the "wrenching" testimony of Otero's daughter who dreamed of walking down the aisle with her father, the fact that Otero's "charred remains" were found in New Jersey, and that Reyes "physically was a principal in the murder by holding down Mr. Otero." *Id.* at 10:22–11:20. The transcript also included Reyes' statement to the Otero sentencing judge, in which Reyes conceded that Cabrera's influence over Reyes did not justify Reyes' actions, but that Reyes allowed his love for Cabrera to lead him in the wrong direction and that Reyes regrets that every day. *See id.* at 14:12–15:8.

38 *Id.* at 4:21–5:4.

While it appears that Reyes understood the right that he waived in waiving his right to testify on his own behalf, Reyes did not understand the consequences of choosing to forego that right. Reyes' explanation to the jury during the sentencing phase of the Reyes Rockford Park Trial that he wanted to testify to profess his innocence during the guilt phase, but did not do so to avoid presentation to the jury about Reyes' role in the Otero murder shows that Reyes' expectation was that such evidence would not be admitted, including by Reyes Trial Counsel. In making the decision not to testify, Reyes should have had the opportunity to consider that evidence regarding his involvement with the Otero murder would be admitted during the penalty phase as an aggravating factor.

Accordingly, Reyes' decision was not knowing or intelligent because it was premised on a misunderstanding. The introduction of evidence about Otero coupled with Reyes' expectation that such evidence would not be introduced seriously undermines whether Reyes' decision was knowing, intelligent, and voluntary.

2. The State's presentation of Reyes' prior testimony from another proceeding undermined Reyes' decision to invoke his Fifth Amendment right not to testify.

When Reyes was interviewed by police regarding the Otero murder, Reyes told police that he made a statement to his girlfriend/fiancé, Elaine Santos, that one night Reyes was with Cabrera, someone came to Reyes' house, and Cabrera and Reyes went to the basement to beat him up. As part of Reyes' plea agreement in the Otero murder, Reyes agreed to testify as a witness against Cabrera in Cabrera's Otero murder trial in 1998. During Cabrera's Otero murder trial, the State questioned Reyes about his statement to Ms. Santos and Reyes admitted that he lied to Ms. Santos. Subsequently, during the guilt phase of the Reyes Rockford Park Trial, the State read into evidence (with a detective on the witness stand) this part of Reyes' trial testimony from Cabrera's Otero murder trial.[39] It appears the State's purpose in introducing this testimony was twofold: (1) to suggest that the beating involved Saunders and Rowe and had taken place on the night of the Rockford Park Murders; and (2) to suggest to the jury that Reyes is a liar.

[39] *See* Guilt Phase Tr. Oct. 2, 2001 at 241:22–242:14 (reading into evidence Reyes' trial testimony dated May 26, 1998, Exhibit 42 in the Reyes Rockford Park Trial).

***7** This was improper and objectionable. Although Reyes Trial Counsel objected to the reading in of Reyes' prior testimony,[40] the Trial Court permitted Reyes' prior testimony to be read to the jury in the Reyes Rockford Park Trial. The Trial Court simply explained that the testimony was probative and determined there was no Delaware Rule of Evidence ("DRE") "403 issue that prohibit[ed] its admission."[41] However, Reyes' former testimony was nevertheless inadmissible hearsay and undermined Reyes' choice to invoke his Fifth Amendment right not to testify.

[40] Reyes Trial Counsel objected to Reyes' prior testimony at a pre-trial conference and during the guilt phase of the Reyes Rockford Park Trial. *See* Pre Trial Conf. Tr. Sept. 27, 2001 at 34:19–53:16; Guilt Phase Tr. Oct. 2,2001 at 230:17–233:11.

[41] Pre Trial Conf. Tr. Sept. 27, 2001 at 49:13–50:11.

"Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."[42] However, an exception to this rule includes "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same."[43] Moreover, a witness' credibility may be impeached by evidence in the form of reputation or opinion.[44] Generally, a witness' credibility may not be impeached with extrinsic evidence of a specific instance of conduct.[45] However, in the discretion of the Court, a specific instance of conduct related to the witness' credibility may be "inquired into on cross-examination of the witness" if it concerns "the witness' character for truthfulness or untruthfulness" or it concerns "the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."[46]

[42] D.R.E. 404(a).

[43] D.R.E. 404(a)(1).

[44] D.R.E. 608(a).

[45] D.R.E. 608(b).

[46] *Id.*

There is nothing in the record that suggests that Reyes

Trial Counsel introduced evidence regarding the character trait for truthfulness or untruthfulness for Saunders, Rowe, or Reyes. Further, Reyes' testimony that was introduced was neither opinion nor reputation evidence as permitted under the DRE. Instead, it was a specific instance of conduct, which is inadmissible in the form of extrinsic evidence and can only be inquired into on cross-examination. Accordingly, evidence of Reyes' character trait for truthfulness was inadmissible because he was not a witness in the Reyes Rockford Park Trial because he invoked his Fifth Amendment right, and his character for truthfulness was not otherwise attacked. Moreover, even if Reyes' character for truthfulness was at issue, extrinsic evidence—the reading of the testimony into evidence and introducing it as an exhibit—was inadmissible under the DRE. Presentation of Reyes' own testimony from a prior proceeding undermined Reyes' decision not to testify as a witness against himself.

B. Cabrera was unavailable as a witness in the Reyes Rockford Park Trial because Cabrera was not promptly sentenced after his conviction.

Cabrera's trial for the Rockford Park Murders took place in early 2001. The jury returned a verdict on February 11, 2001, finding Cabrera guilty of two counts of First Degree Murder, two counts of Conspiracy in the First Degree, and other offenses. The Cabrera penalty phase began on February 13, 2001, and ended on February 15, 2001. The jury recommended that Cabrera receive the death sentence for each of the Rockford Park Murders by a vote of 11–1. The Court postponed Cabrera's sentencing until the completion of the Reyes Rockford Park Trial. Ten months later, Reyes was convicted on October 19, 2001, and on October 26, 2001, the jury recommended that Reyes receive the death sentence for each of the Rockford Park Murders by a vote of 9–3. By decision and Order dated March 14, 2002, the Trial Court sentenced both Cabrera and Reyes to death.[47]

47 *Reyes Sentencing*, 2002 WL 484641, at *5–8.

***8** Although Cabrera's trial concluded more than eight months before the Reyes Rockford Park Trial, Cabrera had not been sentenced by the Trial Court at the time of Reyes' trial. Indeed, the Cabrera death sentence was imposed more than thirteen months after the jury recommended a death sentence for Cabrera. Because his sentencing was still pending, Cabrera was unavailable as a witness at the Reyes Rockford Park Trial.[48]

48 *Cabrera v. State*, 840 A.2d 1256, 1267 (Del.2004) (hereinafter *Cabrera Direct Appeal*).

Had Cabrera testified as a witness at the Reyes Rockford Park Trial, Cabrera may have introduced reasonable doubt regarding Reyes' role in the Rockford Park Murders. Specifically, Reyes Trial Counsel met with Cabrera in March 2001 and Cabrera explained to Reyes Trial Counsel that *Reyes was not responsible for the Rockford Park Murders*, but instead that a man named Neil Walker had committed the murders. Cabrera detailed an altercation that involved Walker, Cabrera, Saunders, and Rowe that gave a motive for Walker to commit the Rockford Park Murders.

However, instead of testifying on behalf of Reyes, Cabrera advised that, if called as a witness in the Reyes Rockford Park Trial, Cabrera would invoke his Fifth Amendment right because he had not yet been sentenced.[49] Accordingly, a critical witness with exculpatory evidence for Reyes was unavailable because of the Trial Court's exercise of discretion as to the timing of Cabrera's sentencing. The Trial Court's delay in sentencing Cabrera rendered Cabrera unavailable as a witness in the Reyes Rockford Park Trial, denying access to exculpatory evidence and undermining the fairness of the trial.

49 *See* Letter from John P. Deckers to Luis Cabrera, March 6, 2001; Letter from Luis Cabrera to Reyes Trial Counsel, Sept. 23, 2001; Letter from John P. Deckers to Reyes Trial Counsel, Oct. 9, 2001.

C. The testimony offered by Sterling was highly suspect yet it was the most significant evidence linking Reyes to the Rockford Park Murders.

There was very limited evidence presented at the Reyes Rockford Park Trial that linked Reyes to the Rockford Park Murders. Indeed, there was no physical evidence at all that connected Reyes to the Rockford Park Murders. Instead, most of the evidence presented linked the murders to Cabrera who had already been tried and convicted. Instead, the only evidence presented at Reyes Rockford Park Trial that linked Reyes to the Rockford Park Murders was the testimony of Roderick Sterling, a convicted sex offender who received a significant advantage by testifying against Reyes and who did not even have personal knowledge about the claims he made against Reyes. The Trial Court described this as "the most significant testimony" presented against Reyes by the State.[50]

50 *Reyes Sentencing*, 2002 WL 484641, at *8.

1. The benefit offered to Sterling by the State in exchange for Sterling's testimony rendered Sterling's testimony unreliable.

Sterling was arrested on May 2, 1997, for raping a seven-year-old child. Sterling was charged with two counts of Unlawful Sexual Intercourse First Degree and detained at Howard R. Young Correctional Institution ("HRYCI"). At that time, Reyes was also detained at HRYCI for the Otero murder and no one had yet been charged with the 1996 Rockford Park Murders.[51]

[51] Reyes was sentenced for the Otero murder on September 25, 1998. Upon sentencing, Reyes would have been moved to the sentenced population at HRYCI.

***9** In June 1997, Sterling—with the assistance of his cellmate Ivan Galindez—sent a letter to Sterling's attorney in the child rape case claiming to have information in connection with the Rockford Park Murders. Specifically, Sterling claimed he had overheard Reyes admit Reyes was responsible for the Rockford Park Murders when Reyes was speaking to Galindez. On January 20, 1998, Sterling gave a statement to the police claiming that sometime between May 1997 and June 23, 1997, a conversation took place between Galindez and Reyes regarding the Rockford Park Murders, which Sterling claimed to have overheard.

On December 1, 1998, Sterling pled guilty to one count of Unlawful Sexual Intercourse Second Degree and was sentenced by Order dated January 29, 1999, to twenty (20) years at Level V, suspended after ten (10) years at Level V, followed by ten (10) years of community-based supervision. On December 6, 1999, Cabrera and Reyes were indicted for the Rockford Park Murders. On September 14, 2001, four days before jury selection for the Reyes Rockford Park Trial, Sterling agreed to testify at the Reyes Rockford Park Trial about the alleged jailhouse confession by Reyes.

Sterling received a huge benefit for his testimony against Reyes. Indeed, after Sterling's testimony in the Reyes Rockford Park Trial, the State joined Sterling's motion to withdraw his guilty plea to Unlawful Sexual Intercourse Second Degree. The motion was granted; Sterling withdrew his plea; the State offered Sterling a plea to the lesser offense of Unlawful Sexual Intercourse Third Degree, and recommended a sentence of ten (10) years at Level V, suspended *immediately* for time served for non-reporting probation at Level I, with the expectation that Sterling would promptly be deported to Jamaica. Therefore, in exchange for his testimony against Reyes, Sterling was released immediately from prison for time served on February 4, 2002, serving half the time to which he was originally sentenced.

2. Sterling did not have personal knowledge regarding the claims he made and, therefore, Reyes was deprived of his Sixth Amendment Right of Confrontation.

Sterling testified inaccurately at the Reyes Rockford Park Trial that Sterling overheard a conversation at HRYCI between Reyes and Galindez and that, in that conversation, Reyes admitted to Galindez that Reyes killed Saunders and Rowe. In other words, when Sterling testified, he claimed to have personal knowledge regarding Reyes' alleged statements. However, in September 2008 when private investigators interviewed Sterling in Jamaica, Sterling claimed that he learned details of the Rockford Park Murders from Galindez and not from Reyes.[52] Reyes had a Sixth Amendment right to confront the witness who testified against him.[53] Because Sterling testified against Reyes and not Galindez, Reyes' Sixth Amendment right was violated.

[52] *State v. Reyes*, 2012 WL 8256131, at *9 (Del.Super. Nov. 13, 2012).

[53] *Franco v. State*, 918 A.2d 1158, 1161 (Del.2007) ("Both the United States and the Delaware Constitutions guarantee an accused the right to confront the witnesses against him in all criminal prosecutions.").

3. The State violated *Brady* by failing to disclose impeachment evidence.

The State violated Reyes' constitutional rights by failing to disclose impeachment evidence concerning Sterling. Specifically, the State knew that Sterling had a history of drug and alcohol use, convictions, and treatment, yet failed to provide this information to Reyes Trial Counsel. Reyes was prejudiced because without access to this impeachment evidence, Sterling could not properly be cross-examined with information that called into question Sterling's reliability.

***10** Under *Brady*, the State may not suppress evidence that is favorable to a defendant if the evidence is material to either guilt or punishment.[54] Under Delaware law, there

are three necessary elements for a finding that a *Brady* violation occurred: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued.[55] Impeachment evidence falls within *Brady* because it is " 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."[56] Moreover, "[e]ffective cross-examination is essential to a defendant's right to a fair trial" because it is the " 'principal means by which the believability of a witness and the truth of [his] testimony are tested.' "[57] To reverse a conviction based on a *Brady* violation, a defendant must show that the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[58] The suppressed evidence must "create[ ] a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[59]

54 *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Atkinson v. State*, 778 A.2d 1058, 1062 (Del.2001) (applying *Brady*).

55 *Starling*, 2015 WL 8758197, at *12.

56 *Atkinson*, 778 A.2d at 1062 (internal citations omitted).

57 *Id.* at 1061–62 (internal citations omitted).

58 *Jackson v. State*, 770 A.2d 506, 516 (Del.2001).

59 *Starling*, 2015 WL 8758197, at *12.

Most recently, the Delaware Supreme Court addressed *Brady* violations in *Starling v. State*.[60] The Court held that the State violated *Brady* when it "inaccurately describe[d] the status of [ ] criminal charges" of a pivotal witness.[61] Indeed, the witness identified Starling as the shooter involved in the deaths of two individuals.[62] The Delaware Supreme Court identified the witness as "the State's main witness" whose credibility was at stake.[63] Specifically, the State inaccurately represented to Starling's trial counsel that the witness' violation of probation and outstanding capias were pending during trial; however, those pending legal matters had in fact been dismissed before Starling's trial.[64]

60 *See id.* at *1

61 *Id.* at *10.

62 *Id.* at *1.

63 *Id.* at *14, 15.

64 *Id.* at *10–11.

The reasoning of the Delaware Supreme Court in *Starling* is applicable here. Just as there was no physical evidence linking Reyes to the Rockford Park Murders, there was also "no physical evidence linking Starling to the crime" of which he was convicted.[65] Like the identification witness about whom the Supreme Court expressed concerns, Roderick Sterling was the State's "main witness" in the Reyes Rockford Park Trial. In *Starling*, the State inaccurately described the pending criminal charges against the State's pivotal witness; similarly, in the Reyes Rockford Park Trial, the State failed to disclose Roderick Sterling's history of drug and alcohol abuse, convictions, and treatment. Reyes could have utilized this information to cast doubt on the credibility of Roderick Sterling as a witness. Cross-examination is critical to a fair trial.[66]

65 *Id* at *1

66 *Atkinson*, 778 A.2d at 1062.

D. There was a miscarriage of justice in the Reyes Rockford Park Trial.

Viewing the Reyes Rockford Park Trial conviction and sentencing as a whole, Reyes' right to a fair trial was seriously undermined. There are colorable claims of miscarriage of justice in the Reyes Rockford Park Trial, and Reyes was deprived of his constitutional trial rights. Accordingly, because the integrity of the Reyes Rockford Park Trial was compromised, the conviction must be vacated.

IV. *REYES' ROCKFORD PARK SENTENCING DID NOT MEET CONSTITUTIONAL STANDARDS BECAUSE THERE WAS INADEQUATE CONSIDERATION OF REYES' STATUS AS AN ADOLESCENT AND HIS IMMATURE BRAIN DEVELOPMENT.*

When Fundador Otero was murdered, Reyes was just seventeen (17) years old. At the time, Reyes was a high school student and varsity member of the A.I. DuPont High School wrestling team. Reyes confessed to his role in Otero's murder, and agreed to testify against Cabrera.[67] At Cabrera's Otero murder trial, Reyes admitted his role, but also explained his reluctance to participate in the crime. Reyes explained how he succumbed to pressure placed on him by Cabrera. In the Reyes Rockford Park Trial—although Reyes was only seventeen (17) years old at the time and despite his confession and cooperation with the police during the Otero investigation and trial—the State and the Trial Court emphasized Reyes' role in the Otero murder as the most significant non-statutory aggravating factor supporting the death penalty for the Rockford Park Murders.

67 In marked contrast to his admissions during the Otero murder investigation, Reyes steadfastly professed his innocence with respect to the Rockford Park Murders.

***11** At the time of the Otero murder, Reyes was seventeen (17) years old. At the time of the Rockford Park Murders, Reyes was eighteen (18) years old.[68] Although Reyes had reached the chronological age of adulthood, Reyes was a youthful offender at the time of the Rockford Park Murders. The weight attributed to the Otero crime, for purposes of the penalty phase for the Rockford Park Murders, is inconsistent with the constitutional standards established by the United States Supreme Court for youthful offenders, especially in consideration of the relationship between Cabrera and Reyes. The constitutional standards for sentencing of a youthful offender demand full consideration of Reyes' youth and brain development, as well as consideration of Cabrera's negative influence, particularly in a death penalty case.

68 At the time of the Rockford Park Murders, Reyes was one month shy of his 19th birthday. While the State emphasized that the murder victims were teenagers, the State did not acknowledge that Reyes was also only a teenager at the time. Indeed, Reyes was a *classmate* of the victims.

A. Constitutional jurisprudence pre–2001

In 1982, the United States Supreme Court decided *Eddings v. Oklahoma*,[69] and held:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be *most susceptible to influence* and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.[70]

The *Eddings* Court noted: " '[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults."[71] The conclusions reached in *Eddings* relied, in part, on task force reports dating back to 1967, which provided:

> Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others. [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.[72]

69 455 U.S. 104 (1982).

70 *Id.* at 115–116 (emphasis added).

71 *Id.* at 116 (quoting *Bellotti v. Baird*, 443 U.S. 622,

635 (1979)).

72 *Id.* at 115, n.11.

The *Eddings* Court explained that consideration of an adolescent defendant's background, as well as the defendant's mental and emotional development, did not serve to excuse the defendant's legal responsibility for the crime committed.[73] Rather, such considerations are important because "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background *and mental and emotional development of a youthful defendant* be duly considered in sentencing [for the crime of murder]."[74]

73 *Id.* at 116 (acknowledging that youths were committing increasingly violent crimes).

74 *Id.* at 116 (emphasis added).

In 1988, the United States Supreme Court held in *Thompson v. Oklahoma*[75] that "the execution of a person who was under 16 years of age at the time of his or her offense" is unconstitutional.[76] The *Thompson* Court's reasoning, rather than its holding, is of interest to this Court. Specifically, the decision in *Thompson* explained that distinctions between juveniles and adults abound in society and these distinctions should apply for purposes of sentencing young criminal defendants:

> ***12** Justice Powell has repeatedly reminded us of the importance of "the experience of mankind, as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office."[77]
>
> * * * *
>
> It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant." There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We [have] stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases.... Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.[78]

75 487 U.S. 815 (1988).

76 *Id.* at 838.

77 *Id.* at 823 (internal citations omitted).

78 *Id.* at 834–35 (internal citations omitted).

In 1993, the United States Supreme Court revisited the issue of youth as a mitigating factor in *Johnson v. Texas.*[79] The *Johnson* Court made clear that "[t]here is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings.*"[80] The *Johnson* Court held:

> 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. These qualities often result in impetuous and ill-considered actions and decisions. A sentencer in a capital case *must be allowed to consider the mitigating qualities of youth* in the course of its deliberations over the appropriate sentence.[81]

The *Johnson* Court stressed the importance of presenting the qualities of youth as mitigating evidence:

> Even on a cold record, one cannot be unmoved by the testimony of petitioner's father urging that his

> son's actions were due in large part to his youth. It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue. *The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.*[82]

79 509 U.S. 350 (1993).

80 *Id.* at 367 (citing *Sumner v. Shuman*, 483 U.S. 66, 81–82 (1987); *Eddings*, 455 U.S. at 115; *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion)); *see* *Lockett*, 438 U.S. at 604 ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer.... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis added).

81 *Johnson*, 509 U.S. at 367 (emphasis added).

82 *Id.* at 368 (emphasis added).

***13** Therefore, the constitutional precedent at the time of the Reyes Rockford Park Trial—as established in 1982, 1988, and 1993—required Reyes Trial Counsel to present the transient qualities of youth as mitigating evidence. The purpose of such a presentation was to advise a jury that the youthfulness of a criminal defendant is to be viewed as more than a chronological age. Rather, youthful criminal defendants, such as Reyes, are *adolescents*, susceptible to their environment, negative influences, and peer pressures but often without the fully developed brain and ability to appreciate the consequences for their reckless and dangerous behaviors. More importantly, evidence of youthfulness allows a jury to consider the fact that, as the youthful defendant ages, his emotional and mental intelligence will develop along with the wherewithal to reason, rationalize, and comprehend consequence.

B. *Roper v. Simons*

In 2005, the United States Supreme Court readdressed the presentation in a capital trial of youthfulness as mitigating evidence in *Roper v. Simmons*.[83] The *Roper* Court recognized that capital punishment, the ultimate punishment, should be limited to a narrow category of defendants who commit the most heinous crimes with extreme culpability. The Court held that a defendant under the age eighteen (18)—a juvenile—could not receive the death penalty even when the juvenile defendant commits a heinous crime.[84]

83 543 U.S. 551 (2005).

84 *Id.* at 568, 570–71 (holding that juveniles are of a diminished capacity and, thus, the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders under eighteen years of age.)

In reaching its conclusion, the *Roper* Court noted three general differences between juveniles and adults that render the death penalty unconstitutional for juveniles. First, according to scientific and sociological data, juveniles lack maturity and have an underdeveloped sense of responsibility.[85] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[86] "This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[87] Third, juveniles have not developed a sense of character as their personality traits are "more transitory, less fixed."[88]

85 *Id.* at 569 (relying, in part, on data from a 1992 study: Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339 (1992)).

86 *Id.*

87 *Id.* (relying, in part, on data from a 2003 report: Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003), providing, "[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.").

88 *Id.* at 570 (relying, in part, on data from a 1968 report:

E. Erikson, Identity: Youth and Crisis (1968)).

The *Roper* Court summarized the significance of a juvenile's transient youth as follows:

> The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. *From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.*[89]

89 *Id.* (internal citations omitted) (emphasis added).

***14** The *Roper* decision was issued three years after the imposition of Reyes' death sentence. Despite the timing of *Roper* after the Reyes Rockford Park Trial, the decision is significant. First, the *Roper* decision is rooted in United States Supreme Court precedent and data from scientific and sociological studies that *pre-date* the Reyes Rockford Park Trial. Indeed, brain development—particularly development of the brain's executive functions—was already a topic of discussion and scientific research at the time of the Reyes Rockford Park Trial.[90] Accordingly, while the *Roper* decision did establish a new constitutionally-based rule of law three years after the Reyes Rockford Park Trial, *Roper* did so, almost entirely, based on information readily available to Reyes Trial Counsel in 2001. Second, this Court acknowledges that Reyes was eighteen (18) years old at the time of the Rockford Park Murders and, therefore, the rule of *Roper* does not strictly apply; nevertheless, as the *Roper* Court explained: "the qualities that distinguish juveniles from adults *do not disappear when an individual turns 18.*"[91]

90 *See e.g.*, Anderson, Vicki A., et. al, *Development of Executive Functions Through Late Childhood and Adolescence in an Australian Sample*, DEVELOPMENTAL NEUROPSYCHOLOGY, Vol. 20, Issue 1, p. 385–406 (2001); Nagera, Humberto, M.D., *Reflections on Psychoanalysis and Neuroscience: Normality and Pathology in Development, Brain Stimulation, Programming, and Maturation*, NEUROPSYCHOANALYSIS: AN INTERDISCIPLINARY JOURNAL FOR PSYCHOANALYSIS AND THE NEURSCIENCES , Vol. 3, Issue 2, p. 179–191 (2001); Welsh, Marilyn C., et. al., *A normative-developmental study of executive unction: A window on prefrontal function in children*, DEVELOPMENTAL NEUROPSYCHOLOGY , Vol. 7, Issue 2, p. 131–149 (1991).

91 *Roper*, 543 U.S. at 574 (emphasis added).

Reyes Trial Counsel should have explored and presented mitigating evidence concerning the qualities of Reyes' youth. Moreover, in its penalty phase presentation, the State emphasized Reyes' involvement in the Otero murder, which occurred when Reyes was only a seventeen (17) year old juvenile. More importantly, the Trial Court relied heavily on the Otero murder in sentencing Reyes to death, explaining that the "non-statutory aggravating circumstance [of Reyes' involvement in the Otero murder] weighs about as heavily as such circumstance can get."[92]

92 *Reyes Sentencing*, 2002 WL 484641, at *512.

C. Evolving Standards Evidenced in *Graham v. Florida* and *Miller v. Alabama*

The trend of recognizing the constitutional differences between youth and adulthood continued in the United States Supreme Court's 2010 decision in *Graham v. Florida*.[93] Noting that juvenile offenders are less culpable than adults, the *Graham* Court held that it was unconstitutional to sentence a juvenile to life imprisonment for any crimes less serious than murder. Referencing *Roper*, the *Graham* Court explained that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."[94] The underlying message of *Graham* is consistent with the message of its decisional predecessors: "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."[95]

93 560 U.S. 48 (2010).

94 *Id.* at 68.

95 *Id.* (quoting *Roper*, 543 U.S. at 570).

In 2012, the United States Supreme Court decided *Miller v. Alabama*.[96] Reiterating the notion that juveniles are "less deserving of the most severe punishments,"[97] and relying on the aforementioned constitutional precedent, the *Miller* Court held it was unconstitutional to "require[ ] that all children convicted of homicide receive lifetime incarceration without possibility of parole, *regardless of their age and age-related characteristics and the nature of their crimes*."[98]

96 132 S.Ct. 2455 (2012).

97 *Id.* at 2464.

98 *Id.* at 2475 (emphasis added). Further, on January 25, 2016, the Supreme Court of the United States decided *Montgomery v. Louisiana* and held that *Miller's* ban on mandatory life-without parole sentences for juvenile offenders must be applied retroactively. *See Montgomery v. Louisiana*, 577 U.S. —— (2016). As noted, *infra* ns.102–04, the Delaware legislature has already extended *Miller* retroactively by statute.

***15** The reasoning and analysis in support of the rule of *Miller*, rather than the rule itself, is relevant to the matter pending before this Court. The *Miller* Court concluded that such a mandate—that all juveniles convicted of homicide receive life without a chance of parole—precludes the sentencer from considering critical factors related to the youthful offender even when imposing the harshest penalties. According to the *Miller* Court, such a mandate precluded consideration of factors such as: (1) the hallmark features of chronological age (immaturity, impetuosity, and the failure to appreciate consequence); (2) the family and home environment from which the youthful offender could not extricate himself; (3) the circumstances surrounding the homicide offense (including the offenders involvement and the effects of peer pressure); (4) the vulnerabilities to negative influence; (5) the features that distinguish adolescents from adulthood; and (6) the possibility of rehabilitation.[99] The concept explained in *Miller* was not new, it was just simplified: children are different.[100]

99 *Miller*, 132 S.Ct. at 2468.

100 *Id.* at 2464.

In response to *Graham* and *Miller*, in 2013, the Delaware General Assembly amended Chapter 42 of Title 11 of the Delaware Code by inserting Section 4209A[101] and amending Section 4204A[102] to conform Delaware law to the constitutional requirements stated by the United States Supreme Court, specifically the differences between juveniles and adult offenders for purposes of sentencing.[103]

101 11 *Del. C.* § 4209A, entitled Punishment for first-degree murder committed by juvenile offenders, provides:

> Any person who is convicted of first-degree murder for an offense that was committed before the person had reached the person's eighteenth birthday shall be sentenced to term of incarceration not less than 25 years to be served at Level V up to a term of imprisonment for the remainder of the person's natural life to be served at Level V without benefit of probation or parole or any other reduction.

102 11 *Del. C.* § 4204A (providing for the confinement of youth convicted in Superior Court).

103 *See* Del. Bill Summ., 2013 Reg. Session. S.B. 9 (147th General Assembly 2013) (May 16, 2013).

D. Reyes Trial Counsel's mitigation presentation did not include adequate information regarding Reyes' youth as a mitigating factor and, therefore, did not meet constitutional standards.

Reyes Trial Counsel did not present the transient qualities of Reyes' youth in accordance with constitutional demands. To the contrary, Reyes Trial Counsel emphasized Reyes' status as an irredeemable adult predisposed to violence, which Reyes was unable to avoid as an adult. Instead of presenting Reyes as a youthful offender who should be considered less culpable, Reyes Trial Counsel actually presented a so-called "mitigation" case that emphasized Reyes as a violent and dangerous person.

In their penalty phase opening statement, Reyes Trial Counsel showed a picture of Reyes as a toddler—"Point A"—and pointing to Reyes, a convicted murder, in the courtroom—"Point B"—Reyes Trial Counsel explained to the jury that its penalty phase presentation would

present evidence meant to "take [the jury] from point A to B. We will introduce this evidence to you for one purpose so you can understand why Luis Reyes turned out the way he is."[104] Reyes Trial Counsel explained its point A to B theory to the jury as follows:

> [T]he evidence is important to help you understand how a child at risk, [a] child like Luis Reyes is molded into a teenager who makes horrible wrong choices. You will hear from our witnesses that at certain important stages of his development Luis Reyes was exposed to certain behaviors by his family members that put him at high risk to commit violent acts.... You will hear Mr. Reyes lived in as home with domestic violence both physical and verbal.[105]

104 Penalty Phase Tr. Oct. 23, 2001 at 27:5–12.

105 *Id.* at 28:15–21, 29:11–12.

Additionally, in its closing statements of the penalty phase, Reyes Trial Counsel stated, "[t]here is only one truly important question in this case and that's how and why Luis Reyes developed the capacity to commit murder."[106] Then Reyes Trial Counsel asked the jury, rhetorically, "How does a child, born like any other child, develop into *a teenage murderer*?"[107] Finally, in one of the final comments for the jury's consideration, Reyes Trial Counsel told the jury: "Reyes' life was marked, measured, and set into place when he was still a child. [Reyes] was unable to escape from the tragic path of his life, though others have escaped, and he became a criminal like all the men who grew up in the Reyes household."[108]

106 Penalty Phase Tr. Oct. 25, 2001 at 113:2–4.

107 *Id.* at 121:1–2 (emphasis added).

108 *Id.* at 137:18–23.

***16** The record demonstrates that Reyes Trial Counsel only discussed Reyes' "youth" to support a theme that Reyes had been "hardwired for violence" and became a violent and dangerous adult. Reyes was presented as someone who was fully developed and beyond the capacity for change. Reyes Trial Counsel did not offer even the possibility for change as Reyes matured chronologically, mentally, intelligently, and so on. Indeed, the jury never heard the idea that the capacities of a youthful offender are less than that of an adult and that youths are still developing and maturing even though these concepts are at the very heart of the jurisprudence demanding consideration of the qualities of youth as mitigating evidence.

This Court is not suggesting that it is *per se* unreasonable for defense counsel to present only "negative" aspects as its mitigation strategy. It seems that the strategy of Reyes Trial Counsel was meant to avoid death for their client. Nevertheless, in light of constitutional demands, prevailing professional norms, the mitigation investigation conducted, and all of the relevant mitigating evidence in the record, including the postconviction record, the Court finds the presentation did not meet constitutional standards. This is especially because of the Trial Court's significant reliance on Reyes' involvement at age seventeen (17) in the Otero murder as well as Reyes' age at the time of the Rockford Park Murders.

Reyes Trial Counsel failed to present the age-related characteristics of Reyes that weighed against Reyes' moral culpability for the Rockford Park Murders. Instead, Reyes Trial Counsel solely presented "negative" aspects of Reyes and his childhood and argued, essentially, that Reyes was born and raised to become the violent man sitting before the jury. Such a mitigation strategy is entirely inconsistent with the well-known concepts of youth underlying our constitutional jurisprudence.[109] Executing Reyes based on this presentation would violate constitutional standards. For these reasons, Reyes' death sentence must be vacated.

109 With respect to the evidence that Reyes Trial Counsel failed to produce in mitigation regarding Reyes' developmental issues, *see infra* Section V(C) generally.

V. *INEFFECTIVE ASSISTANCE OF COUNSEL*

A. Standard for Ineffective Assistance of Counsel

Reyes claims that Reyes Trial Counsel provided ineffective legal assistance in violation of Reyes' rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 7 of the Delaware Constitution. The standard used to evaluate claims of ineffective counsel is the two-prong test articulated by the United States Supreme Court in *Strickland v. Washington*,[110] as adopted in Delaware.[111]

The movant must show that (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different.[112] Failure to prove either prong will render the claim insufficient.[113] Moreover, the Court shall dismiss entirely conclusory allegations of ineffective counsel.[114] The movant must provide concrete allegations of prejudice, including specifying the nature of the prejudice and the adverse affects actually suffered.[115]

110 466 U.S. 668 (1984).

111 *See Albury v. State*, 551 A.2d 53 (Del.1988).

112 *Strickland*, 466 U.S. at 687.

113 *Id.* at 688; *Dawson v. State*, 673 A.2d 1186, 1196 (Del.1996).

114 *Younger*, 580 A.2d at 555; *Jordan v. State*, 1994 WL 466142, at *1 (Del. Aug. 25, 1994).

115 *Strickland*, 466 U.S. at 692; *Dawson*, 673 A.2d at 1196.

With respect to the first prong—the performance prong—the movant must overcome the strong presumption that counsel's conduct was professionally reasonable.[116] To satisfy the performance prong, Reyes must assert specific allegations to establish Reyes Trial Counsel acted unreasonably as viewed against "prevailing professional norms."[117] With respect to the second prong—the prejudice prong—cumulative error can satisfy the prejudice prong when it undermines confidence in the verdict.[118]

116 *Strickland*, 466 U.S. at 687–88.

117 *Id.* at 688; *Wright v. State*, 671 A.2d 1353, 1356 (Del.1996) ("Mere allegations of ineffectiveness will not suffice.").

118 *See Starling*, 2015 WL 8758197, at *14–15.

B. Reyes has established Ineffective Assistance of Counsel in the guilt phase of the Reyes Rockford Park Trial.

***17** With no physical evidence linking Reyes to the Rockford Park Murders, it was essential for a fair trial that Reyes Trial Counsel "use all available impeachment evidence, and make timely and appropriate objections to the admission of evidence going to the heart of the State's case."[119] Roderick Sterling's testimony was at the heart of the State's case against Reyes. This Court finds that the errors by Reyes Trial Counsel during the guilt phase of the Reyes Rockford Park Trial resulted in cumulative prejudice to Reyes.

119 *Id.* at *1.

1. Reyes Trial Counsel failed to establish that the information Sterling provided in the letter to Sterling's counsel was hearsay.

Under the DRE, hearsay is inadmissible unless otherwise provided by the DRE or law.[120] It is well-established under the DRE that admissions by party opponents are considered non-hearsay.[121] Admissions by a party include statements made by the party himself and "statements which he has manifested his adoption or belief in its truth."[122]

120 D.R.E. 802.

121 D.R.E. 801(d)(2); *Flonnory v. State*, 893 A.2d 507, 516 (Del.2006).

122 D.R.E. 801(d)(2)(A)-(B).

Sterling sent a letter to his counsel ("Sterling Letter") claiming that Reyes admitted his role in the Rockford Park Murders and Sterling testified about the Sterling Letter at the Reyes Rockford Park Trial. Sterling admitted at the Reyes Rockford Park Trial that Galindez wrote the Sterling Letter and that Sterling signed it.[123] At the Reyes Rockford Park Trial, Reyes Trial Counsel objected to Sterling's testimony regarding the Sterling Letter on hearsay grounds.[124] Overruling Reyes Trial Counsel's objection, the Trial Court found that even though Galindez and not Sterling wrote the Sterling Letter, Sterling adopted the contents of the Sterling Letter and, therefore, testimony regarding the Sterling Letter was admissible under the DRE.[125]

123 Guilt Phase Tr. Oct. 3, 2001 at 36:3–4; 39:12–16.

124 *Id.* at 36:11–23; 37:1–23.

125 *Id.* at 37:1–12.

Although Reyes Trial Counsel properly objected to Sterling's testimony about the Sterling Letter, Reyes Trial Counsel did not present an accurate and thorough basis for the hearsay objection to the Trial Court. Specifically, even if the Trial Court agreed with the State that Sterling adopted the statements by Galindez by signing the Sterling Letter, the letter was hearsay. Particularly, Sterling testified at the Reyes Rockford Park Trial that the information within the Sterling Letter was learned by Sterling when Sterling overheard a conversation between Reyes and Galindez.[126] However, in September 2008 when private investigators interviewed Sterling in Jamaica, Sterling stated that he learned details of the Rockford Park Murders from Galindez directly and not by overhearing a conversation between Galindez and Reyes.[127] In other words, even though Sterling claimed at the Reyes Rockford Park Trial that he had personal knowledge of the contents of the Sterling Letter, Sterling did not have personal knowledge. Accordingly, the Sterling Letter was hearsay, but this argument was not presented for the Trial Court's consideration. This failure reflected inadequate trial preparation which was not reasonable performance under the circumstances especially, where, as here, Sterling was the *only* witness to link Reyes to the Rockford Park Murders.

126 Guilt Phase Tr. Oct. 3,2001 at 8:15–23; 9:1–21.

127 *Reyes*, 2012 WL 8256131, at *9.

Moreover, Sterling may have signified adoption of Galindez's writing, but adoptive admissions are only considered non-hearsay as to parties. Neither Galindez nor Sterling was a party in the Reyes Rockford Park Trial. Therefore, Reyes Trial Counsel should have presented argument that the Sterling Letter was hearsay if it was to be offered for the truth of its contents. Reyes Trial Counsel's failure to make this argument was unreasonable and Reyes has established the performance prong of *Strickland.*

2. Reyes Trial Counsel's failure to call Galindez as a witness was objectively unreasonable.

***18** Reyes Trial Counsel was ineffective by failing to call Galindez as a witness. Only Galindez could have challenged Sterling's testimony, which was "the most significant testimony" against Reyes.[128]

128 *Reyes Sentencing*, 2002 WL 484641, at *8.

Sterling claimed that Sterling overheard and understood conversations between Reyes and Galindez. However, if Galindez had testified, Galindez would have demonstrated that Sterling's claim was false because Sterling could not possibly have understood any conversation between Galindez and Reyes. At trial, Sterling testified that he did not speak Spanish and only understood Spanish "a little bit."[129] Sterling further testified that he heard the conversation between Galindez and Reyes in English.[130] However, in a 2012 affidavit, Galindez provided:

> [ ] While I was serving my sentence [at Gander Hill], I was on the same pod as Luis Reyes. [ ] Luis Reyes and I talked about a lot of things while we were on the same pod. [ ] When I spoke to Luis Reyes, I spoke to him in Spanish because at the time, I spoke very little English. [ ] At the time, my cell [mate] was Roderick Sterling. [ ] Roderick Sterling did not speak Spanish.[131]

129 Guilt Phase Tr. Oct. 3,2001 at 72:11–16.

130 *Id.* at. 75:3–9.

131 Aff. of Ivan Galindez, Nov. 28, 2012.

Reyes Trial Counsel fell below an objective standard of reasonableness when they failed to call Galindez as a witness. It was critical to challenge Sterling's claim that Sterling heard Reyes tell Galindez that Reyes participated in the Rockford Park Murders. Accordingly, Reyes has established the performance prong of *Strickland.*

3. Reyes Trial Counsel failed to request a missing evidence instruction.

The State never produced the Sterling Letter. Importantly, Reyes Trial Counsel did not request a missing evidence instruction for the Sterling Letter. Had Reyes Trial Counsel requested the instruction, the jury would have received the standard *DeBerry* instruction, providing that the jury is to assume the missing evidence is exculpatory for Reyes:

> In this case, the Court has determined that the State failed to create or to preserve certain evidence, which is material to the defense. The failure of the State to create or preserve such evidence entitles the Defendant to an inference that, if such evidence were available at trial, it would be exculpatory. This means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been created or preserved, would not have incriminated the Defendant, but would have been favorable to his assertion of not guilty.[132]

132 *See, e.g.*, *State v. Adgate*, 2014 WL 3317968, at *5 (Del.Super. July 7, 2014); *see also* *DeBerry v. State*, 457 A.2d 744 (Del.1983).

Reyes Trial Counsel's performance fell below an objective standard of reasonableness and Reyes has established the performance prong of *Strickland.*

4. Reyes Trial Counsel failed to notify the Court that presenting Cabrera as a witness was critical to Reyes' defense.

Approximately one week before the Reyes Rockford Park Trial, Reyes Trial Counsel received a letter from Cabrera who wanted to help Reyes, but not at the expense of admitting his own guilt.[133] Cabrera's counsel subsequently advised Reyes Trial Counsel that Cabrera would not be testifying on behalf of Reyes and if Cabrera was called, he would invoke his Fifth Amendment privilege.[134]

133 Letter from Luis Cabrera to Reyes Trial Counsel, Sept. 23, 2001.

134 Letter from John P. Deckers to Reyes Trial Counsel, Oct. 9, 2001.

***19** Cabrera was a critical witness for Reyes' defense. Had Cabrera been available as a witness, Cabrera would have testified that Reyes was not responsible for the Rockford Park Murders. Furthermore, Cabrera would have testified that a man named Neil Walker had committed the murders. Additionally, Cabrera would have offered details about an altercation that involved Walker, Cabrera, Saunders, and Rowe that gave a motive for Walker to commit the Rockford Park Murders.[135]

135 Cabrera provided these details to Reyes Trial Counsel during an interview in March 2001. Reyes Trial Counsel also reviewed—prior to meeting with Cabrera—a report from an investigator who interviewed Cabrera for the Otero case in August 1997. The investigator's report provided similar details, as recounted by Cabrera, regarding the altercation with Saunders, Rowe, and Walker. Importantly, Cabrera maintained the same account even after Reyes testified against Cabrera in the Otero case.

Under DRE 803(b)(3), statements against interest are those statements that "at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true." Statements against interest are admissible when a declarant is unavailable to testify, which includes when a declarant has invoked his Fifth Amendment privilege against self-incrimination.[136] Moreover, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[137]

136 D.R.E. 804(a)(1); *see also* *Demby v. State*, 695 A.2d 1152, 1158 (Del.1997) (noting that a witness was "unavailable" because he invoked his Fifth Amendment privilege).

137 D.R.E. 804(b)(3). In determining whether there are sufficient corroborating circumstances to indicate trustworthiness of an unavailable declarant's statements, the Court considers: (1) whether the statements were made spontaneously and in close temporal proximity to the commission of the crime at issue; (2) the extent to which the statements were truly self-incriminatory and against penal interest; (3) consideration of the reliability of the witness who was reporting the hearsay statement; and (4) the extent to which the statements were corroborated by other evidence in the case. *Demby v. State*, 695 A.2d 1152, 1158 (Del.1997).

Cabrera's proposed statements about Reyes' factual innocence met the standard under DRE 803(b)(4) because the statements exposed Cabrera to criminal liability and

were contrary to Cabrera's penal interests.[138] Nevertheless, the Trial Court did not rule on the admissibility of Cabrera's statements during the Reyes Rockford Park Trial because Reyes Trial Counsel did not even seek to admit the statements.[139] This was objectively unreasonable performance. Accordingly, the performance prong of *Strickland* has been established.

138 Although Cabrera never admitted any involvement in the Rockford Park Murders, Cabrera's statements were nevertheless incriminating. Cabrera's statements were against Cabrera's penal interests in that Cabrera admitted to purchasing drugs, unlawfully possessing a handgun, assaulting Rowe during a confrontation prior to the Rockford Park Murders, and assaulting Walker.

139 The Trial Court addressed Cabrera's statements at a postconviction evidentiary hearing on August 28, 2012. *See* Evid. Hrg. Tr. Aug. 28, 2012 at 8:10–11; 15–20.

5. The cumulative effect of Reyes Trial Counsel's errors in the guilt phase of the Reyes Rockford Park Trial resulted in prejudice to Reyes.

***20** It was imperative for Reyes Trial Counsel to make timely objections and utilize appropriate impeachment and exculpatory evidence. The cumulative effect of Reyes Trial Counsel's errors during the guilt phase of the Reyes Rockford Park Trial resulted in prejudice to Reyes. Accordingly, Reyes' convictions must be vacated.

C. Reyes has established Ineffective Assistance of Counsel in the penalty phase of the Reyes Rockford Park Trial.

The Court finds that the errors by Reyes Trial Counsel in the penalty phase of the Reyes Rockford Park Trial resulted in cumulative prejudice to Reyes.

1. Reyes Trial Counsel was ineffective for failing to limit the presentation to the jury of Reyes' role in the Otero murder.

Reyes Trial Counsel did not file a motion *in limine*, or otherwise argue, that evidence regarding Reyes' role in the Otero murder was inadmissible. As detailed above,[140] Reyes explained to the jury during his allocution that he wanted to testify to profess his innocence during the guilt phase, but refrained from doing so to avoid presentation of his role in the Otero murder.[141] While no evidence of Reyes' Otero conviction was admitted during the guilt phase of the Reyes Rockford Park Trial,[142] and would have been inadmissible during the guilt phase,[143] the State's penalty phase opening statement immediately began with the murder of Otero by Reyes.[144] The State's presentation also included details of the Otero murder, including that Reyes physically held Otero down while Cabrera suffocated Otero with a plastic bag, then Cabrera and Reyes took Otero's body to New Jersey where they disposed of Otero's body in a dumpster and incinerated him.[145] The State further explained to the jury that while Reyes could have received the death penalty for the death of Otero, he was actually only sentenced to twelve years because of a plea agreement.[146] Then, Reyes Trial Counsel read a portion of the transcript from Reyes' Otero sentencing that included that Reyes participated in the Otero murder because of Cabrera's influence; Reyes fully cooperated in the investigation into Cabrera; Reyes gave a detailed confession to the murder of Otero; Otero's daughter gave a "wrenching" testimony of dreaming of walking down the aisle with her father; Otero's "charred remains" were found in New Jersey; and Reyes "physically was a principal in the murder by holding down Mr. Otero."[147]

140 *See supra* Section III(A).

141 Penalty Phase Tr. Oct. 25, 2001 at 96:3–11.

142 *Reyes Sentencing*, 2002 WL 484641, at *11 (noting that information regarding the murder of Otero was introduced during the penalty phase).

143 *See e.g.*, D.R.E. 404(b) (providing that evidence of a defendant's previous crime is inadmissible to prove a defendant's the character or that a defendant acted in conformity with a crime. However, evidence of a defendant's previous crimes is admissible for other purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident"); D.R.E. 609(a) (stating that a defendant's previous convictions are only admissible for the purposes of impeachment when: (1) the previous conviction was a felony and the court determines that the probative value outweighs its prejudicial effect; or (2) the crime involves dishonesty or false statement).

144 Penalty Phase Tr. Oct. 23, 2001 at 12:19.

145 *Id.* at 12:23–14:7.

146 *Id.* at 15:2–7.

147 Penalty Phase Tr. Oct. 25, 2001 at 6:21–11:20.

***21** "The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence [during the penalty phase]."[148] However, even though Reyes' conviction and guilty plea in connection with the Otero murder were likely admissible during the penalty phase, Reyes Trial Counsel should at least have made an effort to limit the presentation to the jury of *highly* prejudicial details of the Otero murder on the basis that the danger of unfair prejudice substantially outweighed the probative value.[149] Accordingly, Reyes has established the performance and prejudice prongs of *Strickland.*

148 11 *Del. C.* § 4209(c)(1).

149 *See* D.R.E. 403.

2. Reyes Trial Counsel's representation with respect to mitigation during the penalty phase of the Reyes Rockford Park Trial was ineffective.

Reyes Trial Counsel was ineffective under the prevailing professional norms because their mitigation presentation was based on an incomplete and inadequate investigation that failed to consider Reyes' youth and brain development. Moreover, Reyes Trial Counsel missed crucial opportunities to rebut the State's presentation of aggravating factors. Reyes Trial Counsel presented a one-dimensional, negative portrayal of Reyes in an effort to demonstrate to the jury that Reyes never had a chance and, therefore, the strategy was "to focus on, instead of the positive aspect of Luis Reyes, the negative things that happened to [Reyes] in his life."[150] This presentation did not meet prevailing professional norms and was prejudicial to Reyes.

150 Ev. Hrg. Tr. May 9, 2012 at 136:2–13.

a. The Standard for Mitigation in a Capital Case

The United States Supreme Court has recognized that defense counsel in a capital case is "obligat[ed] to conduct a thorough investigation of the defendant's background."[151] In 1989, the American Bar Association promulgated guidelines for defense attorneys in capital cases ("ABA Guidelines").[152] Section 11.4.1 of the ABA Guidelines provides:

> A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.
>
> B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.
>
> C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This *investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence* that may be introduced by the prosecutor.

151 *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

152 *See Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) (hereinafter *ABA Guidelines*).

The ABA Guidelines serve to "enumerate the *minimal* resources and practices necessary to provide effective assistance of counsel."[153] Although failure to follow the ABA Guidelines is not tantamount to ineffective assistance of counsel *per se;*[154] the ABA Guidelines set a standard for evaluation of Reyes Trial Counsel's representation regarding its mitigation investigation.[155] According to the ABA Guidelines, defense counsels' "duty to investigate is not negated by the expressed desires of a client. Nor may [defense] counsel sit idly by, thinking that the investigation would be futile. The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each."[156] Moreover, the ABA Guidelines suggest that the mitigation investigation "should comprise efforts to discover *all reasonably available* mitigating evidence *and* evidence to rebut any aggravating evidence that may be introduced by the [State]."[157] The ABA Guidelines recommend obtaining the following sources for investigative information: all charging documents;[158] information from the accused concerning the incident

relating to the offense charged;[159] and records—including but not limited to—medical records, birth records, school records, employment and training records or reports, family and social history, prior records, and religious or cultural influences.[160] The ABA Guidelines further suggest obtaining the names of sources to contact for verification of the information in the collected records.[161]

153 *Id.* (emphasis added).

154 *State v. Taylor*, 2010 WL 3511272, at *17 (Del.Super. Aug. 6, 2010) ("Neither the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines in legally tantamount to ineffective assistance of counsel.").

155 *Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in the [ABA Guidelines] and the like ... are guides to determining what is reasonable.").

156 *ABA Guidelines*, *supra* note 152 at § 11.4.1, cmt. (internal quotation omitted).

157 *Id.* at § 11.4.1(C) (emphasis added).

158 *Id.* at § 11.4.1(D)(1)(A)–(C).

159 *Id.* at § 11.4.1(D)(2)(B).

160 *Id.* at § 11.4.1(D)(2)(C).

161 *Id.* at § 11.4.1(D)(2)(E).

b. Reyes Trial Counsel's mitigation strategy was not based on a reasonable mitigation strategy and instead was counterproductive by presenting Reyes as a man with inevitable propensity for violence.

***22** Reyes Trial Counsel pursued a mitigation strategy that compared Reyes' background with the findings of a report issued in April 2000 by the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice ("Youth Violence Report").[162] The Youth Violence Report, *Predictors of Youth Violence*, identified risk factors that "confidently predict which youth would be prone to commit violent acts."[163] The Youth Violence Report identified violence-predicting risk factors within each of five domains: individual factors, family factors, school factors, peer-related factors, and community and neighborhood factors.[164] According to the Youth Violence Report "[t]he risk of violence is also compounded by the number of risk factors involved [with the youth]."[165] Reyes Trial Counsel presented to the jury that the characteristics and life of Reyes closely matched the Youth Violence Report risk criteria, which demonstrated Reyes' potential for future violence.[166] As Reyes Trial Counsel explained at the postconviction evidentiary hearing:

> And I think we decided that ... was going to be the strategy to say, do you know what, instead of saying what a good guy ... [Reyes] was or how responsible [Reyes] was, that what we were focusing on was—as I sit here, this is my recollection—what a pretty lousy childhood [Reyes] had and how the cards were stacked against [Reyes]. And [Reyes] met most of the risk factors for that [Youth Violence Report], which would indicate tendency for violence or future violence.[167]

162 Office of Juvenile Justice & Delinquency Prevention, U.S. DOJ, *Predictors of Youth Violence*, Juvenile Justice Bulletin (April 2000) (hereinafter *Youth Violence Report*).

163 *Id.* at 1.

164 *Id.* at 2. The Youth Violence Report also identified situational factors, which are "circumstances that surround a violent event and influence the outcome of that event." *Id.* at 5 (providing that situational factors may include "consumption of alcohol or other drugs by the offender or victim, the behavior of bystanders, the motives of the offender" but noting that such situational factors are "difficult to assess").

165 *Id.* at 7 ("The larger the number of risk factors to which an individual is exposed, the greater the probability that the individual will engage in violent behavior.").

166 Ev. Hrg. Tr. May 9,2012 at 122:17–123:1, 124:12–18.

167 *Id.* at 120:9–121:1–2.

i. Dr. Caroline Burry's testimony focused on Reyes' amenability to violence and was based on a cursory investigation.

Reyes Trial Counsel hired Dr. Caroline Burry as a mitigation specialist to assist with the mitigation investigation. According to Dr. Burry, Reyes Trial Counsel specifically hired Dr. Burry to "determine the factors and events in [Reyes'] developmental, family, and/or social history which may have influenced his subsequent functioning as an adult."[168] The majority of Dr. Burry's mitigation investigation consisted of twenty (20) hours of interviews.[169] Specifically, in addition to interviewing Reyes, Dr. Burry interviewed: (1) Reyes' mother, Ruth Reyes, (2) Reyes' grandmother, Candida Reyes, (3) Reyes' aunts, Luz Diaz and (4) Damarias Reyes, (5) Reyes' girlfriend/fiancé, Elaine Santos, (6) Reyes' daughter, Desiree Reyes, and (7) Reyes' stepson, Raymond Sanchez.[170] Dr. Burry also reviewed family photographs and Reyes' presentencing investigation report ("PSI Report"). Dr. Burry compiled her findings in an informal document titled *Draft of Dr. Caroline Burry Personal Notes* ("Dr. Burry Notes").[171]

168 *See* Dr. Caroline Burry Draft of Personal Notes (Aug. 27, 2001), Reyes App. 4, (hereinafter *Dr. Burry Notes*).

169 *Id.;* Penalty Phase Tr. Oct. 24, 2001 at 96:4–8, 96:14.

170 *Dr. Burry Notes supra* n.168; Penalty Phase Tr. Oct. 24, 2001 at 96:4–8, 96:14.

171 *See Dr. Burry Notes supra* n.168.

During the penalty phase, Dr. Burry testified on behalf of Reyes as an expert in family assessment. To explain her findings to the jury, Dr. Burry created a genogram[172] that showed four generations of Reyes' family and identified repetitive themes throughout the family.[173] Dr. Burry testified that Reyes' genogram contained repetitive themes of criminal history, substance abuse, and relationships Reyes' mother had with "substitute father figure[s]."[174] Moreover, Dr. Burry testified that the father role in Reyes' life was later filled by Cabrera.[175]

172 "The genogram is [the] social work term for a family tree.... geno meaning generations and gam meaning written." Penalty Phase Tr. Oct. 24,2001 at 98:1–3.

173 *Id.* at 100:4–21.

174 *Id.* at 100:22–101:14; 104:12–105:3.

175 *Id.* at 135:14–21.

***23** Dr. Burry testified that, in her professional opinion, "Reyes' family history reveal[s] a number, in fact, a strikingly large number of risk factors predictive of violence."[176] Indeed, Dr. Burry presented to the jury a number of charts that highlighted the factors indicated in the Youth Violence Report and the applicability of each factor as to Reyes. Dr. Burry testified that Reyes had been exposed to twenty out of twenty-seven risk factors identified by the Youth Violence Report. Specifically, Reyes experienced five out of the eight individual risk factors; all seven of the family risk factors; all four of the school risk factors; one of the three peer-related factors; and three out of the five community and neighborhood risk factors.[177] Dr. Burry also elaborated on the risks associated with having a teen mother, noting that Reyes' mother was sixteen when she gave birth to Reyes.

176 *Id.* at 107:16–18.

177 *Id.* at 119:6–127:5.

Dr. Burry noted that a full assessment of a youth requires consideration of protective factors, which are factors that "may help to balance against risk [,]" because "even a child out of a negative background might still do well if he or she has a number of strong protective factors."[178] In this case, Dr. Burry testified that out of four groups of factors, which each contain multiple protective factors, Reyes qualified for only two protective factors.[179] Dr. Burry provided that it was her professional opinion "that

Reyes had numerous risk factors and very few protective factors ... particularly at the individual and family level, [and] that [Reyes] was at very high risk *and did in fact become* dangerous."[180]

178 *Id.* at 130:9–131:1.

179 First, Reyes was socially bonded to his high school; and second, Reyes was subject to early intervention because he attended pre-school. *See* Penalty Phase Tr. Oct. 24,2001 at 131:2135:13 (explaining that Reyes lacks intelligence, social orientation, a resilient temperament, a pro-social family, and exposure to parental values and standards of no violence and/or the promotion of abstinence from drugs).

180 *Id.* at 136:7–12 (emphasis added).

In addition to this Court's concern with the counterproductive presentation of Dr. Burry's testimony that Reyes was seemingly inevitably violent, this Court is also concerned with the adequacy of Dr. Burry's mitigation investigation as it relates to the information obtained through a limited number of interviews from one narrow source—relatives. Even though Dr. Burry presented a genogram addressing four-generations of Reyes' family, Dr. Burry conducted interviews with only seven of Reyes' family members.

This Court is also concerned with the limited scope of records that Dr. Burry reviewed. Dr. Burry testified that she obtained her information to compile Reyes' social history from her interviews, the materials within Reyes' PSI Report, and family photographs.[181] Dr. Burry wanted more records to review; she noted: "Information needed: 1. Criminal records on the entire family [and] 2. Medical records."[182] Dr. Burry never obtained any of these records.[183] Accordingly, the information presented was inadequate and insufficient.

181 *See id.* at 96:1–11.

182 *Dr. Burry Notes*, *supra* note 168.

183 Ev. Hrg. Tr. May 9, 2012 at 125:16–126:8.

Dr. Burry's narrow set of investigative sources is troubling. Dr. Burry was retained to complete a *social* history of Reyes; however, a mitigation investigation should be broader than social information. Mitigation investigations should include the discovery of "all reasonably available mitigating evidence *and* evidence to rebut any aggravating evidence that may be introduced[.]"[184] It is ineffective for defense counsel to abandon an investigation after gathering " 'rudimentary knowledge of [the defendant's] history from a narrow set of sources.' "[185] This is because such a cursory mitigation investigation makes it impossible for defense counsel to make a fully informed decision with respect to a mitigation strategy.[186]

184 *ABA Guidelines*, *supra* note 152 at § 11.4.1(C).

185 *Ploof v. State*, 75 A.3d 840, 852 (Del.2013) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

186 *Wiggins*, 539 U.S. at 527–28.

***24** Moreover, "[i]n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the ... evidence already known to counsel but also whether the known evidence would lead a reasonable attorney to investigate further."[187] Here, the information Dr. Burry began to uncover during her limited mitigation investigation—family drug abuse, physical and verbal abuse, and child abandonment—is exactly the type of information that would lead reasonable attorneys to pursue additional mitigation investigation.[188] The failure to do so did not meet prevailing professional norms.

187 *Id.* at 527.

188 *See id.* at 523–25 (finding defense counsel's mitigation investigation fell short of professional standards where it relied only on the defendant's PSI and records from social services regarding defendant's time in foster care, which provided that defendant's mother was a chronic alcoholic; defendant was transferred from foster home to foster home and displayed emotional

difficulties; defendant had frequent, lengthy absences from school; and, on at least one occasion, defendant's mother left him and his siblings alone for days without food).

ii. Dr. Harris Finkelstein's testimony offered a rudimentary explanation for Reyes' behaviors and relied on Dr. Burry's cursory investigation and Reyes' unsubstantiated self-report.

Dr. Harris Finkelstein testified during the penalty phase as an expert in the field of psychology. Reyes Trial Counsel retained Dr. Finkelstein to "determine some type of insight into ... what would contribute to [Reyes] doing the kinds of behaviors which at that point [Reyes] was accused of and later convicted of."[189] Dr. Finkelstein testified as to his opinion on Reyes' psychological adjustment, which he explained as the "clear end point in terms of a person's behavior.... [and how to] understand those kinds of behaviors.... not necessarily excusing the behavior, [but] simply trying to explain it [to] reach a deeper level of understanding."[190] In forming his opinion, Dr. Finkelstein performed a limited review, including an interview of Reyes for a total of four hours during which Dr. Finkelstein conducted projective psychological tests, and a review of a report prepared by court personnel in connection with sentencing, as well as other records kept by the various courts.[191]

189 Penalty Phase Tr. Oct. 24,2001 at 150:17–20.

190 *Id.* at 163:13–164:2.

191 *Id.* at 160:22–163:10.

Dr. Finkelstein explained that Reyes tends to think of himself in two divided psychological standpoints.[192] According to Dr. Finkelstein, these two psychological standpoints are in conflict and, as a result of this conflict, Reyes became "dependent upon the validation and affirmation of other people who are important to him."[193] As an example, Dr. Finkelstein explained that Reyes' success in high school wrestling earned him the support and recognition that fed into Reyes' positive self-concept and helped him make good choices. Dr. Finkelstein also explained that Reyes' home life and background pulled Reyes to his more withdrawn, hopeless, and despondent side.[194]

192 According to Dr. Finkelstein, on one hand, Reyes appears to feel quite good about himself, thinks he is capable, and carries himself in a confident fashion. On the other hand, Reyes carries significant self-doubt and sees himself as someone who simply cannot succeed.

193 Penalty Phase Tr. Oct. 24,2001 at 164:22–165:1.

194 *See id.* at 165:8–11:7.

Finally, Dr. Finkelstein addressed Reyes' relationship with Cabrera to demonstrate the complexities of Reyes' divided psychological self-perception. According to Dr. Finkelstein, Cabrera provided Reyes with an important source of support and validation that Reyes desired but the "dilemma was when Cabrera started to give [Reyes] validation that was in part based on [Reyes] being able to win [Cabrera's] support by doing very, very awful things."[195] Moreover, Dr. Finkelstein offered an opinion that Reyes possessed impulsive tendencies and may have suffered from Attention Deficit Hyperactivity Disorder ("ADHD"). Dr. Finkelstein explained that Reyes was someone with "narcissistic vulnerability" whose background created "somebody who is very much compromised in terms of their abilities to use other people [for support or advice], compromised in terms of decision-making abilities and [somebody] ... very much in conflict over how to sustain good feelings about himself."[196]

195 *Id.* at 166:8–15.

196 *Id.* at 170:10; 166:15–169:11,169:16–20.

***25** Decisional law mandates that defense counsel's strategic decisions properly involve consideration of the defendant's own statements, actions, and preferences;[197]

however, the mitigation investigation should not be limited to the degree of information offered by the defendant as to his own past.[198] Nevertheless, during cross-examination at the Reyes Rockford Park Trial, Dr. Finkelstein conceded that his testimony represented mere opinions as to Reyes' psychological adjustment more than true medical diagnoses because Dr. Finkelstein's conclusions were "based mostly on the defendant['s] data utilizing just a few selected points from history."[199]

197 *Strickland*, 466 U.S. at 691.

198 *See* *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (the United States Supreme Court explained that a "fatalistic or uncooperative [client] ... does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation."); *see also* *Rompilla v. Beard*, 545 U.S. 374, 381–83, 89–90 (2005) (determining that the defense counsel's mitigation investigation was deficient notwithstanding the defendant's minimal contributions and unwillingness to address his past and providing "[n]o reasonable lawyer would forgo examination of the file[s] thinking he could do as well by asking the defendant or family[,]" despite knowing that the State intends to introduce prior convictions and damaging testimony).

199 Penalty Phase Tr. Oct. 24, 2001 at 194:9–13.

Dr. Finkelstein further explained that he did not review any of Reyes' medical or school records, and that he did not have conversations with any of Reyes' family members. Rather, Dr. Finkelstein reviewed only a brief version of facts presented to him by Reyes Trial Counsel and Dr. Burry. Indeed, Dr. Finkelstein testified that he did not necessarily have full confidence that he received "all the matters about [Reyes'] factual history."[200]

200 *Id.* at 178:16–179:16.

It was the responsibility of Reyes Trial Counsel to make this information available for a complete review. The failure to provide the information necessary for Dr. Finkelstein to act as an effective witness for Reyes was unreasonable.

iii. Reyes Trial Counsel failed to contact mitigation witnesses.

Reyes Trial Counsel presented only three family members on behalf of Reyes during the penalty phase. Candida Reyes, Reyes' grandmother, testified regarding her relationship with Reyes as well as Reyes' difficult childhood without a father and with a mother who was always partying.[201] Elaine Santos, Reyes' fiance/girlfriend and mother of Reyes' two children, testified that Reyes supported their family financially and emotionally and that Reyes had a close relationship with his children.[202] Reyes' stepson, Raymond Sanchez, described his relationship with Reyes and said that he (Raymond) "would not feel good" if he could no longer see Reyes.[203]

201 *See id.* at 216:11–234:23.

202 *See id.* at 19:13–32:2.

203 *See id.* at 32:20–38:13.

Presentation of three family members was inadequate for the jury to have a complete picture of Reyes. Many additional witnesses were available to discuss Reyes' dysfunctional upbringing, as well as Reyes' leadership skills developed on the wrestling team and his ability to act as a role model for the younger wrestlers on the team.

First, Reyes Trial Counsel failed to call George Lacsny, a teacher at Reyes' high school and Reyes' wrestling coach. At the postconviction evidentiary hearing, Mr. Lacsny testified that he does not think Reyes Trial Counsel ever contacted him to testify at the Reyes Rockford Park Trial because, as he stated, "If they did, I said I would."[204] Second, Reyes Trial Counsel failed to call Victor Reyes (of no relation to defendant Reyes), Reyes' wrestling coach during the 1995–1996 winter wrestling season.[205] Third, Reyes Trial Counsel failed to call Kathleen Corvelli–Reyes (Victor Reyes' wife and no relationship to Reyes) who became close with Reyes as a result of her husband's coaching. Although Ms. Corvelli met Reyes Trial Counsel before the Reyes Rockford Park Trial, they did not ask her to testify.[206] At the evidentiary hearing, Ms. Corvelli stated that she would have testified on behalf of Reyes.[207] Fourth, Reyes Trial Counsel failed to call Paul

Perets, a teacher, band director, and timekeeper for the wresting team at A.I. DuPont High School. These additional witnesses would have allowed the jury an understanding of Reyes as a high school student and successful wrestler.

204 Ev. Hrg. Tr. Sept. 29, 2012 at 23:18–23.

205 Victor Reyes admitted that in December 1996, after Reyes had graduated high school, Victor was charged with third degree sexual assault. Pedersen—of Reyes Trial Counsel—represented Victor on the charges and in June 1997, Victor resolved the charges by entering a plea. Reyes Trial Counsel did not contact Victor to testify on Reyes' behalf at the Reyes Rockford Park Trial, but Victor provided that he would have testified if contacted. Victor opined that his own personal problems distracted him from paying better attention to Reyes and that "if I would ha[ve] been a little more involved—I mean, at that time, that was my life, that was my job ... and I should have known better. If I would have got a little bit more involved, I don't think we would be here now."

206 Ev. Hrg. Tr. May 10, 2012 at 61–63.

207 *Id.* at 63.

***26** At the postconviction evidentiary hearing, Reyes Trial Counsel maintained that some of Reyes' Otero supporters were not interviewed because the strategy was "to focus on, instead of the positive aspect of Luis Reyes, the negative things that happened to [Reyes] in his life."[208] Reyes Trial Counsel did admit, however, that they "probably would have *or should have*" presented to the jury any and all credible admissible evidence that was supportive of their presentation of Reyes' dysfunctional childhood.[209] Moreover, Reyes Trial Counsel admitted that Ms. Covelli should have been called as a mitigation witness and, in fact, there was no excuse not to do so.[210]

208 Ev. Hrg. Tr. May 9,2012 at 136:2–13.

209 *Id.* at 158:13–23.

210 *Id.* at 164:8–167:16.

Reyes Trial Counsel did not meet prevailing professional norms and their strategy was not based on an adequate investigation. Under the applicable decisional law, the deference owed to Reyes Trial Counsel's mitigation strategy depends on the adequacy of the mitigation investigation supporting their strategy.[211] A strategy that is based on a " 'thorough investigation of law and facts relevant to plausible [mitigation] options [is] virtually unchallengeable[.]' "[212] Here, Reyes Trial Counsel did not perform a thorough investigation.

211 *Wiggins*, 539 U.S. at 521.

212 *Id.* (citing *Strickland*, 466 U.S. at 690–91).

Certain mitigation strategies may limit the scope of the mitigation investigation as long as defense counsel reasonably decides that " 'particular investigations [are] unnecessary.' "[213] A decision not to investigate further must be assessed for reasonableness in light of all the circumstances.[214] Here, it was not reasonable to limit the investigation. For instance, in *Williams v. Taylor*, the United States Supreme Court concluded, under *Strickland*, that defense counsel could not justify its failure to uncover and present certain mitigation evidence as a strategic decision because defense counsel failed to "fulfill their obligation to conduct a thorough investigation of the defendant's background" to support such a strategy.[215] The reasoning of *Williams* is applicable here and supports a finding that the investigation was inadequate.

213 *Id.* (citing *Strickland*, 466 U.S. at 690–91).

214 *Id.* at 521–22.

215 *Williams v. Taylor*, 529 U.S. 362,395–96 (2000).

Accordingly, the question for this Court is not whether

Reyes Trial Counsel *should have* presented *more* mitigating evidence in support of its mitigation strategy.[216] Rather, the question is whether reasonable judgment supported the extent of Reyes Trial Counsel's mitigation investigation. This Court finds that Reyes Trial Counsel's mitigation strategy was not reasonable, was not based on a proper investigation, and was counterproductive.

216 *Outten v. Kearney*, 464 F.3d 401,416–19 (3d Cir.2006); *Wiggins*, 539 U.S. at 521–23.

c. The jury did not have the opportunity to consider mitigating evidence regarding Reyes' adolescent brain functioning.

There was extensive mitigating evidence that Reyes Trial Counsel would have uncovered if a proper mitigation investigation was undertaken.

i. Dr. Jonathan Mack determined Reyes had limited executive functions.

In connection with the postconviction motion, Rule 61 Counsel retained Dr. Jonathan Mack, a forensic psychologist and neuropsychologist. Dr. Mack testified at a postconviction hearing as a defense expert in the study of the relationship between brain function and behavior. Dr. Mack testified generally that the executive functions of the brain are the last to develop and that the frontal lobes are not mature until age twenty–five.[217]

217 Ev. Hrg. Tr. Aug. 27, 2012 at 34:5–10; *see also* *Roper*, 543 U.S. 551 (discussing the executive functions of the brain in extensive detail).

***27** Dr. Mack conducted a neuropsychological and psychological evaluation of Reyes in 2007, when Reyes was twenty-nine years old, to determine Reyes' executive function sequencing and mental flexibility.[218] With respect to Reyes' executive functions, Dr. Mack testified that Reyes' abilities fell in the sixth (6th) percentile among the general population and Reyes suffered mildly to moderately impaired executive functioning.[219] With respect to mental flexibility, Dr. Mack testified that, based on Reyes' score, which placed Reyes in the eighth (8th) percentile, Reyes demonstrated definite mental impairment.[220] Dr. Mack also testified that he concluded that Reyes' full scale IQ—also known as Reyes' overall intellectual ability—was in the eighteenth (18th) percentile, which is the low average range.[221] Upon consideration of Reyes' records, test results, and a clinical interview of Reyes, Dr. Mack determined that, even at age twenty-nine, Reyes demonstrated difficulties with "nonverbal problem solving, abstract reasoning, concept formation and mental flexibility" and that Reyes' executive functions would have been worse in 1996, when Reyes was seventeen and eighteen years old.[222]

218 Ev. Hrg. Tr. Aug. 27, 2012 at 8:16–10:1, 34:21–23.

219 *Id.* at 35:8–13.

220 *Id.* at 35:18–22.

221 *Id.* at 21:17–19,23:5–6; *see* Ev. Hrg. Tr. April 24,2013 at 27:5–10.

222 Ev. Hrg. Tr. Aug. 27,2012 at 36:10–37:1.

The jury in the Reyes Rockford Park Trial did not have the opportunity to consider the expert opinion of Dr. Mack or any other expert in this field. Reyes Trial Counsel should have presented this or similar mitigating evidence to the jury in deciding whether to recommend a death sentence for Reyes. The failure to develop this mitigating evidence fell short of objectively reasonable performance standards.

ii. Dr. Dewey Cornell determined that Reyes' brain damage had significance for Reyes' relationship with Cabrera.

In connection with these postconviction proceedings, Dr. Dewey Cornell was retained as a forensic psychologist focused on the assessment of psychological evidence for the use in legal—decision making. Dr. Cornell conducted a six hour clinical interview of Reyes and interviewed Reyes' mother, Ruth Reyes; Reyes' Aunt, Luz Diaz; Reyes' cousin, Debbie Diaz; and Reyes' girlfriend/fiance, Elaine Santos. In addition, Dr. Cornell interviewed Kathy Covelli–Reyes; the Skinners; and reviewed the relevant court proceedings and expert reports for a postconviction evidentiary hearing.

At a postconviction evidentiary hearing, Dr. Cornell testified that a neuropsychological evaluation on Reyes

should have been conducted before the Reyes Rockford Park Trial because there were several indicators of brain dysfunction, prenatal marijuana exposure, teen drug use, and being held back in elementary school.[223] Dr. Cornell noted Reyes' significant "psychological dependency on [ ] Cabrera as magnified by his cognitive impairment and maturity."[224] In Dr. Cornell's opinion, Reyes' mild brain damage, as diagnosed by Dr. Mack, coupled with Reyes' incomplete prefrontal cortex development was significant because:

> The young man who does not have the even normal 18–year–old capacity to reflect on consequences of his actions, to separate himself from what other people are telling him to do, sort of use ordinary judgment that would lead you to act more independently rather than dependently on an authority figure or a person that you depend on.[225]

This would have been powerful and important information for the jury to understand Reyes' relationship with Cabrera. Reyes Trial Counsel's failure to develop this evidence fell short of reasonable performance.

223 Ev. Hrg. Tr. Aug. 2,2013 at 22:5–23:1.

224 *Id.* at 44:12–14.

225 *Id.* at 21:16–22.

iii. Dolores Andrews testified that Dr. Burry's mitigation investigation was incomplete and it could have had an effect on the jury.

***28** Dolores Andrews, a clinical social worker who works as a mitigation specialist, particularly in capital cases, was retained in connection with the postconviction proceedings. Ms. Andrews interviewed Reyes; Reyes' mother, Ruth Reyes; his aunts, Demaris and Luz Reyes; his cousin, Debra Diaz; and other non-family members, including employees of A.I. DuPont High School. Ms. Andrews authored a report with her findings. At a postconviction evidentiary hearing,[226] Ms. Andrews testified about Reyes' childhood, including Ruth's drug use and attempted abortions during her pregnancy with Reyes; Ruth's substance abuse; Ruth's general inability to parent Reyes; Ruth's use of corporal punishment on Reyes; the absence of Reyes' biological father; and Reyes' exposure to prostitution, drug use, and drug sales.

226 Ms. Andrews' complete testimony is contained in: Ev. Hrg. Tr. Aug. 2, 2012 at 80:11–152:3.

Ms. Andrews was critical of Dr. Burry's investigation and provided that both Reyes Trial Counsel and Dr. Burry's investigation were incomplete. Ms. Andrews testified that there were various mitigating factors that were underdeveloped during the penalty phase of the Reyes Rockford Park Trial, including Reyes' exposure to emotional and physical abuse; Candida's ability to parent or care for Reyes considering her age, and physical and mental health; Reyes' exposure to child endangerment and criminal activity from his uncle Michael Reyes; the extent of Ruth's drug addiction; the fact that despite of Reyes' unfortunate upbringing, "he tried his best to engage in lawful behavior, to be a productive citizen, to take care of himself, particularly when he had to[,]" such as keeping gainful employment;[227] Ruth's incarceration; and the impact Reyes' execution would have on members of his family.

227 *Id.* at 120:16

Ms. Andrews explained that there were a number of mitigating factors that were completely ignored, including Reyes' family's difficulty in assimilating to a new country; the lack of Reyes' biological paternal family's involvement in Reyes' life; Ruth's attempted abortions while pregnant with Reyes; and Reyes' difficulty in finding an attachment with Ruth. When Reyes Rule 61 Counsel asked Ms. Andrews why it was significant that a comprehensive presentation be made for the jury with respect to Reyes' life, Ms. Andrews testified:

> Because the mitigation report and the mitigation phase addresses the penalty phase, and *originally with what the jury knew then, three people had voted to save his life. Had they known more, had these 12 jurors known more, maybe more would have voted, perhaps all, to save his life.* That is what this is in pursuit of humanizing him, putting Luis Reyes in a context that people will understand what his life was

> about, not simply what he is accused of and charged with.[228]

228 *Id.* at 124:2–12 (emphasis added).

Reyes Trial Counsel did not present a comprehensive mitigation case for the jury's consideration. Even without a more rigorous presentation, three jurors voted for a life sentence. The failure to present a mitigation specialist such as Ms. Andrews did not meet prevailing professional norms.

d. Reyes suffered prejudice as a result of Reyes Trial Counsel's deficient mitigation presentation.

Defense counsel in capital cases have an obligation to conduct a thorough investigation for the purposes of sentencing and mitigation.[229] Per decisional law and the ABA Guidelines, this obligation involves efforts to discover *all reasonably available* mitigating evidence.[230] Reyes Trial Counsel failed to properly satisfy counsel's obligations. Instead, the mitigation presentation was deficient and counterproductive by presenting Reyes as an individual "hard wired for violence."

229 *See supra* Section V(C)(2)(a) for the legal standard for mitigation in a capital case.

230 *Wiggins*, 539 U.S. at 524 (emphasis in original); *ABA Guidelines*, *supra* note 152, 11.4.1(C).

***29** At best, Reyes Trial Counsel's performance left the jury with an incomplete profile and understanding of Reyes, his background, and his mental functioning. At worst, Reyes Trial Counsel's deficient performance actually served to dehumanize Reyes and to portray him as violent. The jury was not given a fair opportunity to assess Reyes' culpability for the Rockford Park Murders because the jurors did not hear complete or sufficient testimony regarding Reyes' youth, mental development, abusive, dysfunctional upbringing, and the extent of Reyes' susceptibility to Cabrera as a father figure. Accordingly, Reyes suffered prejudice as a result of the substandard performance of Reyes Trial Counsel.

3. Reyes Trial Counsel failed to object to prosecutorial misconduct.

The prosecutor, on behalf of the State, made improper comments during the penalty phase of the Reyes Rockford Park Trial, denying Reyes his right to a fair and impartial trial as guaranteed by the United States and Delaware Constitutions.[231] Reyes Trial Counsel was ineffective for failing to protect Reyes from the prosecutorial misconduct (*i.e.*, failing to object to the State's remarks during the Reyes Rockford Park Trial). Moreover, Reyes Trial Counsel was ineffective for failing to assert these claims on direct appeal, thereby limiting Reyes' relief to the more stringent *Strickland* standard of review in these postconviction proceedings[232] Moreover, because Reyes' constitutional challenges were not presented below, those claims are subject to procedural default under Rule 61(i)(3) unless Reyes can demonstrate cause and prejudice or a colorable claim of a constitutional violation.[233]

231 U.S. CONST. amend. VI; DEL. CONST. Art. I § 7; *Flonnory v. State*, 778 A.2d 1044, 1051 (Del.2001) (noting that the right to a fair trial before an impartial jury is a bedrock of the American criminal justice system).

232 Notably, despite acknowledging that his postconviction claims are subject to review under *Strickland*, Reyes focuses the majority of his argument on the grounds that he is entitled to relief under the *Wainwright/Hughes* standards, which are applicable on direct appeal.

233 Super. Ct.Crim. R. 61(i)(3)(A)–(B); (i)(5); *Hainey v. State*, 2008 WL 836599, at *1 (Del. Mar. 31, 2008).

Reyes' claims of prosecutorial misconduct will be addressed on the merits as an ineffective counsel claim. Although the prosecution operates within an adversarial system, prosecutors must seek justice, not merely convictions.[234] In the role of "minister of justice," prosecutors must "avoid improper suggestions, insinuations, and assertions of personal knowledge in order to ensure that guilt is decided only on the basis of sufficient evidence."[235] Pursuant to ABA Standard 35.8(d), "[t]he prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence." Moreover, the conduct of a prosecutor is of

particular importance during the penalty phase of a capital trial. This is "because of the possibility that the jury will give special weight to the prosecutor's arguments ... because of the prestige associated with the prosecutor's office."[236] Ultimately, the trial judge determines whether the defendant will live or die only after giving substantial weight to the jury's recommendation.[237] As such, the "jury's recommendation is significant, and therefore *the conduct of the penalty phase hearing must be conducted fairly.*"[238]

234 ABA Standards, *Prosecution and Defense Functions*, 3–1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict."); *Whittle v. State*, 77 A.3d 239, 246 (Del.2013) (reiterating the special weight juror's give to the prosecutor's arguments); *Brokenbrough v. State*, 522 A.2d 851, 855 (Del.1987).

235 *Kirkley v. State*, 41 A.3d 372, 377 (Del.2012); *Trump v. State*, 753 A.2d 963, 968 (Del.2000).

236 ABA Standards, *Prosecution and Defense Functions*, 3–5.8, commentary (3ed.1993).

237 *Capano v. State*, 781 A.2d 556, 656 (Del.2001) (citing 11 *Del. C.* § 4209).

238 *Id.* (emphasis added).

a. The State's "unpunished murder" comments were objectionable.

***30** The State's argument to the jury that a life sentence for Reyes would leave one of the Rockford Park Murders unpunished was objectionable; yet Reyes Trial Counsel did not object. First, the State's argument was a misleading misstatement of law. Second, the State's argument was an improper plea for vengeance.

Specifically, in its penalty phase opening statement, the State remarked:

> It [the death of two or more individuals] is a significant statutory aggravating circumstance. Because if [Reyes] should be sentenced to life imprisonment for the murder *of one of the two victims* in this case, either Vaughn Rowe or Brandon Saunders, [Reyes] has only one life to serve. And for the murder of the other [victim] he will receive no punishment.
> Oh, the [Trial J]udge would sentence [Reyes] to life without parole, just as [the Trial Judge] would for the other [victim], but *the practical effect of that would be [Reyes] would receive no punishment for the second murder he committed in this case.*[239]

239 Penalty Phase Tr. Oct. 23, 2001 at 16:12–22 (emphasis added).

Additionally, in the State's closing argument, the State improperly emphasized the "practical" effect—rather than the "legal" effect—of recommending a life sentence:

> [A]s you [the jurors] know, as was true with Brandon [Saunders] and with Vaughn [Rowe], [Reyes] only has one life to give. So that second life sentence for the second murder of the two murders [Reyes] committed on January 21, 1996, is essentially a *meaningless punishment.* If you [the jurors] do not recommend the death penalty in this case; your Honor, if you do not impose the death penalty in this case, one of those two murders will go unpunished. Justice, ladies and gentlemen, demands that *every crime* be punished.[240]
>
> * * * *
>
> When you convict someone of two murders, if you impose a life sentence for the first murder[,] because we each have but one life to give, there is no real punishment for that second murder.[241]
> I ask you this ladies and gentlemen, [Trial Judge], whose murder will go unpunished? Will it be Brandon's? Or Vaughn's? And what have you [the jurors] heard throughout the course of this trial, particularly over the last two days, which suggests, for a minute, that [Reyes] deserves the gift, the grace of *being able to go practically and essentially unpunished for one of those two murders?* What has he done to deserve that?[242]
>
> * * * *
>
> Ladies and gentlemen, [Trial Judge], only a death sentence will ensure that the murders of both Brandon Saunders and Vaughn Rowe are *justly and fairly punished.* Only a death sentence can ensure that the defendant pays; yes, pays for those murders. Only a

death sentence can ensure that justice is done.[243]

240 Penalty Phase Tr. Oct. 25,2001 at 43:14–44:1 (emphasis added).

241 *Id.* at 69:13–17.

242 *Id.* at 69:18–70:4 (emphasis added).

243 *Id.* at 70:5–11 (emphasis added).

The State also made improper comments in its closing rebuttal argument:

> We're talking about what the [Delaware] General Assembly says, your general assembly, your legislature says what constitutes appropriate procedure to prove a death penalty when one of them is where two people are killed in a particular case. And it's easy to understand why. It's easy to understand why because a life sentence for one murder *means no punishment for the other [murder]*. It's as simple as that. We're not talking about an eye for an eye. We're talking about accountability. We're talking about *no free murders.* No opportunities to kill somebody and *not be punished*.[244]
>
> ***31** * * * *
>
> If you [the jurors] return a life sentence for these—if you recommend a life sentence for these murders, [Reyes] will serve a one life sentence and that life sentence will begin at sometime between 2007 and 2009. It won't even be [Reyes'] entire life because a portion of that life up until that time will be spent serving a sentence for the murder of Fundador Otero. What does it say, ladies and gentlemen? What does it say as the conscience of the community? What does it say about justice if Luis Reyes can kill and kill and kill yet again, and for the last murder, never be punished?[245]

244 *Id.* at 144:21–145:11 (emphasis added).

245 *Id.* at 153:4–15.

It is well-established that a prosecutor may not misstate or misrepresent the evidence or "mislead the jury as to the inferences it may draw."[246] This Court must consider a prosecutor's statements in the context of the record as a whole and in light of all the evidence.[247] Upon review of the record and consideration of the context of the challenged statements, this Court finds the prosecutor's statements related to an unpunished murder to be, at a minimum, objectionable.

246 ABA Standards, *Prosecution and Defense Functions*, 3–5.8; *Daniels v. State*, 859 A.2d 1008, 1011 (Del.2004) (quoting *Sexton v. State*, 397 A.2d 540, 545 (Del.1979)); *Kurzmann v. State*, 903 A.2d 702, 708 (Del.2006); *Flonnory v. State*, 893 A.2d 507, 540 (Del.2006); *Hunter*, 815 A.2d at 735; *Hughes v. State*, 437 A.2d 559, 567 (Del.1981) ("It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.") (quoting *ABA Standards, Prosecution and Defense Functions* (1971)).

247 *Daniels v. State*, 859 A.2d 1008, 1012 (Del.2004).

Here, the State presented to the jury evidence concerning the gravity of Reyes' criminal conduct throughout the guilt and penalty phases of the Reyes Rockford Park Trial. Thereafter, however, the State focused its penalty phase arguments not on the evidence—*i.e.*, the aggravating and mitigating factors—but on the idea that Reyes can serve but one life sentence and thus, a life sentence is not a punishment for *both* murders. The State's argument that, absent the death penalty, Reyes would somehow escape punishment for one of the murders—notwithstanding the fact that Reyes faced life imprisonment—diverted the jury from deciding if the aggravating factors outweighed the mitigating factors by a preponderance of the evidence.[248] The State improperly appealed to the jury for vengeance by death (i.e., a retaliatory sentence).

248 *See Small v. State*, 51 A.3d 452, 462 (Del.2012) ("The prosecutorial misconduct tainted the jury's vote on whether the aggravating circumstances outweighed the mitigating circumstances.").

As the commentary of ABA Standard 3–5.8 makes clear, "The prosecutor should not make arguments that

encourage the jury to depart from its duty to decide the case on the evidence.... Predictions about the effect of an [outcome] ... go beyond the scope of the issues in trial and are to be avoided."

***32** The State's arguments were improper and Reyes Trial Counsel was objectively unreasonable for failing to object. Moreover, Reyes was prejudiced by the State's improper argument. Accordingly, Reyes has satisfied *Strickland.*

b. The State improperly characterized Reyes' mitigation factors as excuses.

In its closing of the penalty phase, the State argued the following:

> Well, against the weight of these many aggravating circumstances, [Reyes], through his able and capable counsel ... has introduced evidence *of what he claims are facts where were mitigating* which make the death penalty less appropriate. What did we hear?
> Well, [Reyes Trial Counsel] began by saying that this evidence would not be introduced in an attempt to excuse the murders. But then consider the testimony of Caroline Burry, and *although she never said that she was trying to excuse the murders, what was your [the jurors] read on what she was really saying?*[249]
>
> * * * *
>
> Folks, although [Dr. Burry] didn't say it and she never did say it, [Dr. Burry's mitigation testimony] is *an attempt to excuse what [Reyes] has done* and [the State] submits you should reject that for exactly what it is.[250]

249 Penalty Phase Tr. Oct. 25,2001 at 63:9–21 (emphasis added).

250 *Id.* at 64:13–16 (emphasis added).

This was improper argument, yet Reyes Trial Counsel did not object. The Delaware Supreme Court addressed this issue as recently as 2012 in its decision in *Small v. State,* holding that "mitigating circumstances are different from excuses."[251] In *Small,* the State, on eight different occasions, referred to each of the defendant's mitigating circumstances individually as an excuse.[252] On direct appeal, the *Small* Court concluded that the prosecutor's repeated improper characterization of the defendant's mitigating circumstances as excuses "changed the tenor or the penalty phase" and distracted "the jury from its proper role and duty to weigh the aggravating and mitigating circumstances."[253] As a result, the *Small* Court remanded the matter for a new penalty hearing.[254]

251 *Small,* 51 A.3d at 460 (distinguishing the term "excuse" in the context of criminal law from a "mitigating circumstance").

252 *Id.* at 459.

253 *Id.* at 461.

254 *Id.* at 462.

The Delaware Supreme Court's concerns in *Small* are likewise applicable here. The State characterized the entirety of Dr. Burry's mitigation testimony as an attempt to "excuse" the Rockford Park Murders. Therefore, this was improper argument by the State and was objectionable. Reyes Trial Counsel was objectively unreasonable for failing to object to the State's mischaracterizations of Reyes' mitigation evidence as an excuse. Reyes suffered prejudice as a result of this improper presentation. Accordingly, Reyes has satisfied *Strickland.*

c. The State's characterization of Reyes as "monstrous" was improper and Reyes Trial Counsel should have objected.

The State injected improper inflammatory remarks into the penalty hearing by describing Reyes as "monstrous." Specifically, Reyes challenges the following from the State's rebuttal argument:

> When you kill, and you kill, and you kill again, you are a murderer. That is what you are. You need go no further in defining him. *He is so monstrous.* It is so monumental that

> any definition of Luis Reyes pales into insignificance.[255]

255 Penalty Phase Tr. Oct. 25, 2001 at 148:16–21 (emphasis added).

***33** In presenting the State's case at trial, prosecutors "may argue legitimate inferences of the [defendant's] guilt that flow from the evidence."[256] However, prosecutors must "refrain from legally objectionable tactics calculated to arouse the prejudices of the jury."[257] For example, it is both inflammatory and impermissible for a prosecutor to engage in name-calling against the defendant because such characterizations attempt to inflame the passions of the jury.[258] Accordingly, the State's comments in this regard were improper and Reyes Trial Counsel was ineffective by failing to object. Moreover, Reyes suffered prejudice.

256 *Daniels v. State*, 859 A.2d 1008, 1011 (Del.2004) (internal quotations omitted).

257 *Brokenbrough*, 522 A.2d at 855 (internal quotations omitted).

258 *Id.* at 857 (finding that it was improper for the prosecutor to insinuate, by analogy, that the defendant was the devil).

d. The State improperly presented a "message to the community" argument.

Delaware Courts have held that it is improper for a prosecutor to appeal to a jury's sense of personal risk and " 'to direct the jury's attention to the societal goal of maintain a safe community.' "[259] Arguments that urge the jury to prevent danger in the community are objectionable because such arguments, for example, direct juror attention to matters outside the record, implicate varying levels of juror perception and personal knowledge, and suggest jurors are at personal risk.[260]

259 *Williamson v. State*, 1998 WL 138697, at *3 (Del. Feb. 25, 1998) (quoting *Black v. State*, 616 A.2d 320, 324 (Del.1992)).

260 *Black v. State*, 616 A.2d 320 at 324 (Del.1992).

The State improperly appealed to the jury's sense of community. In the final paragraph of its rebuttal at the penalty phase, the State rhetorically asked the jury, "What does it say, ladies and gentlemen? *What does it say as the conscience of the community?* What does it say about justice if Luis Reyes can kill and kill and kill yet again, and for the last murder, never be punished?"[261] These statements were objectionable; it was objectively unreasonable for Reyes Trial Counsel to withhold an objection, and Reyes suffered prejudice. Therefore, *Strickland* is satisfied.

4. Reyes Trial Counsel failed to rebut the State's improper and inaccurate characterization of Reyes' prison record.

While discussing Reyes' prison record during its penalty phase closing argument, the State argued the following:

> What's worse and perhaps what's more significant is what's not here. There is no evidence that the defendant, since he was incarcerated in 1997, has undertaken any significant efforts whatsoever to rehabilitate himself. Now, remember, he told Dr. Finkelstein and you'll see [...] Dr. Feinkelstein's report, that he was convinced you all would exonerate him and that he would be released from prison some day. But he didn't do anything of any significance to make himself a better person in anticipation of his eventual release. No anger counseling, no psychological counseling, no psychiatric counseling, no Key program, no Crest program, no certificates of achievement, nothing. Nothing.[262]

Accordingly, this presentation offered a false impression that Reyes had not attempted to rehabilitate himself and would not do so if given a life sentence; therefore, according to the State, execution was the most appropriate sanction.

261 Penalty Phase Tr. Oct. 25, 2001 at 152:11–15 (emphasis added).

262 *Id.* at 58:1–16. The State offered a similar argument in its rebuttal argument of the penalty phase, stating:

> What's more important is where are the attempts to rehabilitate himself?
> Until Friday, if you believe him, he expected to walk out of jail at the end of his 12–year sentence. So where are the attempts to rehabilitate himself? Where are the certificates from anger management classes, occupational therapy, [sic], anything good? Where are those records?

Id. at 146:6–12.

***34** However, Reyes' prison records reflect that Reyes participated in various education programs from 1999 to 2002. Importantly, most of Reyes' time in prison before the Reyes Rockford Park Trial was as a pre-trial detainee for both the Otero murder and the Rockford Park Murders. As a pre-trial detainee, Reyes was not even eligible for rehabilitative programs at HRYCI. Moreover, at a postconviction evidentiary hearing, correctional consultant James Aiken testified that Reyes had enrolled in vocational programs as a sentenced inmate at HRYCI.

Reyes has established the performance prong of *Strickland.* Where Reyes Trial Counsel, by their own admission, failed to even investigate Reyes' involvement in any prison programs as a mitigating factor in a pending death penalty matter, their representation fell below an objective standard of reasonableness. Reyes Trial Counsel had an obligation to Reyes to gather information which would rebut the State's characterization of Reyes. Ideally, Reyes Trial Counsel would have objected to the State's presentation regarding rehabilitative efforts by Reyes and obtained a ruling by the Trial Court that the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[263] Had the Trial Court declined to prohibit this presentation, then Reyes Trial Counsel should have presented evidence to explain to the jury Reyes' status as a pre-trial prison detainee made him ineligible for rehabilitative programs.

263 *See* D.R.E. 403.

The failure of Reyes Trial Counsel to challenge the State's comments on Reyes' alleged failure to participate in rehabilitative programs fell below the expectations of reasonable performance. Moreover, Reyes was prejudiced because the State relied on this information to argue that a death sentence was mandated because Reyes would not make any effort to be rehabilitated during a life sentence.

5. Reyes Trial Counsel failed to object to the State's improper rebuttal to Reyes' allocution.

Reyes exercised his right to allocate during the penalty phase.[264] Before doing so, the Trial Court engaged in a detailed colloquy regarding the parameters of allocution.[265] Reyes expressed that he had discussed with Reyes Trial Counsel the potential risks and benefits of personally addressing the jury. The Trial Court also engaged in a colloquy with Reyes about allocution.[266] Reyes Trial Counsel also specifically addressed on the record that Reyes has been advised that he could be cross-examined under oath if Reyes' allocution went beyond the record. The State expressly agreed with Reyes Trial Counsel that should Reyes exceed the parameters of allocution, then Reyes must be cross-examined under oath.[267]

264 The right to allocution is not constitutional but, rather, is a substantial right grounded in Superior Court Criminal Rule 32(a)(1)(c), Delaware's death penalty statute, codified at 11 *Del. C.* § 4209(c)(2), and Delaware decisional law. *See* *Shelton v. State*, 744 A.2d 465, 491–98 (Del.1999).

265 *See* Penalty Phase Tr. Oct. 25, 2001 at 73:21–87:9.

266 *Id.* at 81:16–82:11.

267 *Id.* at 84:10–11; *see* *Shelton*, 744 A.2d at 496.

After Reyes personally addressed the jury, the State raised issue with the following statements:

> REYES: I've made many bad choices in my life and I'm guilty of many things, and out of all of those bad choices that I've made, I admitted to my wrong. Whether it was exactly at that time or a little later down the line, I admitted to what I did. I came forward.[268]

> ***35** *Before this trial started, [the State] came to me with a plea of life in prison, to spend the rest of my life in jail, but I turned that plea down*. My lawyers advised me of the evidence that [the State] had and that it didn't look good, but regardless of that, I would not take that plea. I told them I would not take a plea for something that I did not do. So we came to trial.[269]

Specifically, the State submitted and the Trial Court agreed that Reyes had introduced a new matter into evidence—a plea offer from the State rejected by Reyes. However, the State never formally extended a plea offer to Reyes.

268 Penalty Phase Tr. Oct. 25,2001 at 95:11–16.

269 *Id.* 95:17–96:2 (emphasis added).

Nevertheless, while it is technically accurate that a *formal* plea had never been extended, there had, in fact, been plea discussions. Indeed, it was made clear by the State that, if Reyes would admit responsibility for the Rockford Park Murders, then the State would agree to a life sentence and would not seek Reyes' execution. However, Reyes claimed factual innocence and refused to accept responsibility for crimes he contended he did not commit.

To correct the record, per the State's request and as agreed upon by Reyes Trial Counsel, the State read to the jury—and into the record—a letter the State wrote to Reyes Trial Counsel on September 17, 2001, before the Reyes Rockford Park Trial began. Therefore, despite the acknowledgement of all parties and the Trial Court, the correct procedure was not followed; Reyes was not placed under oath and cross-examined.

Not only did Reyes Trial Counsel fail to insist upon correct procedure, but the September 17th letter inserted improper commentary and vouching by the State that was inappropriate. The State's rebuttal argument was as follows:

> [Reyes' allocution] talked about a plea agreement, a plea offer. And [Reyes] was wrong about that. [Reyes] presented incorrect information. And because of that, [the State is] permitted to set the record straight ... so that you're not under any misapprehensions about what the State's position is in this case.
>
> What I'm going to read to you [ ] is a letter sent to [Reyes Trial C]ounsel on September the 17th of this year to [Reyes Trial Counsel] from [the State].

"We also want to comment on [Reyes Trial Counsel's] arguments concerning a prior plea offer. To be precise, no plea was ever offered. We did ask whether your client would be willing to discuss a possible plea to a life sentence coupled with a proffer to the victim's families in some undetermined form as to the specifics of what happened and why. Your client expressed no interest in opening those lines of communication, so no plea was ever offered. While we might be willing to talk about waiving the death penalty for someone who accepts responsibility for his actions and helps grieving families cope with their losses, we are not willing to do so for a person we believe to be a triple murderer who does not accept that responsibility. Without an acceptance of responsibility, we believe that the death penalty for your client is absolutely required. It seems to us that while we will be able—that we will be able to seat an unbiased jury. If your client wants to avoid the possibility of a death penalty, we believe he should rethink his earlier position rather than seek unilateral concessions from the State."[270]

270 *Id.* at 142:8–143:20.

***36** A prosecutor—seeking justice in his or her "unique role in the adversary system"—may argue to the jury "all legitimate inferences of the defendant's guilt that follow from the evidence."[271] A prosecutor must not, however, engage in vouching by "impl[ying] personal superior knowledge, beyond what it logically inferred from the evidence at trial."[272] ABA Standards also warn against a prosecutor sharing his or her personal opinions or beliefs "as to the truth or falsity of any testimony or evidence or the guilt of the defendant."[273]

271 *Burns v. State*, 76 A.3d 780, 789–90 (Del.2013); *Kirkley*, 41 A.3d at 377 (referencing *Daniels v. State*, 859 A.2d 1008, 1011 (Del.2004) (quoting *Hooks v. State*, 416 A.2d 189, 204 (Del.1980)), and *Boatson v. State*, 457 A.2d 738, 742 (Del.1983)).

272 *Burns*, 76 A.3d at 789–90; *Kirkley*, 41 A.3d at 377; *White v. State*, 816 A.2d 776, 779 (Del.2003);

Flonnory, 893 A.2d at 539 ("It it well-settled that prosecutors may not express their personal opinions or beliefs about the credibility of witnesses or about the truth of any testimony.").

273 ABA Standards Prosecution Function, 3–5.8(b), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html.

In *Kirkley v. State*, the Delaware Supreme Court held that the prosecutor's statement—that the State only pursued criminal charges against the defendant because the defendant was actually guilty—constituted improper vouching of the defendant's guilt.[274] The Delaware Supreme Court recently addressed this issue in *McCoy v. State*.[275] The *McCoy* Court found that the prosecutor vouched for the testimony of a State witness by expressing a personal opinion on the defendant's guilt, which "implicitly and inappropriately corroborated [the State witness'] testimony and endorsed [the State witness'] credibility."[276] The *McCoy* Court determined that the prosecutor's statements, like statements made in *Kirkley*, implied superior knowledge of the evidence.[277]

274 *Kirkley*, 41 A.3d at 377–78 (concluding that the prosecutor's comments regarding the State's charging decisions suggested superior knowledge of the evidence and resulted in "an improper inference" that could not be drawn from the evidence).

275 112 A.3d 239 (Del.2015).

276 *McCoy*, 112 A.3d at 261.

277 *Compare* *McCoy*, 112 A.3d at 261 (finding misconduct because the prosecutor vouched for the State's witness by expressing his personal opinion that the defendant shot the victim, which implied superior knowledge of the evidence); *Kirkley*, 41 A.3d at 377–78 (finding misconduct because the prosecutor vouched for the State's case by staying that the State pursued criminal charges only when the defendant was indeed guilty, which implied superior knowledge of the evidence); *and* *Whittle*, 77 A.3d at 247–48 (finding misconduct because the prosecutor expressly endorsed the testimony of the State's witness that the defendant was guilty); *with* *Burns*, 76 A.3d at 790–91 (determining the prosecutor's statements that the defendant committed the criminal conduct charged was logically inferred from the evidence).

In *Burns v. State*, the Delaware Supreme Court held that the prosecutor's statements—that the defendant "did this" and was responsible for the criminal conduct as charged—did not imply superior knowledge of the evidence but, rather, constituted a logical inference from the evidence.[278] The *Burns* Court noted that the prosecutor did not speak in the first person and "couched his statements by saying 'what the attorneys say is not evidence [,]' " and determined that such a warning bolstered the *Burns* Court's conclusion.[279] Unlike the prosecutor's statements in *Burns*, the State's September 17th letter, written in the first person, contained the State's personal opinion that Reyes' case "absolutely required" the death penalty.[280]

278 *Burns*, 76 A.3d at 790.

279 *Id.*

280 Penalty Phase Tr. Oct. 25,2001 at 143:13–14.

***37** It was objectively unreasonable for Reyes Trial Counsel to agree to the State's reading of its September 17th letter into the record to "cure" Reyes' statements that the Trial Court found had exceeded the bounds of allocution. Reyes Trial Counsel was ineffective by agreeing with the State that reading the State's letter into the record "was the fair way to deal with the situation."[281] This was not the correct procedure and Reyes Trial Counsel should have objected to the presentation of the September 17th letter.

281 *Id.* at 106:9–10.

Rather than present to the Trial Court an argument that Reyes' statement was not completely inaccurate, Reyes Trial Counsel abandoned their client on this point.

Moreover, and perhaps more importantly, Reyes Trial Counsel should have argued that the remedy for the State was to cross-examine Reyes. The State concedes, as it must, that Reyes Trial Counsel could have insisted that Reyes be cross-examined.[282] Had that cross-examination taken place, Reyes could have explained Reyes' understanding of the options that were explained to him.

[282] State's Answer to Reyes' Brief Following Ev. Hrg., Oct. 8, 2014, p. 60 ("While [Reyes] is correct that rather than agreeing to let the State read the accurate letter into the record, [Reyes Trial Counsel] could have insisted that [Reyes] be placed under oath and cross-examined to his detriment on the issue....").

This Court finds, at a minimum, Reyes Trial Counsel should have objected to the reading of the September 17th letter because it contained the personal beliefs and opinions of the prosecutors. Indeed, the letter expressly said that "we believe" (the State) that the death penalty was absolutely required. Accordingly, Reyes Trial Counsel acted objectively unreasonable with respect to the State's challenge to Reyes' allocution, the subsequent "curative measure," and the improper vouching within the September 17th letter. Furthermore, Reyes suffered prejudice as a result of the State's improper vouching. Accordingly, this Court finds that Reyes has satisfied both the performance and prejudice prongs of *Strickland.*

VI. *WHETHER REYES IS ENTITLED TO RELIEF ON HIS GENERAL CONSTITUTIONAL OBJECTIONS TO DELAWARE'S EXECUTION DRUGS IS AN ISSUE RESERVED FOR THE APPELLATE COURT.*

Reyes argues that this Court must vacate his death sentence because, in light of a nationwide shortage of lethal injection drugs, the state of Delaware cannot administer the death penalty in a manner consistent with Reyes' constitutional rights against cruel and unusual punishment.

The protocol in Delaware for administering execution via lethal injection is described as:

> Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction.[283]

The Delaware Supreme Court has consistently upheld the constitutionality of the Delaware Death Statute.[284] The Delaware Supreme Court has upheld the constitutionality of the Delaware Death Statute as applied to Reyes[285] Moreover, lethal injection as a form of execution does not violate the United States Constitution or the Delaware Constitution.[286]

[283] 11 *Del. C.* § 4209(f).

[284] *See e.g.*, *Swan v. State*, 820 A.2d 342 (Del.2003) (holding that a jury's conviction of a defendant unanimously and beyond a reasonable doubt for a crime that itself established a statutory aggravating circumstance satisfied the constitutional requirements set forth in *Ring v. Arizona*, 536 U.S. 584 (2002), by providing a determination of the actor that rendered the defendant "death eligible"); *Brice v. State*, 815 A.2d 314 (Del.2003) (upholding the 2002 version of 11 *Del. C.* § 4209, noting that "[t]he 2002 Statute transformed the jury's role ... from one that was advisory under the 1991 version ... into one that is now determinative as to the existence of any statutory aggravating circumstances."); *Ortiz v. State*, 869 A.2d 285, 305 (Del.2005) (stating that the Delaware Supreme Court "adhere[s] to [its] holding in *Brice* that Delaware's hybrid form of sentencing, allowing the jury to find the defendant death eligible and then allowing a judge to impose the death penalty once the defendant is found to be death eligible, is not contrary to the Sixth Amendment of the United States Constitution[.]"); *Cabrera Direct Appeal*, 840 A.2d at 1272–74.

[285] *Reyes Direct Appeal*, 819 A.2d at 316–17.

[286] *State v. Deputy*, 644 A.2d 411, 420–22 (Del.Super.) *aff'd*, 648 A.2d 423 (Del.1994).

***38** The determination of whether the application of Delaware's Death Statute is unconstitutional because of an alleged national lethal injection drug shortage is not for this Court to decide. To the extent that Reyes needs to reserve this argument for further proceedings, it is so reserved.

VII. *CONCLUSION*

This Court has determined that Reyes' constitutional rights were violated during the guilt and penalty phases of the Reyes Rockford Park Trial. Moreover, Reyes Trial Counsel was ineffective. The cumulative effect of Reyes Trial Counsel's errors leads this Court to conclude that "mistakes were made that undermine the confidence in the fairness of the [Reyes Rockford Park T]rial" and "there is a reasonable probability that the outcome of the [Reyes Rockford Park] [T]rial would have been different without the errors."[287] Based on the record before the Court and consideration of decisional law, this Court finds that the fundamental legality, reliability, integrity, and fairness of the proceedings leading to Reyes' convictions and sentencing are not sound. Accordingly, the judgments of convictions and death sentenced imposed by Order dated March 14, 2002 must be vacated.

[287] *Starling*, 2015 WL 8758197, at *2.

NOW, THEREFORE, this 27th day of January, 2016, the Postconviction Motion of Luis Reyes is GRANTED. The judgments of conviction and death sentence imposed by Order dated March 14, 2002 are hereby VACATED.

IT IS SO ORDERED.

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