19-989

To Be Argued By:
JOHN T. PIERPONT, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 19-989

LUIS NOEL CRUZ, aka Noel,
Petitioner-Appellee,

-vs-

UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231 and subsequent proceeding under 28 U.S.C. § 2255. The district court granted the petitioner's motion under § 2255 on March 29, 2018, and resentenced him on February 26, 2019. Government Appendix ("GA__") 73; GA56. Final judgment entered on March 18, 2019. GA174. On April 15, 2019, the government filed a timely notice of appeal pursuant to Fed. R. App. P. 4. GA57; GA74; GA178; GA180. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2255(d) and 18 U.S.C. § 3742(b).

The Solicitor General authorized this government appeal. *See* 28 C.F.R. 0.20(b).

Statement of Issues Presented for Review

I. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that a mandatory life sentence for an individual under the age of 18 at the time of his crime violates the Eighth Amendment. Does this rule extend to a defendant who was over 18 years old when he killed two people for his gang?

II. If the rule in *Miller* does not extend to this case, should the district court have dismissed this successive petition for lack of jurisdiction under 28 U.S.C. § 2255(h)?

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Preliminary Statement

On May 14, 1994, Luis Noel Cruz executed two people, and he was ultimately sentenced to a term of mandatory life imprisonment. Now, more than twenty years later, after the Supreme Court held that the Eighth Amendment prohibits mandatory life imprisonment for juveniles, *see Miller v. Alabama*, 567 U.S. 460 (2012), Cruz argues that *Miller* applies to his case, even though he was over

18 when he committed the murders. The district court agreed with Cruz and resentenced him to 35 years' imprisonment.

This was error. As this Court recently held, *Miller* does not apply to defendants who were over 18 at the time of their crimes. *See United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019), *petitions for rehearing en banc pending*. Accordingly, the district court's order granting Cruz's successive motion should be vacated and Cruz's life sentence reinstated.

Statement of the Case

On July 22, 2013, this Court granted Luis Noel Cruz permission to file a successive petition under 28 U.S.C. § 2255 to raise a proposed claim based on *Miller v. Alabama*. *See United States v. Cruz*, No. 13-2457 (2d Cir.) (Doc. No. 25). Cruz filed this petition in the United States District Court for the District of Connecticut on August 19, 2014. GA64.

After extended proceedings, on March 29, 2018, the district court (Janet C. Hall, J.) granted Cruz's petition in part, and vacated his mandatory life sentences. GA73. At re-sentencing on February 26, 2019, the district court sentenced Cruz to 35 years' imprisonment. GA56; GA174. Cruz is currently serving the term of imprisonment.

A. Cruz's conviction and sentence

In 1994, Luis Noel Cruz was a member of the Latin Kings, a violent gang in Connecticut. On May 14 of that year, Cruz was 18 years and 20 weeks old when he and another gang member killed Arosmo Diaz (purportedly for being an informant) and Tyler White (who happened to be with Diaz at the time). *United States v. Diaz*, 176 F.3d 52, 84 (2d Cir. 1999); GA118-19.

A federal grand jury subsequently indicted Cruz and thirty-two others who were alleged to be members or associates of the Latin Kings. *Diaz*, 176 F.3d at 75. Cruz was charged with two counts of murder in aid of racketeering and one count of conspiracy to murder in aid of racketeering, all in violation of 18 U.S.C. § 1959(a). GA107-09 (Second Superseding Indictment, Counts 24-26 (the "VCAR" counts)). He was also charged with a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), conspiracy to violate RICO, 18 U.S.C. § 1962(d), and conspiracy to commit a drug offense, 21 U.S.C. § 846. GA75-90-92; GA109-10 (Counts 1, 2, & 27).

On September 29, 1995, a jury convicted Cruz on all counts against him. *Diaz*, 176 F.3d at 75. As relevant here, on January 30, 1996, the district court (Alan H. Nevas, J.) sentenced Cruz to two mandatory terms of life imprisonment for the

VCAR murders, and two life terms for the RICO convictions. GA114-16 (Judgment).[1]

This Court affirmed Cruz's conviction on May 4, 1999. *Diaz*, 176 F.3d at 73. Between 2001 and 2013, Cruz filed four motions under 28 U.S.C. § 2255; all were denied. GA120.

B. Cruz's fifth successive petition

On June 25, 2013, Cruz sought permission from this Court to file a fifth successive § 2255 motion with the district court. *See United States v. Cruz*, No. 13-2457 (2d Cir.) (Doc. No. 2). Cruz argued principally that his sentence was unconstitutional under *Miller v. Alabama*, 567 U.S. 460 (2012), because he was under 18 when he committed part of the relevant offense conduct. This Court granted Cruz's motion "to allow him to file a § 2255 motion raising his proposed claim based on *Miller v. Alabama*," but directed the district 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." *Id.*, No. 13-2457 (Doc. No. 25).

Cruz filed his petition on August 19, 2014, raising two arguments. *See* GA64 (docket). First, he argued that he was 15 years old when he joined the Latin Kings, and because membership in a

[1] The record is unclear whether the court sentenced Cruz to *mandatory* life terms on the RICO offenses.

RICO enterprise is an element of his VCAR convictions, he was a juvenile at the time that he committed the element of the crimes that triggered mandatory life imprisonment, thereby making his sentence unconstitutional under *Miller*. GA121. Second, he argued that *Miller*'s prohibition of mandatory life imprisonment for individuals younger than 18 should also be applied to those who were 18 at the time of their crimes. GA121. In other words, Cruz argued that *Miller* should apply to him, even though he was older than 18 when he committed the murders.

After a stay of the proceedings, during which time the Supreme Court held in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that *Miller* announced a new substantive constitutional rule that was retroactive on collateral review, the district court granted Cruz's request for a hearing. GA121. Although the court rejected Cruz's first argument (explaining that Cruz was eligible for life imprisonment based on his conduct that took place after his 18th birthday), the court found that a question of fact existed as to Cruz's second argument. In particular, the court concluded that it should hear evidence on whether *Miller*'s protections should apply to an 18-year old. GA121-22.

The government moved to reconsider, arguing that Cruz sought from the court the announcement of a new rule of constitutional law extending

Miller beyond 18-year olds in a successive petition, which is prohibited by 28 U.S.C. § 2255(h). GA70. The court denied the motion, GA121, and the parties proceeded to an evidentiary hearing.

At the hearing, which took place over two days in September 2017, GA71, Cruz presented evidence from Professor Laurence Steinberg to show that individuals aged 18-21 are similar to juveniles with respect to brain development, impulse control (including heightened risk-taking and reward-seeking behavior), and susceptibility to peer influence. *See generally* GA166-69 (describing testimony of Professor Steinberg). The government did not contest Professor Steinberg's scientific opinion on these matters. GA169.

C. The district court's ruling and subsequent re-sentencing

On March 29, 2018, the district court issued a written ruling granting Cruz's petition, and vacating the mandatory life sentences. In its order, the court reached four conclusions: *First*, the district court found that the Second Circuit's mandate authorized it to rule on both of Cruz's arguments. GA126-28. *Second*, the district court found that Cruz's argument that *Miller*'s protections should apply to him, despite the fact that he was older than 18 when he committed the double homicide, satisfied the gate-keeping requirements § 2255(h)(2). GA130-46. In particular, the court concluded that the principle underlying *Miller*

applies to Cruz's case, even though resolution of Cruz's claim might require a "non-frivolous extension of *Miller*" to facts not considered by the *Miller* Court. GA143-46.

Turning to the merits, the court held, *third*, that Supreme Court precedent did not foreclose Cruz's argument. According to the court, while *Miller* held that mandatory life sentences for defendants under 18 at the time of their crimes were unconstitutional, nothing in *Miller* (or other Supreme Court cases) limited its application to defendants who were older than 18. GA147-52. And *fourth*, the district court concluded that there was a national consensus, along with supporting scientific evidence, in support of the conclusion that the Eighth Amendment forbids a mandatory life sentence for a defendant who was 18 at the time of his crime. GA152-73.

On the basis of these conclusions, the court granted Cruz's petition and vacated his life sentences. GA173. At a re-sentencing hearing on February 26, 2019, the district court sentenced Cruz to 35 years' imprisonment. GA174.

D. This Court's decision in *United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019)

On August 1, 2019, this Court resolved the central question presented in this appeal, expressly holding that *Miller* does not apply to defendants who were over 18 at the time of their crimes. *See Sierra*, 933 F.3d at 97.

In *Sierra*, three members of the Bronx Trinitarios Gang were convicted for drug trafficking and an array of violent crimes, including murders, attempted murders, and robberies. *See id.* at 96. Each defendant was sentenced to at least one mandatory term of life imprisonment for a VCAR murder committed when he was between 18 and 22. *Id.* at 97. In the district court and on appeal, the three *Sierra* defendants argued that *Miller*'s rule should be extended to individuals over the age of 18. *Id.*

This Court squarely addressed and rejected their arguments, holding as follows:

> *Miller* held "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,'" [567 U.S.] at 465, because "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," *id.* at 489. The defendants argue that *Miller*'s holding should be extended to apply to them, because scientific research purportedly shows that the biological factors that reduce children's "moral culpability" likewise affect individuals through their early 20s.
>
> The Supreme Court has acknowledged that "[d]rawing the line at 18 years of age is subject, of course, to the objections always

> raised against categorical rules," such as that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," and that "[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach." *Roper v. Simmons*, 543 U.S. 551, 574 (2005). Nevertheless, "a line must be drawn," and the Supreme Court has repeatedly chosen in the Eighth Amendment context to draw that line at the age of 18, which "is the point where society draws the line for many purposes between childhood and adulthood." *Id.*; *see also Graham v. Florida*, 560 U.S. 48, 74-75 (2010); *United States v. Reingold*, 731 F.3d 204, 215 (2d Cir. 2013) (under *Miller*, courts may not "substitute the defendant's relative immaturity for the actual age of minority"). Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences, *Miller*, 567 U.S. at 465, the defendants' age-based Eighth Amendment challenges to their sentences must fail.

Id. (footnote omitted).

Summary of Argument

I. *Miller* does not apply to Cruz, who was over 18 years old when he committed his crime. Indeed, this Court has now resolved this very question in *Sierra*, conclusively holding that *Miller*'s categorical rule does not extend to defendants who were over 18. This Court's decision is consistent with controlling Supreme Court decisions and case law from around the country. Further, the Eighth Amendment does not require the extension of *Miller* to defendants who were older than 18 at the time of their crimes.

II. Under 28 U.S.C. § 2255(h), a court may not grant relief in a successive petition based on a rule that the Supreme Court has not established and made retroactive on collateral review. Accordingly, because the Supreme Court's rule in *Miller* does not apply in this case, the district court should have dismissed this successive petition for lack of jurisdiction.

Argument

I. *Miller v. Alabama* does not apply to Cruz, who was older than 18 when he committed the double murders for which he was convicted.

A. Standard of review

This Court reviews *de novo* a district court's legal conclusions underlying a motion for relief under 28 U.S.C. § 2255, and reviews its findings of fact for clear error. *See United States v. Hoskins*, 905 F.3d 97, 102 (2d Cir. 2018), *cert. denied*, No. 18-8636, 2019 WL 4921532 (Oct. 7, 2019).

B. Discussion

1. This Court has expressly held that *Miller* does not extend to defendants who were over 18 at the time of their crimes.

After the district court granted Cruz's petition in this matter, this Court issued its decision in *Sierra*, holding that *Miller* does not apply to individuals older than 18. Because this Court has now expressly rejected the district court's reasoning and resolved the core issue presented in this appeal, the district court's judgment should be vacated with instructions to reinstate the original sentence.

This case and *Sierra* are indistinguishable on every material fact relevant to determining the

applicability of *Miller*. Like each of the defendants in *Sierra*, Cruz: (1) was convicted of a VCAR murder committed when he was between the ages of 18 and 22; (2) was sentenced to a mandatory life term; and (3) argued that the rule of *Miller* should be expanded to include individuals over the age of 18.

This Court explicitly rejected this argument in *Sierra*. Acknowledging the "'objections always raised against categorical rules,'" 933 F.3d at 97 (quoting *Roper*, 543 U.S. at 574), the *Sierra* Court unambiguously held that "[s]ince the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences, *Miller*, 567 U.S. at 465, the defendants' age-based Eighth Amendment challenges to their sentences must fail." *Id.*

Applying this holding to the identical relevant facts presented here requires vacatur of the district court's decision with instructions to reinstate the original life sentence. *See United States v. Ng Lap Seng*, 934 F.3d 110, 133 n.25 (2d Cir. 2019) ("[A] subsequent panel of this court is bound by prior precedent unless and until reversed by the Supreme Court or by this court sitting *en banc*[.]").

2. This Court's decision in *Sierra* is consistent with governing law.

The decision in *Sierra* is completely consistent with governing law. As recognized in *Sierra*, the

Supreme Court has drawn a categorical line of demarcation between adults and children for purposes of Eighth Amendment jurisprudence at the age of 18. This was explicit not only in *Miller* but also in prior Supreme Court decisions as well.

Miller's holding is clear: "[M]andatory life without parole for those *under the age of 18* at the time of their crimes violates the Eighth Amendment[.]" 567 U.S. at 465 (emphasis added); *see also id.* at 470 ("[M]andatory life-without-parole sentences for *juveniles* violate the Eighth Amendment.") (emphasis added). In adopting the age of 18 as the dividing line, the Supreme Court was drawing upon earlier decisions in which the Court has consistently drawn the line at 18 in announcing Eighth Amendment limitations on sentencing based on the defendant's age. Most notably, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were *under the age of 18* when their crimes were committed," *id.* at 578 (emphasis added). The Supreme Court explained that its adoption of a categorical rule at 18 was deliberate:

> 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. . . . [H]owever, a line must be drawn. . . . 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.

Id. at 574; *see also id.* at Appendices B-D (documenting that the minimum age to vote is 18 in every state, that the minimum age for jury service is 18 in all but four states, and that the minimum age to be married without parental or judicial consent is 18 in all but four states (three are younger)).

Similarly, in *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Id.* at 74. The Supreme Court again set a bright line at age 18: while acknowledging that "[c]ategorical rules tend to be imperfect," *id.* at 75, it noted that "'[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,'" *id.* at 74 (quoting *Roper*, 543 U.S. at 574).

In the face of this precedent, the district court's conclusion that *Miller* extends to individuals older than 18 was error. To reach this conclusion, the district court largely relied on the assumption that *Miller* was silent with respect to its application to individuals over the age of 18. *See*

GA147 ("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."). But as set out above, the Supreme Court has *not* been silent on this issue. The Supreme Court expressly—and unequivocally—adopted a categorical rule at 18 in its Eighth Amendment jurisprudence. The district court's alternative reading—that a court should extend *Miller* to an individual who was over 18 at the time of his crime—cannot be reconciled with the Supreme Court's decisions, which draw a bright-line rule at the age of 18.

Indeed, in recognition of the Supreme Court's categorical rule, every court of appeals to consider the issue has held that *Miller* applies only to defendants who were younger than 18 at the time of their crimes. *Sierra*, 933 F.3d at 97 ("Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences, *Miller*, 567 U.S. at 465, the defendants' age-based Eighth Amendment challenges to their sentences must fail."); *United States v. Marshall*, 736 F.3d 492, 500 (6th Cir. 2013) (rejecting argument, based on *Miller*, that mandatory sentence was unconstitutional, and noting that "an immature adult is not a juvenile . . . Because Marshall is not a juvenile, he does not qualify for the Eighth Amendment protections accorded to juveniles."); *In re Garcia*, No.

13-2968, 2013 U.S. App. LEXIS 26139, at *1, (3d Cir. Aug. 21, 2013) (denying petition for permission to file successive application, explaining that reliance on *Miller* "is misplaced because [petitioner] was not under the age of 18 when he committed his crime"); *United States v. Dock*, 541 Fed. Appx. 242, 245 (4th Cir. 2013) (per curiam) (rejecting defendant's argument based on *Miller*, because the defendant was over 18 at the time of his crime); *see also United States v. Guzman*, 664 Fed. Appx. 120, 122 (2d Cir. 2012) (describing *Roper*, *Graham*, and *Miller* as placing limits on sentences for "juvenile offenders, *i.e.*, those who were under 18 at the time they committed their crimes"); *Doyle v. Stephens*, 535 Fed. Appx. 391, 395 (5th Cir. 2013) (rejecting defendant's argument based on *Roper* because he was over 18); *Melton v. Florida Dep't of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015) (same).

These decisions are consistent with the overwhelming weight of federal authority on this issue. *See, e.g.*, *United States v. Farmer*, No. 04-CR-0209(JS), 2019 WL 4247629, at *4-6 (E.D.N.Y. 2019); *Cruz v. Muniz*, No. 2:16-CV-498, 2017 WL 3226023, at *6 (E.D.C.A. July 31, 2017) (report and recommendation), *adopted*, No. 2:16-CV-498, Doc. No. 31 (E.D.C.A. Sept. 28, 2017); *Martinez v. Pfister*, No. 16-c-2886, 2017 WL 219515, at *5 (N.D. Ill. Jan. 19, 2017); *Meas v. Lizarraga*, No. CV 15-4368, 2016 WL 8451467, at *14 (C.D. Cal. Dec. 14, 2016) (report and recommendation),

adopted, No. CV 15-4368, 2017 WL 870731 (C.D. Cal. Mar. 3, 2017); *Bronson v. General Assembly of the State of Pennsylvania*, No 3:16-CV-00472, 2017 WL 3431918, at *5 (M.D. Pa. July 17, 2017) (report and recommendation), *adopted*, No. 3:16-CV-000472, 2017 WL 3427977 (M.D. Pa. Aug. 9, 2017); *White v. Delbalso*, No. 17-443, 2017 WL 939020, at *2 (E.D. Pa. Feb. 21, 2017) (report and recommendation), *adopted*, No. 17-443, 2017 WL 937731 (E.D. Pa. Mar. 9, 2017); *United States* v. *Young*, 847 F.3d 328, 364-65 (6th Cir. 2017); *Thomas v. Arnold*, No. 3:16-CV-02986 WQH-NLS, 2018 WL 279975, at *6 (S.D. Cal. Jan. 3, 2018) (report and recommendation), *adopted*, No. 3:16-CV-02986, 2018 WL 1426835 (S.D. Cal. March 22, 2018); *Tate v. Link*, No. 17-365, 2017 WL 1363335, at *2 (E.D. Pa. Mar. 21, 2017) (report and recommendation), *adopted*, No. 17-365, 2017 WL 1393056 (E.D. Pa. April 12, 2017); *Copeland v. Davis*, No. 3:13-CV-272, 2017 WL 274809, at *3 (S.D. Tex. Jan. 20, 2017); *Adkins v. Wetzel*, No. CV 13-3652, 2017 WL 1030704, at *3 (E.D. Pa. Mar. 17, 2017); *Ricciardi v. Lane*, No. 16-266, 2017 WL 3084589, at *3, *17 (W.D. Pa. Mar. 8, 2017) (report and recommendation), *adopted*, No. 16-266, 2017 WL 3076024 (W.D. Pa. July 19, 2017); *Guzman v. Rozum*, No. 13-7083, 2017 WL 1344391, at *17 (E.D. Pa. Apr. 12, 2017); *Miller v. Mooney*, No. 2:16-CV-5041, 2016 WL 7375015, at *13 n.3 (E.D. Pa. Dec. 19, 2016); *Buckner v. Montgomery*, No. CV 16-8471 JAK (JCG), 2016 WL 7975311, at *2 (C.D. Cal. Dec. 2,

2016) (report and recommendation), *adopted*, No. CV 16-8471, 2017 WL 354163 (C.D. Cal. Jan. 1, 2017); *United States v. Fell*, No. 5:01-cr-12-0, Doc. No. 1642 (D. Vt. Aug. 20, 2018). In fact, apart from the district court's decision in this case, the government has not identified a single case where a federal court has extended the rule in *Miller* to apply to individuals over the age of 18.

In sum, the district court's rule is inconsistent not only with this Court's decision in *Sierra*, but also with Supreme Court precedent and the overwhelming weight of federal precedent.

3. The Eighth Amendment does not require the extension of *Miller* to individuals who are older than 18.

Although *Sierra* requires vacatur of the district court's decision here, *see Ng Lap Seng*, 934 F.3d at 133 n.25, an independent Eighth Amendment analysis yields the same conclusion: it is not cruel and unusual to sentence an 18-year-old to mandatory life imprisonment for committing a double homicide.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller*, 567 U.S. at 469 (quoting *Roper*, 543 U.S. at 560). "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a

maturing society." *Graham*, 560 U.S. at 58 (internal quotation marks and citations omitted). "'[T]he concept of proportionality is central to the Eighth Amendment.'" *Miller*, 567 U.S. at 469 (quoting *Graham*, 560 U.S. at 59). To make this judgment, the Court considers "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 572). "Next guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.* at 60-61 (internal quotations and citations omitted).

Neither step of the analysis justifies holding that 18 U.S.C. § 1959(a)(1) is unconstitutional as applied to individuals older than 18. There is no national consensus against the sentencing practice at issue, and the standards elaborated by controlling precedents do not justify striking down the statute as unconstitutional. The district court erred in concluding otherwise.

a. Objective indicia of society's standards do not establish a national consensus against sentencing 18-year-olds to life sentences for committing double homicides.

It is not unusual for 18-year-olds to be subject to a mandatory life sentence without the possibility of parole. First, numerous states have passed laws where 18-year-olds who commit double murders, like Cruz, face mandatory life-without-parole sentences. Second, courts around the country have refused to extend Miller to adults over the age of 18. Finally, Cruz's evidence about a national consensus (upon which the district court relied) is not persuasive.

i. State legislative enactments and practices do not support extending *Miller* in this context.

Far from a national consensus against this practice, twenty-five states and the federal government prescribe a mandatory sentence of life without the possibility of parole for murder when the offender is 18 or older. *See* Exhibit A (survey of state sentencing laws).[2] Some states require

[2] The government submitted a version of this chart to the district court. *See Cruz v. United States*, No. 3:11-CV-787 (JCH) (Doc. No. 117-1). The version attached

demonstration of some sort of an aggravating circumstance for such a penalty. *See, e.g.*, Conn. Gen. Stat. § 53a-54b (mandatory life without the possibility of parole for murder with special circumstances or "murder of two or more persons at the same time or in the course of a single transaction"); Kan. Stat. Ann. §§ 21-6620(a)(1), 21-5401(a)(6) (mandatory life without the possibility of parole for capital murder or "intentional and premeditated killing of more than one person as a part of the same act or transaction"). Cruz's conduct in this matter—killing two people in one incident—satisfies the aggravating requirement for each state that requires these circumstances.

Beyond that, Congress has enacted dozens of different statutes that prescribe life without the possibility of parole as a mandatory sentence for premeditated murder. *See, e.g.*, 18 U.S.C. § 1111(a) and (b) (defining first-degree murder and prescribing punishment for the same); 18 U.S.C. § 115 (murder in furtherance of influencing, impeding, or retaliating against a federal officer punished as described in § 1111); 18 U.S.C. § 930 (murder during the course of possessing a firearm in a federal facility punishable as described in § 1111); 18 U.S.C. § 1116 (murder of a foreign official punishable as described in § 1111); 18 U.S.C. § 1513 (murder for retaliating against

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as Exhibit A to this brief has been modified for formatting and printing purposes only.

a witness, victim, or informant punishable as described in § 1111).

With respect to murder, no state treats individuals aged 18 to 21 differently than their older counterparts.

For its part, the district court acknowledged this evidence, but noted that "the Supreme Court in both *Graham* and *Miller* indicated that merely counting the number of states that permitted the punishment was not dispositive." GA156. It then went on to note that some states do treat individuals aged 18 to 21 differently than adults generally for some crimes. GA157-58.

Those states that treat individuals aged 18 to 21 differently than adults, however, do not do so for the most violent of crimes. In fact the citations provided by Cruz and upon which the district court relied yield the opposite conclusion—namely, even state legislatures that carve out exceptions for young adult offenders for minor crimes still believe that young adult offenders of the most serious crimes should face the toughest penalties. Indeed, most of the state statutes cited by Cruz explicitly except any sort of relaxed penalty for youthful offenders for the most serious crimes. *See* Exhibit B (survey of state laws that sentence young adult offenders differently than their older counterparts except in cases where serious crimes are committed).

Accordingly, what Cruz and the district court highlighted actually cuts against their conclusions. These state legislatures certainly carved out exceptions for youthful offenders, but they explicitly limited the reach of those exceptions to exclude the most serious of crimes. Far from demonstrating that states treat young adults who commit serious crimes differently than their older counterparts, these citations demonstrate that states deliberately subject 18-year-old defendants to the most serious of penalties for committing the most serious of crimes. *See Miller*, 567 U.S. at 469 ("[T]he concept of proportionality [between the crime and punishment] is central to the Eighth Amendment.") (internal citations omitted).

ii. Courts around the country have refused to extend *Miller* to adults over the age of 18.

As discussed above, courts around the country have refused to extend *Miller* to young adults over the age of 18. *See supra* at 15-17. These decisions—in addition to being persuasive authority—undercut any contention that there is a "national consensus" against sentencing young adults who have committed horrific crimes to a mandatory life sentence without possibility of parole.

iii. The district court erred in finding a national consensus.

Much of the remaining authority the district court relied upon in support of the proposition that there is a "national consensus" against mandatory life-without-parole sentences for young adults is not persuasive.

For instance, the district court relied on a May 2017 United States Sentencing Commission report on youthful offenders in the federal system. *See* GA159-61. This document 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 provide evidence establishing trends regarding mandatory life sentences. The district court pointed to the fact that five federal defendants younger than 20 received a life sentence between the years 2010 and 2015. GA159. But the report provides no data that suggests the number of life sentences had been larger prior to 2010, which might be suggestive of trends one way or the other.

Additionally, neither the district court nor Cruz pointed to any indication as to how the states—where the vast majority of violent crimes in this country are prosecuted—sentence individuals older than 18.

To be sure, there are some areas (noted by the district court) where there could be evidence of

small movements towards treating 18-year olds differently from fully mature adults. The drinking age, for example, is 21; an appellate court in Kentucky declared the state's death penalty statute unconstitutional as applied to individuals under 21; the American Bar Association issued a resolution urging jurisdictions not to impose the death penalty on an individual who was 21 or younger at the time of the offense; five states and many localities have raised the age to buy cigarettes from 18 to 21. *See* GA162-63.

But even taken together, these data points do not establish an emerging national consensus that 18-year olds should be treated differently than older adults. And in any event, the relevant inquiry is whether there is a "national consensus against the sentencing practice at issue," *Graham*, 560 U.S. at 61, not whether 18-year olds are treated differently in distinct contexts.

b. Standards elaborated by controlling precedents do not yield the result that life without parole in this context violates the Constitution.

An analysis "guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," yields the conclusion that the practice of sentencing individuals over 18 to mandatory

life without parole does not violate the Constitution. *See Graham*, 560 U.S. at 61 (internal quotations and citations omitted).

Miller itself yields the conclusion that the practice of sentencing individuals over the age of 18 to life without the possibility of parole is constitutional. Indeed, the scientific evidence Cruz presented to the district court was largely the same information submitted to the Supreme Court in *Miller*.

In *Miller*, the Supreme Court recounted scientific facts it had developed in earlier precedents. 567 U.S. at 471-72. The Court then observed that these factors rested not only on common sense, but also "on science and social science as well." *Id.* at 471. The Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example in parts of the brain involved in behavior control." *Id.* at 471-72 (internal quotations and citation omitted). In support of these assertions, the Supreme Court cited a 2003 scientific article authored by Professor Steinberg as well as two *amicus* briefs. *Id.* at 471-72 & n.5. The first was a brief submitted by the American Psychological Association as *Amici Curiae*. *See* Br. for Am. Psychological Assoc., et al. as *Amici Curiae*, No. 10-9646, 10-9647, 2012 WL 174239 (Jan. 17, 2012). The second was a brief submitted by J. Lawrence Aber and others as *Amici Curiae*.

See Br. for J. Lawrence Aber, et al. as *Amici Curiae*, No. 10-9646, 10-9647, 2012 WL 195300 (Jan. 17, 2012). Both the APA Brief and the Aber Brief contained scientific evidence on the state of neuroscience and brain functioning in adolescents.

These two briefs, the APA Brief and the Aber Brief, presented scientific facts to the Supreme Court that are nearly identical to those that Professor Steinberg presented to the district court in September 2017. Professor Steinberg himself confirmed that the scientific facts contained in these briefs were the same as the information he presented to the district court. Indeed, a comparison of Professor Steinberg's presentation during his direct examination in front of the district court with what the APA Brief and Abner Brief contained—both of which were cited by the Supreme Court in *Miller*—yields no significant difference in the scientific findings.

This second step of the Eighth Amendment inquiry requires reference to "standards elaborated by controlling precedents." *Graham*, 560 U.S. at 61. Given that the Supreme Court in *Miller* heard the same information that the district court heard at the hearing and still drew the line at 18, controlling precedent suggests that the practice of sentencing individuals older than 18 to mandatory life-without-parole sentences for a double homicide is constitutional.

In conclusion, neither prong of the two-part Eighth Amendment analysis yields the conclusion that the Court should strike down 18 U.S.C. § 1959(a)(1) as unconstitutional as applied to individuals aged over 18. There is no national consensus against the practice of sentencing 18-year olds to life imprisonment for double murders. And the scientific evidence upon which Cruz relies was already presented to the Supreme Court, which nonetheless drew the line at 18.

II. Because *Miller* does not extend to this case, the district court should have dismissed this successive petition for lack of jurisdiction under 28 U.S.C. § 2255(h).

A. Governing law and standard of review

Congress established threshold requirements for claims raised in second or successive collateral attacks under 28 U.S.C. § 2255. Section 2255(h)(2) provides that a "second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The cross-reference to Section 2244 establishes the standard by which a court of appeals is to make its gatekeeping determination: "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie

showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C); *see also Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) (per curiam) (incorporating prima facie standard in § 2244(b)(3)(C) into gatekeeping standard under § 2255(h) for federal prisoners). Section 2244(b)(4) further directs that "[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." (emphasis added).

As relevant here, three principles flow from these statutes. *First*, a district court is not permitted to consider a second or successive petition at all, unless a court of appeals has first issued the certification provided by § 2255(h). *See, e.g.*, *Herrera-Gomez v. United States*, 755 F.3d 142, 145 (2d Cir. 2014) (per curiam). And even when a court of appeals does grant certification, that decision does not definitively answer the question of whether the defendant's claims are eligible for adjudication under § 2255. That is because the court of appeals' authorization under § 2255(h) is made under the relatively light "prima facie" standard. As this Court has explained, "[a] prima facie showing is not a particularly high standard. An application need only show sufficient likelihood of satisfying the strict standards of § 2255 to warrant a fuller exploration by the district court."

Blow v. United States, 829 F.3d 170, 172 (2d Cir. 2016) (per curiam) (internal quotation marks omitted).

Second, after appellate certification, the district court's "fuller exploration" of the § 2255 motion must begin with the threshold requirements of § 2255(h)—here, whether the defendant's claim relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"—before addressing the merits of the defendant's claim. *See, e.g.*, *Ferranti v. United States*, 480 Fed. Appx. 634, 637 (2d Cir. 2012) (affirming district court's dismissal of successive § 2255 motion, where defendant failed to produce newly discovered evidence that satisfied threshold standard of § 2255(h)(1)). In making this § 2255(h) determination, the district court must ask whether the Supreme Court has already recognized this new rule, and made it retroactively applicable. It cannot, in a successive § 2255 proceeding, undertake to announce the new rule or even to determine its retroactivity in the first instance. That task must already have been done by the Supreme Court, in some other proceeding. *See Tyler v. Cain*, 533 U.S. 656, 667-68 (2001).

Third, the district court should consider threshold eligibility questions under § 2255(h) definitively, not based on the lower prima facie standard that is reserved for the courts of appeals. As the Supreme Court has explained, the

standard set forth in § 2244(b)(4) under which district courts *must* dismiss habeas motions differs from the lower, prima facie showing required for appellate authorization under § 2244(b)(3)(C). *Id.* at 661 n.3.

B. As confirmed by *Sierra*, *Miller* does not extend to preclude the imposition of a mandatory life sentence on an individual who was over 18 years old at the time of his crimes.

The threshold question for the court in this case was whether the new rule of constitutional law in *Miller*, made retroactive to cases on collateral review by the Supreme Court in *Montgomery*, applies to Cruz, who was older than 18 when he committed the murders for which he was convicted. In other words, the question was whether the "new rule" the Supreme Court announced in *Miller* applies to Cruz. As explained above, it does not.

In *Sierra*, this Court definitively rejected the argument that *Miller* extends to a defendant, like *Cruz*, who was over 18 when he committed his crime. Accordingly, because *Miller* does not apply to this case, the district court should have dismissed Cruz's successive petition as not satisfying the standards set out in § 2255(h). *Miller* did not create a new rule of constitutional law applicable to individuals, like Cruz, who were older than 18 when they committed the crime for which

they received a mandatory life sentence without the possibility of parole, and thus Cruz's petition seeking relief under that rule should have been dismissed. The "new rule" of law announced in *Miller* applies only to individuals younger than 18. Any extension of that rule in a successive petition—to a new class of defendants, like Cruz—is barred by 28 U.S.C. §§ 2255(h)(2) and 2244(b)(2)(A).

Conclusion

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded with instructions to reinstate Cruz's life sentence.

Dated: October 31, 2019

Respectfully submitted,

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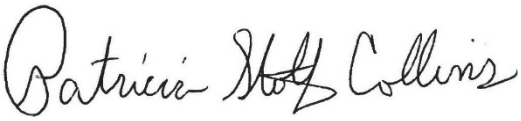

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Federal Rule of Appellate Procedure 32(g) Certification

This is to certify that the foregoing brief complies with the 14,000-word limitation of Second Circuit Local Rule 28.1.1(a), in that the brief is calculated by the word processing program to contain approximately 6,852 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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Addendum

Exhibit A – 50 State Survey

All sentences described below are for premeditated, intentional murder committed by an adult.

Alabama

Minimum: Life without parole ("LWOP").

Maximum: Death.

See Ala. Code § 13A-6-2 (murder statute); Ala Code. § 13A-5-2 (penalties).

Alaska

Minimum: 30 years with the possibility of parole ("WPP") after 20 years.

Maximum: 99 years without the possibility of parole.

See Alaska Stat. § 11.41.100 (murder statute); Alaska Stat. § 12.55.125 (penalties); Alaska Stat. § 33.16.090 (parole eligibility).

Arizona

Minimum: LWOP.

Maximum: Death.

See Ariz. Rev. Stat. Ann. § 13-1105 (murder statute); Ariz. Rev. Stat. Ann. § 13-751 (penalties); Ariz. Rev. Stat. Ann. § 13-752 (penalties).

Arkansas

Minimum: LWOP.

Maximum: Death.

See Ark. Code Ann. § 5-10-101 (capital murder statute); Ark. Code Ann § 5-4-104 (penalties).

California

Minimum: Life with the possibility of parole ("LWPP") after 25 years.

Maximum: Death.

See Cal. Penal Code § 187 (murder statute); Cal. Penal Code § 189 (degrees of murder); Cal. Penal Code § 190 (penalties).

Colorado

Minimum: LWOP.

Maximum: Death.

See Colo. Rev. Stat. § 18-3-102 (first degree murder statute); Colo. Rev. Stat. § 18-1.3-401

(penalties); Colo. Rev. Stat. § 17-22.5-104 (parole eligibility).

Connecticut

Minimum: 25 years WPP.

Maximum: LWPP.[3]

See Conn. Gen. Stat. § 53a-54a (murder statute); Conn. Gen. Stat. § 53a-35a (penalties); Conn. Gen. Stat. § 54-125(a) (parole eligibility).

Delaware

Minimum: LWOP.

Maximum: Death.

See Del. Code. Ann. tit. 11, § 636 (murder statute); Del. Code. Ann. tit 11, 4209(a) (penalties).

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[3] Both the minimum and maximum penalties in Connecticut are increased to LWOP where a murder is committed under special circumstances, which includes the "murder of two or more persons at the same time or in the course of a single transaction." *See* Conn. Gen. Stat. § 53a-54b (murder with special circumstances); Conn. Gen. Stat. § 53a-35a (penalties).

District of Columbia

Minimum: 30 years without the possibility of parole ("WOP").

Maximum: 60 years WOP.

See D.C. Code § 22-2102 (murder statute); D.C. Code § 22-2104 (penalties).

Florida

Minimum: LWOP.

Maximum: Death.

See Fla. Stat. § 782.04 (murder statute); Fla. Stat. § 775.082 (penalties).

Georgia

Minimum: LWPP.

Maximum: Death.

See Ga. Code Ann. § 16-5-1 (murder statute and penalties).

Hawaii

Minimum: LWPP.[4]

Maximum: LWOP.

See Haw. Rev. Stat. § 707-701.5 (second degree murder statute); Haw. Rev. Stat. § 706-656 (penalties); Haw. Rev. Stat. § 706-657 (enhancements for second degree murder).

Idaho

Minimum: LWPP.

Maximum: Death.

See Idaho Code Ann. § 18-4001 (murder statute); Idaho Code Ann. § 18-4003 (degrees of murder); Idaho Code Ann. § 18-4004 (penalties).

Illinois

Minimum: 20 years WOP.

Maximum: Death.

---

[4] The minimum penalty in Hawaii is increased to LWOP for first degree murder, which includes a defendant that knowingly causes the death of "[m]ore than one person in the same or separate incident." Haw. Rev. Stat. § 707-701 (first degree murder statute); *see also* Haw. Rev. Stat. § 706-656 (penalties).

See 720 Ill. Comp. Stat. § 5/9-1 (first degree murder statute); 720 Ill. Comp. Stat. § 5/5-4.5-20(a) (penalties).

Indiana

Min: 45 years.

Max: Death.

See Ind. Code § 35-42-1-1 (murder statute); Ind. Code § 35-50-2-3 (penalties).

Iowa

Min: LWOP.

Max: LWOP.

See Iowa Code § 707.2 (first degree murder statute); Iowa Code § 902.1(1) (penalties).

Kansas

Minimum: LWPP after 25 years.

Maximum: LWPP after 50 years.[5]

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[5] The minimum penalty in Kansas increases to LWOP and the maximum penalty to death in cases where the defendant is convicted of capital murder, which includes the "intentional and premeditated killing of more than one person as a part of the same

See Kan. Stat. Ann. § 21-5402 (first degree murder statute); Kan. Stat. Ann. § 21-6620 (penalties).

Kentucky

Minimum: 20 years.

Maximum: Death.

See Ky. Rev. Stat. Ann. § 507.020 (murder statute); Ky. Rev. Stat. Ann. § 532.030 (penalties).

Louisiana

Minimum: LWOP.

Maximum: LWOP.

See La. Rev. Stat. Ann. § 14:30.1 (second degree murder statute and penalties)

Maine

Minimum: 25 years.

Maximum: LWPP.

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act or transaction[.]" Kan. Stat. Ann. § 21-5401(a)(6) (capital murder statute); Kan. Stat. Ann. § 21-6617 (sentences for defendants convicted of capital murder).

See Me. Rev. Stat. Ann. tit. 17-A, § 201 (murder statute); Me. Rev. Stat. Ann. tit., 17-A § 1603 (penalties).

Maryland

Minimum: LWPP after 25 years.

Maximum: LWOP.

See Md. Code Ann., Crim. Law § 2-201 (first degree murder statute and penalties); Md. Code Ann., Corr. Servs. § 7-301 (parole eligibility).

Massachusetts

Minimum: LWOP.

Maximum: LWOP.

See Mass. Gen. Laws. ch. 265, § 1 (murder statute); Mass. Gen. Laws. ch. 265, § 2 (penalties).

Michigan

Minimum: LWOP.

Maximum: LWOP.

See Mich. Comp. Laws § 750.316 (first degree murder statute and penalties).

Minnesota

Minimum: LWOP.

Maximum: LWOP.

See Minn. Stat. § 609.185 (first degree murder statute and penalties); Minn. Stat. § 609.106 (parole eligibility).

Mississippi

Minimum: LWOP.

Maximum: LWOP.

See Miss. Code Ann. § 97-3-19 (murder statute); Miss. Code. Ann. § 97-3-21 (penalties); Miss. Code. Ann. § 47-7-3 (parole eligibility).

Missouri

Minimum: LWOP.

Maximum: Death.

See Mo. Rev. Stat. § 565.020 (first degree murder statute and penalties)

Montana

Minimum: 10 years.

Maximum: Death.

See Mont. Code Ann. § 45-5-102(2) (murder statute and penalties).

Nebraska

Minimum: LWOP.

Maximum: Death.

See Neb. Rev. Stat. § 28-303 (first degree murder statute); Neb. Rev. Stat. § 28-105 (penalties).

Nevada

Minimum: 50 years WPP after 20 years.

Maximum: Death.

See Nev. Rev. Stat. Ann § 200.030 (murder statute and penalties).

New Hampshire

Minimum: LWOP.

Maximum: LWOP.

See N.H. Rev. Stat. Ann. § 630:1-a (first degree murder statute and penalties).

New Jersey

Minimum: 30 years WOP.

Maximum: LWPP after 30 years.

See N.J. Stat. Ann. § 2C:11-3 (murder statute and penalties).

New Mexico

Minimum: LWPP.

Maximum: LWOP.

See N.M. Stat. § 30-2-1 (murder statute); N.M. Stat. § (penalties).

New York

Minimum: 20 years.

Maximum: LWOP.

See N.Y. Penal Law § 125.25 (second degree murder statute); N.Y. Penal Law § 70.00 (penalties).

North Carolina

Minimum: LWOP.

Maximum: Death.

See N.C. Gen. Stat. § 14-17 (murder statute and penalties).

North Dakota

Minimum: None specified.

Maximum: LWOP.

See N.D. Cent. Code § 12.1-16-01 (murder statute); N.D. Cent Code § 12.1-32-01 (penalties).

Ohio

Minimum: 15 years.

Maximum: LWOP.

See Ohio Rev. Code Ann. § 2903.02 (murder statute); Ohio Rev. Code Ann. § 2929.02 (penalties).

Oklahoma

Minimum: LWPP.

Maximum: Death.

See Okla. Stat. tit. 21, § 701.7 (first degree murder statute); Okla. Stat. tit., § 701.9 (penalties).

Oregon

Minimum: LWPP after 25 years.

Maximum: LWPP after 25 years.[6]

See Or. Rev. Stat. § 163.115 (murder statute and penalties).

Pennsylvania

Minimum: LWOP.

Maximum: Death.

See 18 Pa. Cons. Stat. § 2502 (murder statute); 18 Pa. Cons. Stat. § 9711 (sentencing procedures for first degree murder); 61 Pa. Cons. Stat. § 6137 (parole eligibility).

Rhode Island

Minimum: LWPP after 25 years.

Maximum: LWPP after 25 years.

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[6] The minimum penalty increases to LWPP after 30 years and the maximum penalty increases to death in Oregon for aggravated murder, which includes instances where "[t]here was more than one murder victim in the same criminal episode." *See* Or. Rev. Stat. § 163.095 (aggravated murder statute); Or. Rev. Stat. § 163.105 (aggravated murder penalties).

See R.I. Gen. Laws § 11-23-1 (murder statute); R.I. Gen. Laws § 11-23-2 (penalties); R.I. Gen Laws § 13-8-13 (parole eligibility).

South Carolina

Minimum: 30 years.

Maximum: Death.

See S.C. Code Ann. § 16-3-10 (murder statute); S.C. Code Ann. § 16-3-20 (penalties).

South Dakota

Minimum: LWOP.

Maximum: Death.

See S.D. Codified Laws § 22-16-4 (first degree murder statute); S.D. Codified Laws § 22-16-12 (classifying murder in the first degree as a Class A felony); S.D. Codified Laws § 22-6-1 (penalties by felony class); S.D. Codified Laws § 24-15-4 (parole eligibility).

Tennessee

Minimum: LWPP.

Maximum: Death.

See Tenn. Code Ann. § 39-13-202 (first degree murder statute and penalties).

Texas

Minimum: 5 years.

Maximum: 99 years.[7]

See Tex. Penal Code Ann. § 1902 (murder statute); Tex. Penal Code Ann. § 12.32 (penalties).

Utah

Minimum: 15 years.

Maximum: LWPP.[8]

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[7] The minimum penalty increases to LWOP and maximum penalty to death in Texas in cases of capital murder, which includes instances where "the person murders more than one person during the same criminal transaction." Tex. Penal Code Ann. § 19.03 (capital murder); Tex. Penal Code Ann. § 12.31 (capital murder penalties).

[8] The minimum penalty increases to 25 years and maximum penalty to death in Utah for aggravated capital felonies, which include crimes where "the homicide was committed incident to one . . . criminal episode during which two or more persons were killed." *See* Utah Code Ann. § 76-5-202 (aggravated

See Utah Code Ann. § 76-5-203 (murder statute and penalties).

Vermont

Minimum: 35 years.

Maximum: LWPP.[9]

See Vt. Stat. Ann. tit. 13, § 2301 (first degree murder statute) Vt. Stat. Ann. tit. 13, § 2303 (penalties).

Virginia

Minimum: 20 years.

Maximum: LWPP after 15 years.[10]

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murder statute); Utah Code Ann. § 76-3-206 (aggravated murder penalties).

[9] The minimum penalty increases to LWOP and maximum penalty to LWOP in Vermont if "[a]t the time of the murder, the defendant also committed another murder." *See* Vt. Stat. Ann. tit. 13, § 2311 (aggravated murder statute and penalties).

[10] The minimum penalty increases to LWPP after 25 years and maximum penalty to death in Virginia if there was a "deliberate, and premeditated killing of more than one person as a part of the same act or transaction." *See* Va. Code Ann. § 18.2-31 (capital murder statute); Va. Code Ann. § 18.2-10 (penalties)

See Va. Code Ann. § 18.2-32 (murder statute); Va. Code Ann. § 18.2-10 (penalties).

Washington

Minimum: 20 years.

Maximum: 45 years.[11]

See Wash. Rev. Code. § 9A.32.030 (first degree murder statute); Wash. Rev. Code. § 9.94A.540 (mandatory minimum terms); Wash. Rev. Code § 9.94A.515 (crimes listed by seriousness level); Wash. Rev. Code § 9.94A.510 (table providing sentence based on seriousness level and offender score).

West Virginia

Minimum: LWPP after 15 years.

Maximum: LWOP.

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[11] The minimum penalty increases to LWOP and maximum penalty to LWOP in Washington if "[t]here was more than one victim and the murders were … the result of a single act of the person" *See* Wash. Rev. Code § 10.95.020(10) (aggravated first degree murder statute); Wash. Rev. Code § 10.95.030 (penalties).

See W. Va. Code Ann. § 61-2-1 (murder statute); W. Va. Code Ann. § 61-2-1 (penalties); W. Va. Code Ann. § 62-3-15 (parole eligibility).

Wisconsin

Minimum: LWPP after 20 years.

Maximum: LWOP.

See Wis. Stat. § 940.01 (first degree murder statute) Wis. Stat. § 939.50 (penalties); Wis. Stat. § 973.014 (parole eligibility).

Wyoming

Minimum: LWOP.

Maximum: Death.

See Wyo. Stat. Ann. § 6-2-101(b) (first degree murder statute); Wyo. Stat. Ann. § 6-10-301 (parole eligibility).

Federal

Minimum: LWOP.

Maximum: Death.

See 18 U.S.C. § 1111 (murder statute and penalties); 18 U.S.C. § 3591 (death penalty statute).

Exhibit B – Statutes Reflecting Exceptions to Treating Youthful Offenders Differently for Serious Offenses.

Colorado. "[A] young adult offender shall be ineligible for sentencing to the youthful offender system if the young adult offender is convicted of . . . [a] class 1 or class 2 felony, [which include murder]." Col. Rev. Stat. § 18-1.3-407.5.

Florida. "[A] person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act . . . ." Fla. Stat. Ann. § 958.04.

Georgia. The definition of "conviction" for purposes of the treatment of youthful offenders excludes "judgments upon criminal offenses for which the maximum punishment provided by law is death or life imprisonment." Ga. Code Ann. § 42-7-2.

Hawaii. "This section [the young adult defendants section] shall not apply to the offenses of murder or attempted murder." Haw. Rev. Stat. Ann. § 706-667(1).

Indiana. A youthful offender is defined as an individual who "has been committed to the department to serve a maximum sentence of not more than eight (8) years." Ind. Code Ann. § 11-14-1-5(2).

Michigan. Youthful trainee status does not apply to "[a] felony for which the maximum penalty is imprisonment for life [such as murder]." Mich. Comp. Laws Ann. § 762.11.

New Jersey. "This section [young adult offenders] does not apply to any person less than 26 years of age at the time of sentencing who qualifies for a mandatory minimum term of imprisonment without eligibility for parole." N.J. Stat. Ann. § 2C:43-5.

North Carolina. Expungement of records "for first offenders not over 21 years of age at the time of the offense of certain drug offenses," not applicable to homicides. N.C. Gen. Stat § 15A-145.2 (no mention of expungement for homicides committed by youthful offenders).

New York. Youthful offender status not available for class A-1 felonies (like double homicides). N.Y. Crim. Proc. § 720.10(2)(a); N.Y. Penal Law § 125.27.

Oklahoma. Offender as defined in the delayed sentencing program for young adults limited to "nonviolent felony offense." Okla. St. tit. 22, § 996.1.

South Carolina. Youthful offender definition limited to individuals charged with a misdemeanor or less serious felonies. S.C. Code Ann. § 24-19-10(d)(ii).

Virginia. Youthful offender program exclusive of convictions of "capital murder, murder in the first degree or murder in the second degree." Va. Code Ann. § 19.2-311(B)(2).

West Virginia. Separate facilities for youthful offenders not applicable to offenders convicted of an offense punishable by life imprisonment. W. Va. Code § 25-4-6.