19-989

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUIS NOEL CRUZ, AKA NOEL,
Petitioner - Appellee,
v.

UNITED STATES OF AMERICA,
Respondent - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT (NEW HAVEN)

BRIEF OF APPELLEE LUIS NOEL CRUZ

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PRELIMINARY STATEMENT

Luis Noel Cruz was sentenced to die in prison for a crime he committed when he was a teenager, just twenty weeks past his 18th birthday. On orders from leaders of the Latin Kings, and fearing for his own life if he refused, he carried out a "mission" to kill a gang member named Arosmo Diaz and, in the process, also killed Tyler White, a friend of Diaz's. He has now served more than half his life in federal prison for this offense and—until recently—had no hope of ever walking free.

Prisoners serving life without parole have little incentive to reform their lives. Nevertheless, over the past quarter-century of incarceration, Mr. Cruz has undergone an extraordinary transformation. Noel Cruz, the reckless and impulsive teenager, has matured into Noel Cruz, the kind, generous, mature—and deeply remorseful—man. In the words of one of his prison unit managers, he has "fully dedicated himself to a new path in life and rehabilitation." AA1017. A forensic social worker who examined Mr. Cruz attested to her "complete confidence" that he has been rehabilitated. AA961.

While Mr. Cruz's transformation is—in the District Court's words—"extraordinary," it is also entirely consistent with what modern science tells us about developmental psychology. When Mr. Cruz committed his offense, he was still in a stage of mental adolescence, characterized by "a lack of maturity and an underdeveloped

sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Though the adolescent Mr. Cruz was more reckless and impulsive than a mentally mature adult, he also had a greater "capacity for change." *Id.* at 472. As his subsequent evolution confirms, his character was not fully formed when he committed these crimes.

Over the last thirty years, the Supreme Court has listened to what science tells us about adolescence and issued a series of decisions recognizing that "*youth matters* for purposes of meting out the law's most serious punishments." *Id.* at 483.[1] This recognition has led the Court most recently to hold that "the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479.

Had Mr. Cruz been born a few months later—had he been 17 years and 364 days old at the time of his offense, rather than 17 and 505 days—there is no question that he would be entitled to resentencing under *Miller*. Recognizing that *Miller*'s holding rested more on a scientific understanding of youth than a numerical one, Mr. Cruz sought relief, and this Court granted him leave to file a successive motion under

[1] Throughout this brief, unless otherwise noted, emphases have been added to, and internal brackets and ellipses removed from, quotations.

28 U.S.C. § 2255.

The District Court (Hall, *J.*) then presided over a lengthy and exhaustive habeas proceeding, which included a two-day evidentiary hearing, complete. During the hearing, Dr. Laurence Steinberg, one of the world's leading experts on adolescence and developmental psychology—whose research and conclusions were cited in *Roper*, *Graham*, and *Miller*—testified with "absolute[] certain[ty]" that there is no meaningful difference between a 17-year-old and an 18-year-old in terms of cognitive maturity and development.

Relying on this uncontested scientific evidence, as well as the uncontested evidence of Mr. Cruz's rehabilitation, Judge Hall granted his § 2255 motion. Then, after considering the circumstances of both the offender and the offense, Judge Hall resentenced Mr. Cruz to 35 years in prison. This term—which is in line with, if not more severe than, national median sentences for similarly aged homicide offenders—accomplishes the goals of criminal punishment. But it does something else, as well: It signals that our penal system recognizes genuine rehabilitation; and it allows Mr. Cruz, his ailing mother, and the son who's grown up without his steady presence to *hope*—hope for reunification, for a productive life, for continued atonement. His current projected release date is November 22, 2024.

The Government, however, believes Mr. Cruz should die in prison. Although it does not appeal from, or contest, the reasonableness of, his current sentence—it does not, in other words, argue that Mr. Cruz *should* be imprisoned for life—the Government argues that he *must* die in prison because he had the misfortune of being born 141 days too early. And it insists that, notwithstanding Judge Hall's well-reasoned decision, this Court has no choice but to reverse, because "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." Gov't Br. at 12–13. But that just isn't true.

The Supreme Court in *Miller* did not draw any fixed numerical line. In fact, it refused the petitioners' invitation to draw a categorical line at age 15, because the thrust of its holding was that "a sentencing scheme that . . . mak[es] *youth* (and all that accompanies it) irrelevant to the imposition of th[e] harshest prison sentence . . . poses too great a risk of disproportionate punishment." *Miller*, 567 U.S. at 479. *Miller* does not *forbid* life sentences; it simply requires that sentencing courts first consider "youth (and all that accompanies it)." If the distinctive attributes of youth—including diminished culpability and increased capacity for change—are not considered, *Miller* instructs, there is too great a risk that too many offenders will receive unconstitutionally disproportionate penalties.

To be sure, the Supreme Court did draw a line in *Roper*, where it held that the Eighth Amendment *categorically* prohibits the death penalty for offenders under 18. 543 U.S. at 574. That line, while entirely arbitrary and outdated, can arguably be defended in capital cases, where sentencers are *always* required to consider the "mitigating qualities of youth." *Johnson v. Texas*, 509 U.S. 250, 367 (1993). But it cannot be defended in the context of mandatory life without parole, where those factors cannot be considered for adults, even young adults. In any event, *Roper* itself moved a line that the Court had previously drawn at 16, and did so by affirming a *lower court's* judgment that societal mores surrounding juvenile capital punishment had changed. *Id.* Thus, the Supreme Court has endorsed the mutability of age-based lines, consistent with the general principle that the Eighth Amendment should be "interpreted in a flexible and dynamic manner." *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989).

The Government also argues that this Court is bound by the decision of a previous panel, in *United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019), which affirmed the mandatory life sentences of three defendants who were between the ages of 20 and 22 when they committed the murders triggering their mandatory life sentences. The cursory opinion of the *Sierra* panel is relevant, but not controlling—at least not in this appeal, which involves an 18-year-old offender. Based on the expert testimony she

heard, Judge Hall carefully cabined her holding to include only 18-year-old offenders like Mr. Cruz. Accordingly, *Sierra* is distinguishable and any statements in the decision regarding 18-year-olds are dicta.

In short, this Court *can* affirm the judgment below and permit Mr. Cruz to leave prison in four years, when he will be almost 50 years old and have spent nearly two-thirds of his life behind bars. The Supreme Court has insisted that courts must exercise their own, independent, moral judgment when considering Eighth Amendment challenges. *See Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). And it has admonished courts not to ignore evolving scientific standards. *See Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017). Fifteen years after *Roper*, it is clear that the distinctive aspects of youth "diminish the penological justifications for imposing" a life sentence on 18-year-olds like Mr. Cruz, every bit as much as they do for 17-year-old offenders.

In light of the clear (and uncontested) scientific consensus that 18-year-old offenders are less culpable, and more capable of rehabilitation, than adults, and in consideration of Mr. Cruz's remarkable transformation, this Court can, and should, affirm.

STATEMENT OF THE CASE

I. Factual Background

A. The Offense and Sentencing

Mr. Cruz was born in Boston on December 25, 1975. He grew up partly in Puerto Rico and partly in Bridgeport, where he witnessed drug-dealing, violence, and shootings in his neighborhood. AA666–67.[2] He himself was shot, robbed, and on multiple occasions physically assaulted. AA668–69. At home, Mr. Cruz faced an alcoholic father with an explosive temper. AA666–67, 1014.

When Mr. Cruz was 16, he joined a branch of the Latin Kings in Bridgeport, seeing it as an opportunity to be part of a "brotherhood family." AA669–70. As a low-ranking "soldier" in the gang, Mr. Cruz learned that if members refused to follow orders and carry out "missions," including murder, the same mission would be carried out against them as punishment. AA671, 676; SA2. About two years after he joined, Mr. Cruz sought to take advantage of a one-time "amnesty," permitting members to quit the gang without repercussions. AA673. But it turned out not to be so simple. He continued to receive orders and later learned that leadership viewed his attempt to resign

[2] Citations to AA__ are to the Appellee's Appendix, filed herewith. Citations to SA__ and GA__ are to the Supplemental Appendix and Government's Appendix, filed along with its brief on October 31, 2019.

as an act of disrespect. AA673–76; SA2–3.

On December 25, 1993, Mr. Cruz turned 18. Less than five months later, gang leaders decided to test his loyalty. They instructed one of Mr. Cruz's childhood friends (also a member) to order him to kill a suspected "snitch" named Arosmo Diaz. AA674–75; SA3. On May 14, 1994, Mr. Cruz's friend informed him of the mission. AA675, 695–96, 700–01. When Mr. Cruz hesitated, his friend shot a gun into the air and told him that leadership was debating what to do about his act of "disrespect[]." AA676. As Mr. Cruz later testified, he understood that if he didn't carry out the mission, he "would be done." *Id.* ("[I]f you are sent to kill someone and you don't kill that person, well, you know, you will be killed."); SA3. In a heated action that he regrets to this day, Mr. Cruz carried out the mission, killing both Diaz and a second person, Tyler White, who just happened to be with Diaz at the time. AA676–77; SA3.

Mr. Cruz was later arrested and—along with nineteen other members of the Latin Kings—and charged with racketeering and violence in aid of racketeering. *See* GA77–113. Any form of cooperation with authorities was strictly forbidden and harshly punished under gang rules, so Mr. Cruz felt his only choice was to go to trial on the criminal charges against him. AA677–78. In September 1995, a jury found him guilty of three counts of Violent Crimes in Aid of Racketeering under 18 U.S.C. § 1959(a), a

RICO violation under 18 U.S.C. § 1962(c), a RICO conspiracy, and a conspiracy to commit a drug offense. SA3–4. At the time, all concerned believed that these charges carried mandatory sentences of life without parole, and indeed the Sentencing Guidelines (which were then mandatory) did mandate life irrespective of the substantive statutes. *See* AA943, 978. Accordingly, without much fanfare—and certainly no consideration of his youth or other mitigating circumstances—the trial judge (Nevas, *J.*) sentenced Mr. Cruz on January 30, 1996, to four concurrent sentences of life without the possibility of parole. GA114–15.

B. Mr. Cruz's Extraordinary Record of Rehabilitation

Mr. Cruz has been incarcerated for more than half his life. It wasn't long, however, before he decided he wanted to live the rest of his life in a different way. He formally renounced the Latin Kings, AA680, and has, in the Government's words, been a "model inmate," AA727. Indeed, over a quarter-century of incarceration, Mr. Cruz has maintained a *perfect* disciplinary record. AA953, 735.

He has also taken full advantage of the programs and opportunities available to him completing over 80 programs offered by the BOP. AA907. Early on, he entered the "CODE" program, which equipped inmates with psychological coping and conflict resolution skills. AA679–80. He went on to take classes in computer literacy, parenting,

psychology, auditing, and small business administration, among others. AA670–71. He worked in the prison library, served as a Spanish translator for prison educational programs and religious services, and became involved in the financial management of Unicor Federal Prison Industries. AA681–82.

Dr. Jozlyn Hall, a forensic social worker who evaluated Mr. Cruz in 2019, testified at re-sentencing that Mr. Cruz "st[ood] out" from the other inmates she had evaluated, such that she had "complete confidence" "that he's rehabilitated." AA960–61. "[W]hat struck me about [him]," she said, "is his kindness. There's a kindness and a sweetness about him" AA960. She found this remarkable because "he was incarcerated . . . he thought for life, so there wasn't . . . something motivating him to really change. He did it because he wanted to be a better person because he wanted to take responsibility and he wanted to grow." *Id.*

In a report that Dr. Hall prepared for the court, she noted that Mr. Cruz's success in prison "is due to his unwavering want to be a better man, wanting to never let his family down," and by "dreams beyond prison walls," including the "desire to take care of his ailing mother" and to "set a good example for his son[]." AA907. And he was

aided by a supportive family that "offered the needed structure for his maturity." *Id.*[3] She also evaluated Mr. Cruz with several performance and neuropsychological tests, which reflected that maturity and rehabilitation. AA909. Indeed, "[o]n a validated risk assessment instrument," of the sort used by parole boards, AA967, "his risk of future violence was appraised as low." AA909. Given the results of her examination, Dr. Hall stated that "it is highly unlikely that Mr. Cruz would reoffend. AA909.

Perhaps the best testament to Mr. Cruz's rehabilitation is the support he has received from BOP officials. When he filed his motion for resentencing, eight officials wrote letters attesting to his exemplary behavior. *See* AA76–85. And when he was resentenced, a unit manager stated that he had "fully dedicated himself to a new path in life and rehabilitation." AA1017–18. Summarizing all the evidence before her, Judge Hall told Mr. Cruz, "what you did after you were sentenced in 1996 . . . is extraordinary." AA1016.

II. Procedural Background

In June 2012, the Supreme Court issued its decision in *Miller v. Alabama*, holding that "the Eighth Amendment forbids a sentencing scheme that mandates life

[3] Friends, family, and members of his religious community submitted nearly 30 letters of support during the course of the proceedings below. *See* AA86–132, 864–76, 910.

in prison without possibility of parole for juvenile offenders." 567 U.S. 460, 480 (2012). In light of the *Miller* decision, Mr. Cruz sought leave to file a motion to challenge his sentence under 28 U.S.C. § 2255. In July 2013, a panel of this Court consisting of Judges Raggi, Wesley, and Livingston, issued an order granting Mr. Cruz leave to pursue his proposed *Miller* claim. AA1. The Court determined that Mr. Cruz "has made a *prima facie* showing that he has satisfied the successive petition requirements," but instructed the district court to address the preliminary inquiry of "whether the United States Supreme Court's decision in *Miller* announced a new rule of law made retroactive to cases on collateral review," AA1. Though the panel was aware of Mr. Cruz's age at the time of his offense, it did not instruct the district court to assess *Miller*'s applicability to offenders over 18.

As it happened, the Supreme Court itself answered the retroactivity question. *See Montgomery v. Louisiana,* 136 S. Ct. 718 (2016). Thereafter, Judge Hall undertook an exhaustive process of determining whether *Miller* applied to 18-year-old offenders like Mr. Cruz.

A. Scientific Evidence in the Record

Mr. Cruz moved for an evidentiary hearing. In a thorough opinion detailing the evolution of the Supreme Court's Eighth Amendment jurisprudence in the context of

youthful offenders, Judge Hall concluded that there was mixed issue of law and fact as to *Miller*'s application to 18-year-olds, and therefore granted the motion for an evidentiary hearing. AA266–80, 284–90.

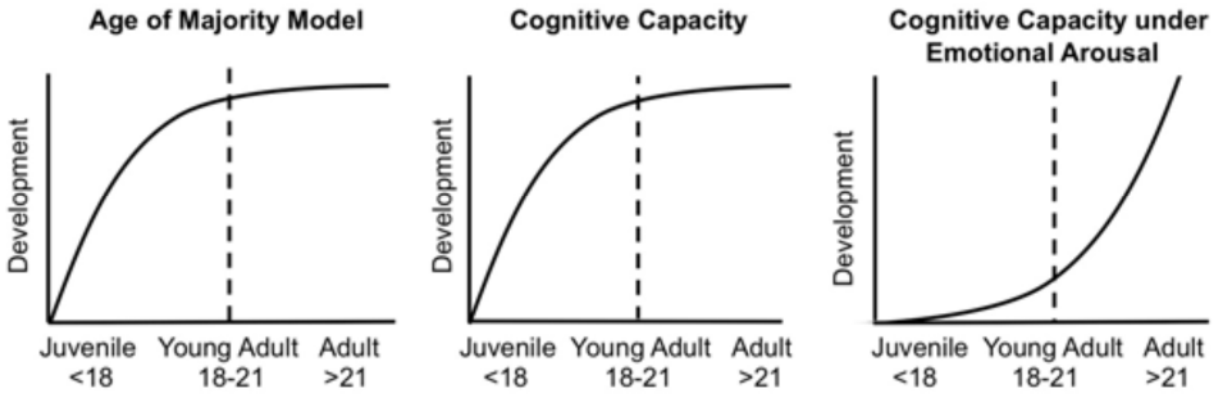
On September 26, 2017, Judge Hall held an evidentiary hearing at which Dr. Laurence Steinberg provided testimony. AA584–652. Dr. Steinberg is a leading expert in adolescent brain development, who was the lead neuroscientist on the amicus briefs submitted by the American Psychological Association in *Roper*, *Graham*, and *Miller*. The government disputed the legal significance of this evidence but did *not* challenge the accuracy of the research, Dr. Steinberg's expertise, or the correctness of his scientific conclusions. SA51, 54.

Dr. Steinberg detailed the extraordinary sea change in our understanding of brain development that has taken place in the past 25–30 years—and that continues today. As recently as the 1990s, he testified, experts assumed that the human brain was fully developed by age 10 or 11, when it reached its full size. AA594–95. That conventional wisdom was disturbingly far from the truth. Brought about by the availability of Functional Magnetic Resonance Imaging, scientists in the early 2000s were able for the first time to observe brains in action. *Id.* Even then, early research focused on subjects under age 18, and "research on development in the brain beyond age 18" did not

"beg[i]n to accumulate" until "2010 and beyond." AA595.

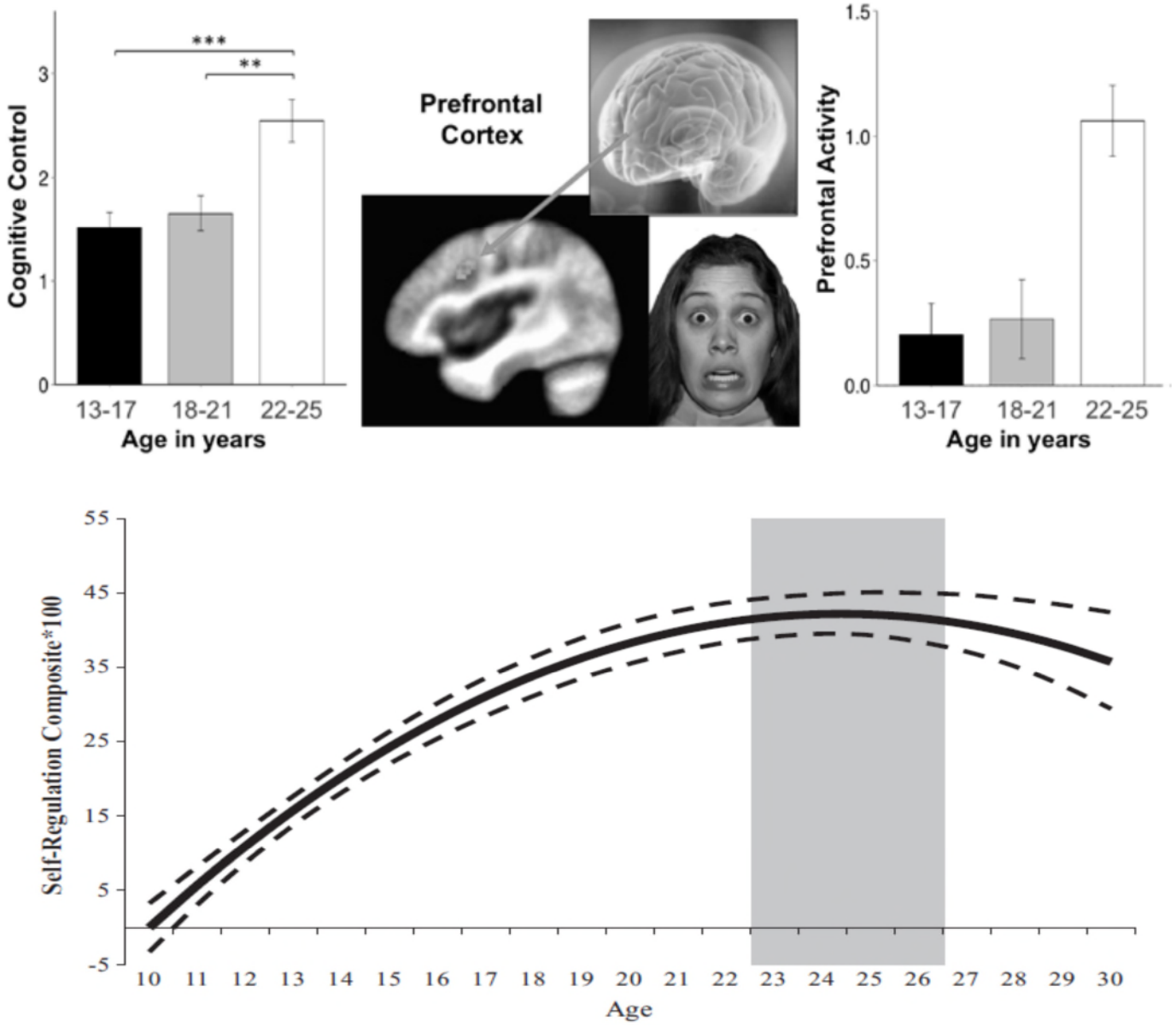
Dr. Steinberg's own research followed the same course: One of his 2003 studies, which was cited by the Court in *Miller*, focused on adolescents under the age of 18. But he testified that if he were writing the same paper today, in light of new scientific developments, he would say "the same things are true about people who are younger than 21." AA603; *see also* SA55. As Dr. Steinberg explained, mental adolescence lasts from about age 10–20, AA613, and he was "absolutely confident" that development continued beyond age 18, AA643. Although a child's ability to think when she is calm and emotionally neutral ("cold cognition") is developed by around age 16, her ability to regulate her thoughts when emotionally aroused ("hot cognition") is not mature until her early- to mid-20s. AA590–91. In moments of hot cognition, the brain's social and emotional center (the Limbic System) competes with the brain's center of logic and planning (the Cognitive Control System). Because the Limbic System develops more quickly than the Cognitive Control System during adolescence, emotions and social pressure overwhelm decision-making in adolescents more often than in adults. AA588–89. "[W]hen hot cognition is operating," said Dr. Steinberg, "adolescents are less likely to pay attention to the downside of a risky decision, and they're more focused on the rewards of it, so it means that the prospect of being punished for something . . . is less

salient than it is to an adult." AA610. Diagrams from a 2016 article submitted into evidence illustrate this developmental lag:

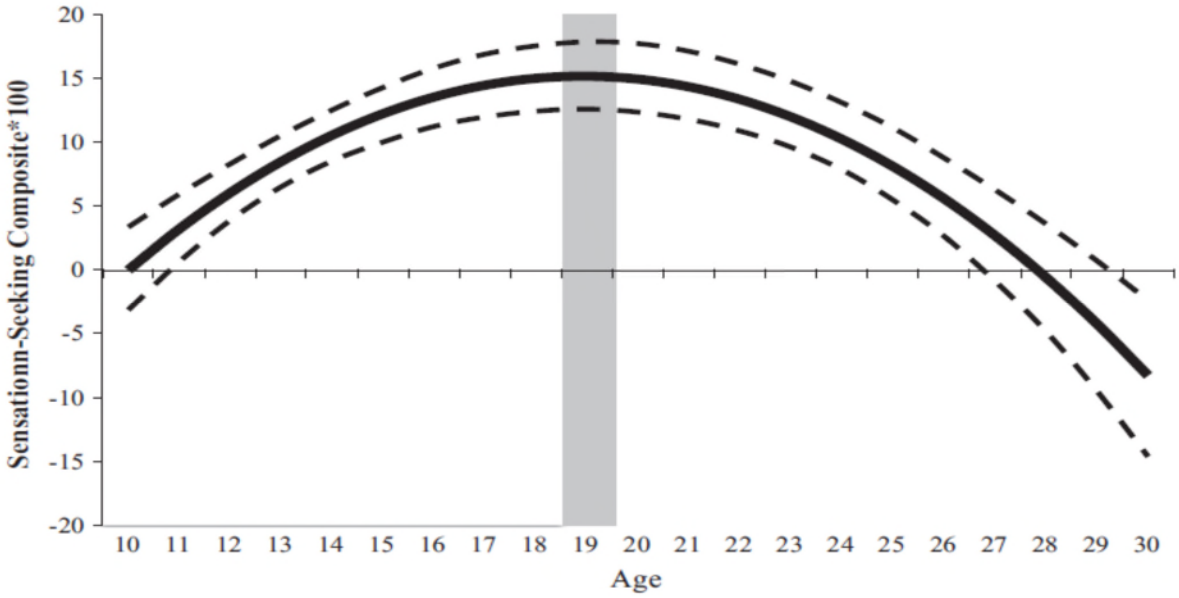


AA307.

As a result of this lag, late adolescents continue to have "problems with impulse control and self-regulation and heightened sensation-seeking," as well as heightened susceptibility to peer pressure. AA600–01. With respect to cognitive control, self-regulation, and activity in the prefrontal cortex (a crucial part of the Cognitive Control System), the late-adolescent brain is similar to the early-adolescent brain and significantly different from the adult brain:



AA309, 314. In fact, risk-seeking behavior, especially in the company of peers, actually reaches its *apex* between the ages of 17 and 19. AA601. This peak is helpfully illustrated in a 2017 scientific article submitted to the District Court:



AA309.

Crucially, as to all these traits, Dr. Steinberg knew of *no statistically significant difference* between 17-year-olds and 18-year-olds. AA650 ("If you were asking me as a scientist, if I thought that we would find a statistically significant difference between 17-year-olds and 18-year-olds on the kind of things that we study . . . no, I can't think of a study where one would find such a bright-line boundary."). He was "[a]bsolutely certain" that these traits apply to 18-year-olds, while less confident that they extend to age 21. AA651–52. Dr. Steinberg also testified that 18-year-olds, like 17-year-olds, are more capable of changing their character than are adults. AA602; 607–08.

B. Judge Hall's Decision

On March 29, 2018, Judge Hall issued a 57-page ruling granting Mr. Cruz's

§ 2255 motion. She first concluded that Mr. Cruz's motion satisfied the prerequisites for a successive petition under § 2255(h) because it "contain[ed] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." SA15–31.

She then addressed the Government's primary legal argument—that *Miller*'s holding was limited by its own terms to offenders under age 18. SA31–40. Although she acknowledged *Miller's* holding that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[]," she declined to "infer by negative implication that the *Miller* Court *also* held that mandatory life without parole is necessarily constitutional as long as it applied to those over the age of 18." SA32. As Judge Hall pointed out, the Court in *Miller* and *Graham* did not need to decide who qualified as a "juvenile" under its decision. SA32–34. And in *Roper,* the one case where the Supreme Court *did* "draw a line," it actually *moved* a line that it had previously drawn, at age 16. SA34 ("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* and would have required *Roper* to overturn *Thompson* rather than endorsing it."). In addition, based on the expert testimony she heard and scientific studies that were submitted into evidence, Judge Hall

concluded that the scientific research underpinning *Roper*, *Graham*, and *Miller* had grown and evolved substantially since the issues were briefed to the Supreme Court. SA54. None of those cases had examined whether 18-year-olds share the same attributes of youth as younger adolescents, because none of those cases involved an 18-year-old offender. *Id.* at 54–55.

Judge Hall then turned to the mixed question of whether *Miller*'s reasoning in fact applies to 18-year-olds. In addressing that question, Judge Hall "look[ed] 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." SA39. With respect to national consensus, Judge Hall noted "an emerging trend toward recognizing that 18-year-olds should be treated different from fully mature adults," SA48, and looked at the "actual use" of life without parole as a sentence for 18-year-old offenders, SA43–45. In particular, she cited a 2017 report from the U.S. Sentencing Commission showing that, in practice, life sentences are very rarely imposed on defendants under age 21 in the federal system. SA43–45; AA360–430. Finally, Judge Hall observed some broader societal trends away from treating 18-year-olds as fully mature adults, including the American Bar Association's stance against imposing the death penalty on 18- to 20-year-olds; the now-universal extension of juvenile courts'

jurisdiction beyond the age of 18; and the movements to raise both the drinking age and, more recently, the age to buy tobacco products to 21. SA45–47.

Taking all of this—as well as the scientific evidence presented by Dr. Steinberg—into account, Judge Hall held 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," like Mr. Cruz, "who were 18 years old at the time of their crimes." SA56 (quoting *Miller*, 567 U.S. at 479). When an 18-year-old commits a crime, she concluded, a sentencing scheme that "mak[es] youth (and all that accompanies it) irrelevant to imposition of th[e] harshest prison sentence . . . poses too great a risk of disproportionate punishment." *Id.* (quoting *Miller*, 567 U.S. at 479). She therefore granted Mr. Cruz's motion to vacate his mandatory life sentence. SA57.

C. Resentencing

After several delays, *see* AA884, Mr. Cruz was finally resentenced on February 26, 2019. In advance of the hearing, the parties submitted their sentencing memoranda and exhibits, *e.g.* AA734–79, 903–10, and the Probation Office prepared a revised presentence investigation report. *See* AA913–14. In addition, at Judge Hall's request, the parties submitted supplemental briefing and data "concerning sentences imposed on defendants aged 17 years old in re-sentencng under *Miller*, as well as sentences

imposed in state and federal courts for murder convictions upon defendants aged 17, 18, 19, 20, and 21 years old." GA57; *see* AA885–902 (Mr. Cruz's response).

Relying on these submissions, as well as testimony at the sentencing hearing, and Judge Hall weighed the seriousness of the crime against the numerous mitigating circumstances, especially Mr. Cruz's youth and circumstances at the time of the offense and his truly extraordinary record of rehabilitation since then. JA1011–20. In light of the parties' submissions on sentencing data, Judge Hall took great pains to compare them to Mr. Cruz's case and noted the rarity of life sentences for offenders in Mr. Cruz's age group. AA1020–29.

Notwithstanding *Miller*'s instruction that juvenile life sentences be "rare," and notwithstanding Mr. Cruz's truly extraordinary rehabilitation, the Government took the position that he should be sentenced to life all over again. Though Judge Hall recognized that the Government disagreed with her habeas ruling, she found its position on a proper sentence to be "insupportable." AA129 ("[I]t seems to me your position in the sentence you recommend, completely ignores the other factors of his history and characteristics, including his age and the fact that I'm not sentencing him today as an 18 year old or 20."). Mr. Cruz, the court emphasized, is clearly not the "rare case of irreparable depravity" for which *Miller* reserved life sentences. *Id.*

Taking account of all § 3553 factors, Judge Hall sentenced Mr. Cruz to 35 years. AA1030. The Government has not appealed Mr. Cruz's new sentence, or suggested that it is unreasonable. But by appealing the § 2255 judgment, it asks this Court to ignore all of the evidence Judge Hall considered and reinstate Mr. Cruz's life sentence.

SUMMARY OF THE ARGUMENT

The Eighth Amendment prohibits excessive sanctions and requires that "punishment for crime should be graduated and proportioned *both* to the *offender* and the offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). In determining which punishments are so disproportionate as to be unconstitutional, the Supreme Court has looked to "evolving standards of decency," *Roper*, 543 U.S. at 560, exercising its own "independent judgment," *id.*, and recognizing that "the Amendment has been interpreted in a flexible and dynamic manner," *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). *See infra* at 24–25.

Over the last thirty years, the Supreme Court has taken a particular interest in the proportionality of sentences and sentencing schemes with respect to youthful offenders. In these decisions, the Court has considered scientific evidence and concluded that the attributes of youth make young offenders both less culpable and more capable of change. Thus, in *Miller*, the Court held that a mandatory sentencing

scheme that prohibits sentencers from considering the "mitigating qualities of youth" when imposing life-without-parole sentences is unconstitutional. *See infra* at 25–28.

Applying these principles—and considering advancements in the scientific understanding of adolescent brain development—the District Court properly held that Mr. Cruz's mandatory life sentence violated the Eighth Amendment. Though he was five months past his 18th birthday at the time of his offense, there is now a scientific consensus that there is no material difference between 17- and 18-year-olds in terms of cognitive development, moral culpability, and the capacity to change. This decision was compelled by science, but also consistent with an emerging national consensus that 18-year-olds should not be treated as fully mature adults. *See infra* at 28–48.

Contrary to the Government's arguments, no binding authority compels reversal of the District Court's judgment. The Supreme Court has never endorsed a rigid line at age 18 and this Court's decision in *Sierra* is not controlling as to *Miller's* application to 18-year-olds like Mr. Cruz because the defendants in that case were each at least 20 years old at the time of their triggering offenses. *See infra* at 49–56.

Because Mr. Cruz's § 2255 motion was plainly premised on—and therefore "contained"—a new and retroactive rule of constitutional law, it was proper for the District Court to consider it under § 2255(h). *See infra* at 61–63.

ARGUMENT

I. The Eighth Amendment prohibits mandatory sentences of life without parole for individuals who were 18 years old at the time of their offense.

The Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U.S. at 560; *see also Atkins*, 536 U.S. at 311 n.7. The prohibition of excessive sanctions follows from the basic "precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 567 U.S. at 469. Time and again, the Supreme Court has made clear that the "concept of proportionality is central to the Eighth Amendment." *Id.*

In determining "which punishments are so disproportionate as to be cruel and unusual," the Supreme Court has looked to "the evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 560. As the Court has long observed, "the [Eighth] Amendment has been interpreted in a flexible and dynamic manner." *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). While the "*standard* itself remains the same, . . . its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 418 (2008). To track the changing mores of society, the Court has looked at various objective indicia, including legislative enactments and sentencing practices. But it has consistently maintained that "the standard of extreme cruelty is not merely

descriptive, but necessarily embodies a *moral judgment*." *Id.* "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. Instead, it falls ultimately to the courts to interpret the Eighth Amendment and apply its flexible and dynamic standard to new situations though "the judicial exercise of independent judgment." *Id.*

Given the nature of the Eighth Amendment inquiry, the Government's insistence that "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," Gov't Br. at 12–13, is ill-informed. No line in this area of constitutional law is, or can be, etched in stone. Instead, as the Supreme Court's own cases have amply demonstrated, the only constant is the constitutional *standard*—that excessive sanctions are "cruel and unusual punishments." The *application* of that standard will necessarily lead to flexible and dynamic lines drawn and redrawn to keep pace with evolving societal mores. *See Kennedy*, 554 U.S. at 419.

A. *Miller* requires sentencers to take account of the mitigating circumstances of youth before imposing mandatory life sentences.

The Supreme Court has long recognized that "youth matters for purposes of meting out the law's most serious punishments." *Miller*, 567 U.S. at 483; *see also Graham*, 560 U.S. at 76 ("An offender's age is relevant to the Eighth Amendment, and

criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."); *Roper*, 543 U.S. at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("[T]he Court has . . . endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."). This central recognition led the Court in *Miller* to conclude that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479.

"The 'foundation stone' for *Miller's* analysis was th[e] Court's line of precedent holding certain punishments disproportionate when applied to juveniles." *Montgomery v. Alabama*, 136 S. Ct. 718, 732 (2016) (quoting *Miller*, 567 U.S. at 470 n.4). In those cases—including *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (categorically prohibiting capital punishment for offenders under the age of 16); *Roper v. Simmons*, 543 U.S. 551 (2002) (categorically prohibiting capital punishment for offenders under the age of 18); and *Graham v. Florida*, 560 U.S. 48 (2010) (categorically prohibiting life without parole sentences for juvenile nonhomicide offenders)—the Court

established the principle that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471.

Drawing on these foundational cases, *Miller* identified three fundamental differences that separate children from adults for purposes of sentencing:

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

Id. at 471. These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472; *see also Graham*, 560 U.S. at 71–74.

In addition to its cases concerning youthful offenders, *Miller* drew upon a "second line of [its] precedents, demanding individualized sentencing when imposing the death penalty." *Miller*, 567 U.S. at 475 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976). That line of cases stressed that sentencers must take account of mitigating circumstances—including the "mitigating qualities of youth," *Johnson v. Texas*, 509 U.S. 350, 367 (1993)—before imposing the death penalty. *Miller*, 567 U.S. at 475–77.

Combining these two lines of authority, *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Id.* at 479. "By 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*." *Id.*

Unlike in *Graham* and *Roper*, *Miller* did not impose a categorical ban on life without parole for juvenile homicide offenders. *Id.* Instead, it required that sentencers take account of the mitigating qualities of youth, through individualized sentencing proceedings, so as to reduce the risk that less culpable offenders, who are capable of rehabilitation, will be sentenced to disproportionately harsh sentences. *Id.*

B. In light of evolving scientific consensus, the reasoning of *Miller* applies to 18-year-old offenders.

The Court in *Miller* rested its holding not only on "common sense—on what 'any parent knows'—but on science and social science as well." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). At the time of the Court's decision in *Miller*—and certainly at the time of its 2005 decision in *Roper*—science and social science had coalesced around the conclusion that the brains of adolescents under the age of 18 were not fully developed, "leading to recklessness, impulsivity, and heedless risk-taking." *See Miller*, 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569). However, as Dr. Steinberg

testified below, in the mid- to late-2000s, "virtually no research . . . looked at brain development during late adolescence or young adulthood." AA595. "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.*

1. The scientific evidence in the record demonstrates that there is no material difference between 18-year-old offenders and 17-year-old offenders.

In the years since *Roper* was decided, empirical research in neurobiology and developmental psychology has shown that the "distinctive attributes of youth" identified in *Miller*, *Graham*, and *Roper* are present in older adolescents, as well. *See, e.g.*, Scott, et al., *Young Adulthood as a Transitional Legal Category*, 85 Fordham L. Rev. 641, 642 (2016) ("Over the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority.").

a. In 2010, for example, scientists published a study tracking the brain development of 5,000 children, which found that their brains were not fully mature until age 25. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329

Sci. 1358, 138–59 (2010); *see also, e.g.*, Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Research Imaging Studies*, 33 Hum. Brain Mapping 1987–2002 (2012). The following year, scientists delved deeper, using diffusion tensor imaging (DTI) to show for the first time within individual subjects that white matter "wiring" continues beyond adolescence, particularly in the frontal lobe. Beaulieu & Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 J. Neuroscience 31 (2011). There is now widespread agreement that the development of the prefrontal cortex, which plays a key role in "higher-order cognitive functions" like "planning ahead, weighing risks and rewards, and making complicated decisions" continues into the earl twenties. *See* Monahan, et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 Crime J. 557, 582 (2015).

Recent research has been especially supportive of the conclusion that 18-year-olds are indistinguishable from younger adolescents in terms of brain development. *See, e.g.*, Icenogle, et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample ("Maturity Gap")*, 43 L. & Human Behavior 69 (2019); Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U.

Rev. L. & Soc. Change 139 (2016). Studies show that 18-year-olds "are more likely than somewhat older adults to be impulsive, sensation seeking, and sensitive to peer influence in ways that influence their criminal conduct." Icenogle, et al., *Maturity Gap* at 83. And they demonstrate 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." Cohen, et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temple L. Rev. 769, 786 (2016).

In sum, in the years since *Roper* "dr[e]w a line at 18," empirical research has confirmed that, "[a]lthough eighteen- to twenty-one-year-olds are in some ways similar to individuals in their midtwenties, in other ways, young adults are more like adolescents in their behavior, psychological functioning, and brain development. Thus, developmental science does not support the bright-line boundary that is observed in criminal law under which eighteen-year-olds are categorically deemed to be adults." Scott, et al., *Young Adulthood*, 85 Fordham L. Rev. at 645.

b. Importantly, the record in this case contains direct, uncontested, and credited expert testimony supporting the conclusion that 18-year-olds are indistinguishable from younger adolescents when it comes to brain development. Dr. Laurence Steinberg—a world-renown expert in adolescent psychological development, whose work has been

repeatedly cited by the Supreme Court—provided sworn testimony before Judge Hall supporting the application of *Miller*'s rule to 18-year-old offenders like Mr. Cruz. AA583–656.

As described in greater detail above, *see supra* at 12–17, and in Judge Hall's decision, SA48–56, Dr. Steinberg testified without contradiction that adolescents (including those aged 18–20) are generally more impulsive than adults, prone to risky and reckless behavior, motivated less by punishment than by reward, and susceptible to the influence of others. AA587. Some of these traits—like risk-taking and reward-seeking—actually *intensify* in late adolescents (aged 18–20) when they are in unsupervised groups with their peers. AA605. Indeed, Dr. Steinberg testified that risk-seeking behavior peaks at around age 18, before receding in adulthood. *Id.*

Although much of the scientific evidence that Dr. Steinberg discussed would support treating 19- and 20-year-old offenders the same as younger adolescents, AA603, he testified that he was "[a]bsolutely certain" that there is no meaningful difference between 17-year-old and 18-year-old offenders. AA652; AA650 ("If you were asking me as a scientist, if I thought that we would find a statistically significant difference between 17-year-olds and 18-year-olds on the kind of things that we study . . . no, I can't think of a study where one would find such a bright-line boundary.").

c. The Government does not challenge, or even question, *any* of the scientific evidence described above, including Dr. Steinberg's "conclusion that there's no statistical[ly] significant difference between an 18-year-old and a 17-year-old." AA824–25. Indeed, the Government conceded that Judge Hall "ha[d] certainly developed a factual record here to tee this up for consideration by the circuit courts and by the Supreme Court." AA827.

The Government's only argument is that this consensus already existed when the Supreme Court decided *Miller*. *See* Gov't Br. at 26–27. Pointing to two amicus briefs filed in *Miller*—one on behalf of the American Psychological Association and one on behalf of Professor J. Lawrence Aber—the Government confidently asserts that "a comparison of Professor Steinberg's presentation during his direct examination in front of the district court with what the APA Brief and Abner [sic] Brief contained . . . yields no significant difference in the scientific findings." *Id.* at 27. Yet the Government makes no effort to actually support that assertion and, indeed, did not even include the transcript of Dr. Steinberg's testimony in its Appendix.

Dr. Steinberg in fact testified that it was only "as we moved into 2010 and beyond that 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." AA595. And, while the APA and Aber amicus briefs refer in places to "late adolescence" or "young adulthood," they did not urge the Court to move the categorical line. Indeed, the APA brief expressly clarifies that "[t]he research discussed in this brief . . . applies to adolescents under age 18," because "this Court's decisions have recognized age 18 as a relevant demarcation." Br. of *Amici Curiae* J. Lawrence Aber, et al., *Miller v. Alabama*, No. 10-9646 & 10-9647 (Jan. 17, 2012) at 6 n.3.

More importantly, as Judge Hall correctly observed, the relevant inquiry is not whether the *Miller* Court had before it the same scientific evidence that exists now. *Miller* didn't draw *any* categorical lines, instead holding that youth and immaturity must be considered in *all* cases involving juvenile offenders. *See* 567 U.S. at 479. It is thus doubly disingenuous for the Government to suggest 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." Gov't Br. at 27. The Supreme Court *didn't* hear anything approaching the same information and it *didn't* draw a line at 18.

The relevant inquiry, as Judge Hall noted, is whether the scientific consensus has changed since *Roper* was decided, in 2005. And on that score, there can be no doubt. Dr. Steinberg testified that "from 2000 into the middle or latter part of the decade,

most of the research on adolescen[ts'] brain development focused on people who were 18 and younger. There was to my knowledge *virtually no research that went past that age and that looked at brain development during late adolescence or young adulthood.*" AA595.

In sum, there is no serious dispute that the current scientific consensus that 18-year-old offenders are indistinguishable from 17-year-old offenders did not exist when the Supreme Court first "dr[e]w a line" at age 18, back in 2005. The only question for this Court, therefore, is whether it may take that new consensus into account in bringing its independent judgment to bear on the proportionality of mandatory LWOP sentences for 18-year-old offenders. In fact, it *must*.

2. **The Eighth Amendment requires sentencing courts to take account of evolving scientific consensus.**

This Court must take account of the current scientific understanding of adolescence and juvenile brain development because "[t]he Eighth Amendment 'is not fastened to the obsolete.'" *Hall v. Florida*, 572 U.S. 701, 708 (2014). As the Supreme Court has instructed time and again, the Eighth Amendment "acquire[s] meaning as public opinion becomes enlightened by a humane justice." *Id.* For this reason it both necessary and "proper to consider . . . psychiatric and professional studies" when assessing the constitutionality of sentences or sentencing schemes. *Id.* at 709–10.

The Supreme Court's decisions in the related arena of punishment for

intellectually disabled offenders illustrates this principle. In *Atkins v. Virginia*, the Court held that the Eighth Amendment prohibits imposition of the death penalty on intellectually disabled persons. 536 U.S. at 321. However, the Court did not undertake to define who qualifies as intellectually disabled, instead leaving that determination to the States. *Id.* at 317. In the years since, however, the Supreme Court has clarified that States' discretion in making this determination "is not 'unfettered,'" and that it "*must* be 'informed by the medical community's diagnostic framework.'" *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (quoting *Hall*, 572 U.S. at 719, 721).

In *Hall*, for example, the Supreme Court invalidated Florida's bright-line, categorical rule "that if an I.Q. is above 70, a person is not mentally retarded." *Hall*, 572 U.S. at 707. In doing so, the Court held that "it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*." *Id.* at 709–10. Similarly, in *Moore*, the Supreme Court invalidated the standard that the Texas Court of Criminal Appeals had adopted in 2004 to evaluate *Atkins* claims, holding that it was based on "superseded medical standards." 137 S. Ct. at 1048, 1050–52.

These recent cases stand inexorably for the conclusion that the Eighth Amendment requires courts to consider, and adapt to, evolving scientific consensus in

determining whether a punishment is excessive. *Cf., e.g.*, *Helling v. McKinney*, 509 U.S. 25, 29–30 (1992) (affirming lower court judgment that prisoner stated Eighth Amendment claim based on involuntary exposure to environmental tobaccos smoke (ETS) in light of "scientific opinion supporting [prisoner's] claim that sufficient exposure to ETS could endanger one's health" and finding 'that society's attitude had evolved to the point that involuntary exposure to unreasonably dangerous levels of ETS violated current standards of decency").

This requirement that courts take account of evolving scientific norms in applying the Eighth Amendment is every bit as salient in the *Miller* context as it is in the *Atkins* context. Just as the question there is "how intellectual disability must be defined in order to implement the[] principles and the holding of *Atkins*," *Hall*, 572 U.S. at 709, the question here is how the terms "juvenile" and "adolescent" should be understood in order to implement the principles and holding of *Miller*. In both contexts, the answer "*must* be informed" by the relevant scientific or medical community's current "diagnostic framework." *Moore*, 137 S. Ct. at 1048. As the Supreme Court observed in *Hall*, the medical community defines intellectual disability not by IQ score, but according to established "diagnostic criteria." 572 U.S. at 721. So, too, in this context the psychological community defines the terms "adolescent" or

"juvenile" based on cognitive development, not chronological age. *See* AA645. Just as "[i]ntellectual disability is a condition, not a number," *Hall*, 572 U.S. at 723, "youth is more than a chronological fact," *Miller*, 567 U.S. at 476. Therefore, to the extent "a line must be drawn," that line cannot deviate from "prevailing clinical standards" regarding adolescent brain development. *See Moore*, 137 S. Ct. at 1050.

C. There is no penological justification for imposing life without parole on 18-year-old offenders who are capable of rehabilitation.

The Supreme Court has repeatedly cautioned that "[c]ommunity consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual." *Graham*, 560 U.S. at 67. Instead, it falls ultimately to the courts to interpret and apply the Eighth Amendment "through the judicial exercise of independent judgment," which "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 67–68. The Court has exercised its independent judgment in its cases addressing juvenile punishment by examining whether the penalty in question advances the traditional penological purposes of criminal punishment—retribution, deterrence, incapacitation, and rehabilitation. *See Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 71; *Roper*, 543 U.S. at 571.

In *Miller*, Justice Kagan concisely explained why children are "less deserving of

the most severe punishments":

> Because the heart of the retribution rationale relates to an offenders' blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation could not justify that sentence. Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a capacity for change.

Miller, 567 U.S. at 472–73 (citing *Graham*, 560 U.S. at 71–74; *Roper*, 543 U.S. 571). "[A]s a corollary to a child's lesser culpability," *Montgomery*, 136 S. Ct. at 734, *Miller* held that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," 567 U.S. at 472. *Miller* thus concluded that the Eighth Amendment prohibits sentencing schemes that mandate life without parole for juveniles because, by making youth irrelevant, "such a scheme poses too great a risk of disproportionate punishment." *Id.* at 479.

Because there is no meaningful distinction between 18-year-olds and 17-year-olds, *see supra* at 29–35, all of the Court's observations in *Miller* apply equally here.

Indeed, Mr. Cruz's own history demonstrates the diminished penological justifications for imposing life without parole on a juvenile offender. As Judge Hall observed during resentencing, "[h]e has acted in a way which to me would be Exhibit A if there were to be a *Miller* case today. He's demonstrated that the youth are not irreparably depraved even when youth commit the worst act we can imagine." AA1029. Therefore, after an exhaustive analysis of sentencing factors under § 3553(a), Judge Hall concluded that there was no adequate penological justification for sentencing Mr. Cruz to die in prison. *See* AA1008–30. Instead, consistent with penalties handed down for similar offenses, Judge Hall sentenced Mr. Cruz to 35 years on his principal counts. AA1030.

A "sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 560 U.S. at 71. There is no legitimate penological justification for imprisoning an 18-year-old offender like Mr. Cruz—someone who has definitively shown he is redeemable—for the rest of his life. Just as "life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption," *Montgomery*, 136 S. Ct. at 734, that sentence is excessive for an 18-year-old who is capable of rehabilitation. Imposing a mandatory life-without-parole sentence on an 18-year-old "poses too great a risk of disproportionate punishment," *Miller*, 567 U.S. at 479.

D. A growing national consensus reflects the scientific understanding that 18-year-olds should not be treated as adults.

The clear and undisputed scientific consensus that 18-year-old offenders are developmentally identical to younger adolescents is enough to resolve this appeal. After all, "the task of interpreting the Eighth Amendment remains [the judiciary's] responsibility." *Roper*, 543 U.S. at 575. The Court's judgment, in turn, must consider "the views of medical experts," *Hall*, 572 U.S. at 721, which in this instance are clear and uniform. What's more, as *Miller* explained, the usual practice of tallying legislative enactments and sentences in order to assess the "national consensus" regarding a particular penalty is not useful in this context—where the Court "does not categorically bar a penalty" but instead "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 567 U.S. at 482–83.

Nevertheless, the scientific consensus discussed above corresponds with an emerging societal consensus that that 18-year-olds have more in common with younger adolescents than they do with older adults, and should be treated accordingly by law.

1. With respect to legislation, the tally the Government has assembled does little to support its argument. Only nineteen states impose a mandatory minimum sentence of life without parole for murder on offenders aged 18–21, with another six requiring

that sentence under aggravating circumstances. *See* Gov't Ex. A. That means at least half of the states *do not* permit mandatory life sentences for 18-year-olds. This compares favorably to the legislative consensus that supported the Supreme Court's holdings in *Graham* and *Miller*. In *Graham*, thirty-eight jurisdictions permitted life without parole for juvenile nonhomicide offenders, *see* 560 U.S. at 62, and in *Miller*, twenty-nine jurisdictions permitted mandatory life without parole for juvenile homicide offenders, *see* 567 U.S. at 482.

Looking beyond the narrow context of statutes mandating life without parole, several states have enacted laws providing greater protections to adolescent and young-adult offenders, in recognition of their similarity to juveniles. At least sixteen states, for example, expressly recognize an intermediate classification of "youthful offenders" between juveniles and adults, who are entitled to special protections within the criminal justice system. *See* AA335–40. To be sure, many of these protections do not apply to those convicted of the most serious crimes, *see* Gov't Br. at 22–23, but that is beside the point. As *Miller* pointed out, "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific." 567 U.S. at 473. The relevant question is not whether there is a national consensus in favor of treating those who commit murder similarly to less serious

offenders, but whether there is a consensus in favor of treating 18-year-olds similarly to 17-year-olds. There is.

2. Actual sentencing trends also support this conclusion. When courts do have discretion, they rarely sentence late adolescents to life without parole. The resentencings of juveniles following *Montgomery* reveal what happens when courts can take youth into account. When *Montgomery* was decided, more than 2,800 individuals were serving life-without-parole sentences nationwide for crimes committed as children. In the last four years, this number has been reduced by nearly 75%. Of the approximately 2,000 individuals whose life-without-parole sentences have been altered through judicial resentencing or legislative reform, the median sentence is 25 years before parole or release eligibility. And, to date, fewer than 100 individuals have been resentenced to life without parole nationwide, suggesting that when courts have discretion to avoid condemning a young person to die in prison, they use it. *See generally* The Campaign for the Fair Sentencing of Youth, *Montgomery v. Louisiana Anniversary*, (Jan. 25, 2020), available at http://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-1.24.pdf.

These trends hold true for 17-year-old offenders too, not just younger teens. At Judge Hall's request, Mr. Cruz submitted data on new sentences imposed on 17-year-

old offenders who had previously been sentenced to life without parole. *See* AA885–902. The data reveal that in Pennsylvania—which had the most mandatory juvenile life-without-parole sentences in the country at the time of *Montgomery*—only four 17-year-old offenders have received life without parole at resentencing. In the remaining 187 cases where resentencing has occurred, 17-year-olds have received term-of-years sentences, with the median length of term approximately 32 years. AA888–97.

The Government submitted a chart compiling federal *Miller* resentencings. *See* AG57 (ECF No. 2109). Of twenty-one cases involving juvenile homicide offenders resentenced under *Miller* and *Montgomery*, only two received a new sentence of life without parole (and one of these two is currently on appeal). ECF No. 2109.

In the federal system, twenty-one cases have been identified involving juvenile homicide offenders previously sentenced to life without parole who have received new sentences following *Miller* and *Montgomery*. Of these, only two life-without-parole sentences have been reimposed (one of these two is on appeal). The median sentence imposed at resentencing is 35 years—precisely what Mr. Cruz received. Notably, this 35-year median holds true even for the 17-year-olds in the group, with some 17-year-olds receiving substantially less time. The small number of 17-year-old offenders serving life sentences now in the federal system is consistent with data from the U.S. Sentencing

Commission finding that only one 18-year-old received a life sentence in the federal system between 2010 and 2015. *See* AA413.

3. Looking beyond criminal law, there is ample evidence that society views 18-year-olds as children, no different from 17-year-olds, and far different from older adults. A brief filed with the Kentucky Supreme Court in support of a judgment holding the death penalty unconstitutional for 18–21-year old offenders, compiled several appendices showing the dozens of state and federal laws, rules, and standards that draw the line higher than 18 for purposes of separating juveniles from adults. *See* Br. for Appellee, *Commonwealth v. Bredhold*, No. 2017-SC-000436, at 178–97, *available at* https://tinyurl.com/Bredhold. To take just a few examples:

- All fifty states require a person to be 21 years old to purchase alcohol.
- As of December 2019, the minimum age to purchase tobacco products nationwide is 21.
- Federal law prohibits the sale of any firearm or ammunition (other than a shotgun or rifle) to anyone under age 21.
- As of 2016, the federal government and all fifty states (plus D.C.) had extended jurisdiction for juvenile courts beyond the age of 18 for dispositional purposes.
- As of 2017, 25 states had extended the age at which young people can remain in foster care to age 21. *See* Nat'l Conference of State Legislatures.

- For purposes of federal financial aid, the government considers students under the age of 23 to be legal dependents of their parents.

- The Patient Protection and Affordable Care Act provides that insurance plans must make dependent coverage "available for an adult child until the child turns 26 years of age."

See AA518; Scott, et al., *Young Adulthood*, 85 Fordham L. Rev. at 666 n.156; Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year Olds from the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 151 (2016).

4. In light of these statutes, guidelines, and standards, it can no longer be said with confidence that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574. Indeed, there is reason to doubt whether 18 was *ever* a logical point to draw this line. As the Fifth Circuit explained in a case challenging the federal prohibition on selling firearms to minors, "the term 'minor' or 'infant'—as those terms were historically understood—applied to persons under the age of 21, not only to persons under the age of 18." *Nat'l Rifle Ass'n of Amer. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 201 (5th Cir. 2012). At common law, the age of majority was 21, and "it was not until the 1970s that States enacted legislation to lower the age of majority to 18." *Id.*

The lowering of the age of majority in the 1970s was prompted not by an evolving societal consensus on adolescent maturity, but in response to protests about

the injustice of drafting men aged 18–21 to fight in Vietnam, when they did not have the right to vote. *See generally* Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*, 76 Md. L. Rev. 405, 406–07 (2017).[4] Once the voting age was lowered to 18, the age of adulthood for most legal categories followed suit. *Id.* at 407. However, "[i]t does not appear that a great deal of independent analysis and thought went into lowering the age for each of the various categories, at this time, but rather something on the order of 'an adult for one purpose, an adult for all purposes.'" *Id.*

Now, "with the benefit of hindsight," as well as a better understanding of the science behind cognitive development, a movement is afoot to return the age of majority to 21. *See id.* at 438–43. It would be cruel and unusual to cling to a completely arbitrary line at age 18 for purposes of imposing the harshest prison sentence, when scientific and societal mores have shifted toward the recognition that 18-year-olds are not truly "adults."

[4] The 18-year-old draft age, in turn, was lowered from 21 to 18 in 1942, not based on societal views regarding cognitive maturity, but rather out of necessity, given the United States' entry into World War II. *See id.*

E. The Government's arguments for an immutable line at 18 are unsupported and unavailing.

Tellingly, the Government does not argue on appeal that Mr. Cruz's mandatory life-without-parole sentence is justified by any penological goal, or even that it is unreasonable under all the circumstances. Instead, its entire argument is premised on the belief that "the Supreme Court has drawn a categorical line of demarcation between adults and children for the purposes of Eighth Amendment jurisprudence at the age of 18." Gov't Br. at 12–13. That just isn't so.

The Supreme Court has repeatedly rejected static lines in the Eighth Amendment context, insisting that "the Amendment [be] interpreted in a flexible and dynamic matter." *Stanford*, 492 U.S. at 369. And it has specifically instructed courts to keep pace with scientific understanding when bringing their independent judgment to bear on the constitutionality of a punishment or sentencing scheme. *See Hall*, 572 U.S. at 710–11; *Moore*, 137 S. Ct. at 1049. As the Supreme Court's own decisions in this area show, the "line" separating youthful offenders from fully mature adults is not carved in stone.

This Court's decision in *United States v. Sierra*, 933 F.3d 92 (2d Cir. 2019) poses no greater obstacle to affirmance. The *Sierra* panel rebuffed an argument made by three defendants on direct appeal that *Miller* should be expanded to preclude mandatory life sentences for them, even though they committed their triggering offenses at the ages of

20, 21, and 22. Mr. *Cruz*, by contrast, does not seek to "expand" *Miller*'s holding, but merely to *apply* it to the facts of his case, including the robust and uncontested scientific evidence showing that an 18-year-old offender is materially indistinguishable from a 17-year-old offender. That the record in *Sierra* did not support the arguments of the 20–22 year old defendants there does not detract from the powerful record supporting affirmance here.

1. The Supreme Court has not drawn a strict line at 18.

In *Miller*, the Supreme Court held that "the Eighth Amendment *forbids* a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. It did *not* hold that the Eighth Amendment *permits* a sentencing scheme that mandates life in prison without possibility of parole for 18-year-old offenders. On the contrary, the Court *declined* an invitation from the petitioners—who were both 14 at the time of their offenses—to draw a categorical line at 15. *See id.* To read *Miller* as granting license to sentencing schemes that subject 18-year-old offenders to mandatory life without parole ignores the Court's traditional "reluctance to decide constitutional questions unnecessarily." *See Bowen v. United States*, 422 U.S. 916, 920 (1975). The Court in *Miller* was focused not on drawing arbitrary lines, but rather ensuring that sentencers have the opportunity to consider the "mitigating

circumstances" of youth before imposing life without parole. *Id.* at 489.

To be sure, the Court's earlier decision in *Roper* does refer to a "line at 18 years of age" in connection with a categorical prohibition on the imposition of the death penalty on juvenile offenders. 543 U.S. at 574. But that case itself demonstrates that this line is not fixed. Prior to *Roper*, the Supreme Court had held that the Eighth Amendment prohibits imposition of the death penalty on offenders under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). One year later, the Court affirmatively held that the Eighth Amendment did *not* prohibit capital punishment for offenders aged 16 to 18. *Stanford*, 392 U.S. at 380. Obviously, when the Court granted certiorari in *Stanford*, it did not believe that the constitutionality of capital punishment for offenders aged 16 to 18 had already been decided in *Thompson*. And when it later held in *Roper* that the Eighth Amendment *does* prohibit capital punishment for juveniles under 18, it overruled *Stanford*, but not *Thompson*. Indeed, the Court in *Roper* concluded that, in light of evolving scientific understanding, "*the same reasoning*" that led it in *Thompson* to ban the death penalty for "juveniles under 16," now "applies to all juvenile offenders under 18." *Roper*, 543 U.S. at 570–71. In doing so, the Court demonstrated "flexible and dynamic manner" in which the Eighth Amendment is meant to be applied. *Stanford*, 492 U.S. at 369.

Roper also demonstrates that *lower* courts are empowered to bring their independent judgment to bear on the issue of proportionate sentencing. The case began as a successive habeas petition filed in Missouri state court. The respondent, Christopher Simmons, brought a successive petition arguing that the "reasoning of *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)], established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed." *Roper*, 543 U.S. at 559. The Supreme Court of Missouri agreed, holding that, in the fifteen years since *Stanford* was decided, "a national consensus ha[d] developed against the execution of juvenile offenders." *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (2003) (Stith, *J.*, en banc). Notwithstanding that it had previously "drawn a line" at age 16, the U.S. Supreme Court affirmed the Missouri Supreme Court's decision.

The Supreme Court's own actions in this context belie the Government's assertion that the Court has "drawn a categorical line of demarcation between adults and children for purposes of Eighth Amendment jurisprudence at the age of 18." Gov't Br. at 12–13. But even if there was such a bright line in the death-penalty context, it should not carry over to the context of life-without-parole sentences, which—unlike capital sentences—can be imposed on a mandatory basis. *Compare Harmelin v. Michigan*, 501 U.S. 957 (1991) *with Woodson v. North Carolina*, 428 U.S. 280 (1976).

Because the Eighth Amendment requires "that a sentencer have the ability to consider the 'mitigating qualities of youth'" before imposing the death penalty, *Miller*, 567 U.S. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)), there is less risk that failing to extend *Roper*'s line past the age of 18 will result in disproportionate sentencing. Animated by this concern, the Court in *Miller* held that a sentencing scheme that "mak[es] youth (and all that accompanies it) irrelevant to imposition of [life without parole] . . . poses too great a risk of disproportionate punishment." *Id.* at 479. In order to contain that risk, the line that the Court drew in *Roper* cannot be rigidly replicated to permit mandatory life without parole for 18-year-old offenders.

2. ***Sierra* is not controlling in cases involving 18-year-old offenders.**

In *United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019), a panel of this Court affirmed the life sentences of three defendants who were convicted of murders in aid of racketeering, notwithstanding their argument that *Miller* should be "extended to apply to them." *Id.* at 97.

The case arose on a direct appeal, in which the extension of *Miller* was just one of several arguments raised. The defendants did not present expert testimony at sentencing demonstrating that they were less culpable than mature adults as a result of their relative youth and, given the narrow passage of time between their offenses and

sentencing, they did not demonstrate any significant rehabilitation. Indeed, the District Judge who sentenced them to life explicitly stated that he would likely have sentenced them to life even if had discretion. *See United States v. Lopez-Cabrera*, 2015 WL 3880503, at *4 (S.D.N.Y. 2015) ("Given these facts and the overall evidence at trial, the Court firmly rejects the notion that a sentence of life imprisonment would be 'grossly disproportionate' to the crimes that each defendant committed.").

Given all these factors, it is unsurprising that a panel of this Court rejected the defendants' *Miller*-based arguments. The panel's reasoning, however, runs a bit thin. It acknowledged the defendants' argument that "scientific research purportedly shows that the biological factors that reduce children's 'moral culpability' likewise affect individuals through their early 20s," but did not engage it enough to realize that there is far more than a "purported[]" scientific consensus. *Id.* at 97. Nor did it reckon with the Supreme Court's decisions in *Hall* and *Moore* requiring courts to keep up with evolving scientific consensus. And it incorrectly suggested that the "Supreme Court has chosen to draw the constitutional line at the age of 18 for *mandatory minimum life sentences*." *Id.*

On the whole, the *Sierra* decision (like the Government's argument here) reads far too much into the Supreme Court's stray remark about "line drawing" in *Roper*, without recognizing that *Roper* itself moved the line it was referring to, and far too little

into the *reasoning* of the Court's decisions, particularly in *Miller*. Despite these flaws, however, a subsequent panel of the Court is not free to simply disagree with the controlling decision of another panel. Happily, *Sierra* is *not* controlling—at least with respect to 18-year-old offenders like Mr. Cruz.

The defendants in *Sierra* were each 20 years of age or older at the time of the offenses triggering their mandatory life sentences. Defendant Lopez was 22 when he committed murders in May and November of 2010. *See United States v. Sierra*, No. 15-2220, ECF No. 82. Defendant Beltran committed murder in March 2009, when he was age 21. *See id.*, ECF No. 84. And Defendant Lopez-Cabrera committed the last of three murders in the same racketeering scheme on May 23, 2010, when he was 20. *See id.*, ECF No. 133.[5] Mr. Cruz, by contrast, was just 16 years old when he joined the Latin Kings and just five months past his 18th birthday when he committed the murders that resulted in his mandatory life sentence.

Indeed, at oral argument in *Sierra*, the Government itself emphasized the differences in age between Mr. Cruz and the *Sierra* defendants:

> This is also definitively *not* the case in which the Court should consider

[5] Although Mr. Lopez-Cabrera was 18 at the time of his *first* offense, this Court has held that "the defendant's age at the time the substantive . . . conspiracy offense is *completed* is the relevant age." *United States v. Wong*, 40 F.3d 1347, 1368 (2d Cir. 1994).

> reevaluating *Miller* and applying it to individuals who are over the age of 17. . . . Look at the ages of these individuals at the time of the murders. . . . [T]his is significantly different that the circumstance presented in the *Cruz* case, where the individual was 18 years . . . and several weeks old.

Id. Oral Arg. Audio at 28:09–29:59 (May 6, 2019). Now that it's more convenient to treat the cases alike, the Government argues that both Mr. Cruz and the *Sierra* defendants were "between the ages of 18 and 22" at the time of their offenses. Gov't Br. at 12. That is like saying the voting age in the United States is between 18 and 22; technically accurate, but wildly misleading. Mr. Cruz actually *was* 18 at the time of his triggering offenses; the *Sierra* defendants were two to four years older.

The age difference is significant. As discussed above, Dr. Steinberg testified with that he was "[a]bsolutely certain" that there is no meaningful difference between 17-year-old and 18-year-old offenders, but he could not express the same certainty with respect to those who were over age 20. AA650–52. For that reason, Judge Hall carefully tailored her holding to apply only to 18-year-old offenders. SA53 ("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.").

Just as the District Court below was not presented with the question whether

Miller extends to 20-year-olds, the panel in *Sierra* was not presented with the question whether *Miller* applies to 18-year-olds. Because the defendants in *Sierra* were all age 20 and above, any statement about *Miller*'s application to 18-year-olds was dicta, and not binding here. *See generally, e.g.*, *Ming Shi Xue v. Board of Immigration Appeals*, 439 F.3d 111, 121 (2d Cir. 2006) ("An opinion simply cannot hold more than the facts before it."); *United States v. Garcia*, 413 F.3d 201, 232 n.2 (2d Cir. 2005) (Calabresi, *J.*, concurring) ("[Dicta] is not and cannot be binding. Holdings—what is *necessary* to a decision-making—are binding. Dicta—no matter how strong or how characterized—are not."). In determining what constitutes dicta, this Court has frequently cited Justice Curtis's opinion in *Carroll v. Lessee of Carroll*, 57 U.S. (16 How.) 275, 286–87 (1853): "[I]f [a point of law] might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision." Whether *Miller* applies to 18-year-olds—the question of law at issue here—could be decided either way without affecting the rights of the defendants in *Sierra*. Therefore, any statement on that question in *Sierra* is not binding here.

3. **None of the lower-court cases the Government cites is controlling.**

a. Needless to say, the out-of-circuit cases the Government cites in its brief are

also not controlling. *See* Gov't Br. at 15–17. It is worth noting, however, that none of these cases squarely addresses the argument presented here: That, in light of evolving scientific consensus, the rule of *Miller* prohibits the imposition of life-without-parole sentences on 18-year-olds who are not found to be irretrievably corrupt.

Most of the decisions cited involved defendants who were over the age of 18 at the time of their triggering offense, and are therefore no more instructive than *Sierra*. *See, e.g. White v. Delbaso*, 2017 WL 937731 (E.D. Pa. 2017) (23); *United States v. Fell*, No. 5:01-cr-12-01 (D. Vt. 2018) (20); *United States v. Farmer*, 2019 WL 4247629, at *3–4 (E.D.N.Y. 2019) (19); *United States v. Marshall*, 736 F.3d 492, 500 (6th Cir. 2013) (20); *United States v. Young*, 847 F.3d 328, 364 (6th Cir. 2017) (22); *Thomas v. Arnold*, 2018 WL 279975, at *1 (S.D. Cal. 2018) (20); *Tate v. Link*, 2017 WL 1363335, at *2 (E.D. Pa. 2017) (20); *Copeland v. Davis*, 2017 WL 274809, at *1 (S.D. Tex. 2017) (23); *Ricciardi v. Lane*, 2017 WL 3084589, at *3 (W.D. Pa. 2017) (20); *Miller v. Mooney*, 2016 WL 7375015, at *1 n.3 (E.D. Pa. 2016) (22).

Several other decisions do not squarely raise arguments under *Miller*, either because they concern discretionary sentences, sentences for a term of years, or death sentences with the opportunity for mitigation under *Woodson*. *See United States v. Guzman*, 664 F. App'x 120, 122–23 (2d Cir. 2016) (discretionary sentence of life plus

35 years after evidentiary hearing and consideration of § 3553(a) factors); *Doyle v. Stephens*, 535 F. App'x 391, 395–96 (5th Cir. 2013) (death penalty after mitigation hearing); *Marshall*, 736 F.3d at 500 (mandatory 5-year sentence); *United States v. Dock*, 541 F. App'x 242, 244 (4th Cir. 2013) (mandatory 240-month sentence); *Melton v. Fla. Dep't of Corrs.*, 778 F.3d 1234, 1236–37 (11th Cir. 2015) (death sentence); *Cruz v. Muniz*, 2017 WL 3226023, at *4-5 (E.D. Cal. 2017) (25 years to life); *Tate*, 2017 WL 1363335, at *1 (discretionary sentence of 25–60 years); *Copeland*, 2017 WL 274809, at *1 (life with possibility of parole).

Still others arose in the AEDPA context and included only cursory discussion of *Miller* in the course of finding that a petitioner's claim was procedurally barred. *See Ricciardi*, 2017 WL 3084589, at *17; *Guzman v. Rozum*, 2017 WL 1344391, at *17 (E.D. Pa. 2017); *Cruz*, 2017 WL 3226023, at *5; *Martinez v. Pfister*, 2017 WL 219515, at *5 (N.D. Ill. 2017); *Meas v. Lizarraga*, 2016 WL 8451467, at *15 (C.D. Cal. 2016); *Adkins v. Wetzel*, 2017 WL 1030704, at *2–3 (E.D. Pa. 2017); *Buckner v. Montgomery*, 2016 WL 7975311, at *2 (C.D. Cal. 2016); *see also Bronson v. General Assembly of the State of Pa.*, 2017 WL 3427977 (M.D. Pa. 2017) (dismissing pro se equal-protection challenge to sentence under Eleventh Amendment); *In re Garcia*, No. 13-2968, 2013 U.S. App. LEXIS 26139, at *1 (3d Cir. 2013) (denying application for successive

petition raising equal-protection challenge to distinguishing 18-year-olds from younger adolescents).

None of these cases bear any resemblance to this case, where Judge Hall held an evidentiary hearing, methodically addressed uncontested scientific evidence—as well as uncontested evidence of Mr. Cruz's rehabilitation—and issued a carefully reasoned 57-page opinion. This Court can and should review the decision below on its own merits, without feeling constrained by the nonbinding decisions of these other courts.

b. The Government also ignores lower-court decisions that tend to support the judgment below. In *Commonwealth v. Bredhold*, for example, the Fayetteville Circuit Court in Kentucky declared the death penalty unconstitutional for offenders under age 21. No. 14-CR-161 at (Fayetteville Cir. Ct. 7th Div.) (Aug. 1, 2017), *available at* https://tinyurl.com/BredholdDecision. Although the court recognized that *Roper* had drawn a line at 18, it held that "given the national trend toward restricting the use of the death penalty for young offenders, and given the recent studies by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age" at the time of the offense. *Id.* at 4; *id.* at 6 ("If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling."). Similarly, a New Jersey appellate

court relied on *Miller* to support its decision to vacate a 75-year aggregate sentence imposed for murder committed by a 21-year-old defendant. *State v. Norris*, 2017 WL 2062145 (N.J. App. Div. May 15, 2017). The court reasoned that, where a sentence is the practical equivalent to life without parole, courts must "consider at sentencing a youthful offender's failure to appreciate risks and consequences, as well as other factors often peculiar to young offenders." *Id.* at *5.

In other cases, courts have invoked the reasoning of *Miller* to give mitigating effect to the characteristics of youth under their own state constitutions or particular state or federal sentencing regimes. The Washington Supreme Court, for example, invoked *Miller*—as well as recent "studies reveal[ing] fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure"—to conclude that "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender . . . who committed his offense just a few days after he turned 18." *State v. O'Dell*, 358 P.3d 359, 364–66 (Wash. 2015). Similarly in *People v. House*, 2019 WL 2718457, at *11–13 (Ill. App. 1st Dist. 2019), an Illinois appellate court invoked *Miller* in concluding that a 19-year-old offender's mandatory life sentence violated the state constitution. The Court of Appeals of Indiana invoked

Miller in vacating the 55-year felony-murder sentence of a defendant who was "just three months past turning eighteen years of age at the time of the crime." *Sharp v. State*, 16 N.E. 3d 470, 480 (Ind. App. 2014). And a California appellate court cited *Miller* in a decision vacating the state parole board's denial of release to a prisoner who was 19 years old at the time of his offense, due to the board's inadequate consideration of the prisoner's youth. *In re Poole*, 24 Cal. App. 5th 965, 981 (Cal. Ct. App. 2018).

While none of these decisions expressly hold the Eighth Amendment prohibits mandatory life without parole for 18-year-old defendants, all of them support Judge Hall's conclusion that, in the years following *Miller*, a national consensus has developed around the common-sense notion that "youth matters," that youth must be considered before an adolescent defendant can be sentenced to life without parole, and that youth doesn't end on one's 18th birthday.

II. Because Mr. Cruz's motion "contains" the retroactive rule or *Miller*, the District Court properly considered it.

The Government asserts that the District Court should have dismissed Mr. Cruz's motion under 28 U.S.C. § 2255(h)(2) because "*Miller* does not apply to this case." Gov't Br. at 31. However, the Government appears to agree that if the rule in *Miller does* apply to 18-year-olds, then Judge Hall correctly concluded that Cruz satisfied the requirements for filing a successive petition. Because Cruz's motion asserts

that the retroactive change in law announced in *Miller* applies to him, section 2255(h)(2) is no impediment to relief.

Before granting relief on a successive motion brought by a federal prisoner, a district court must determine that the motion "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). Here, Judge Hall correctly held that Cruz's motion satisfies § 2255(h)(2)'s requirements because the motion relies upon *Miller*—a case that applies retroactively, *Montgomery*, 136 S. Ct. at 736–37—and *Miller* provides the foundational principles upon which Mr. Cruz's request for relief rests.

In *In re Williams*, 759 F.3d 66 (D.C. Cir. 2014), the D.C. Circuit certified two successive § 2255 motions challenging under *Graham* and *Miller* a life-without-parole sentence imposed for conduct that occurred before and after the defendant turned eighteen. The government there argued that *Graham* and *Miller* were inapplicable to such conduct and that the petitioner's reliance on an "extension" of those cases could not support certification. *Id.* at 70. The D.C. Circuit rejected this argument, explaining that it would require "us in effect to make a final determination of whether the holding of *Graham* will prevail for [the petitioner]," which it deemed "a question for the district court in the first instance." *Id.* at 70-71; *see also id.* at 72 (stating that "whether the new

rule in *Miller* extends to a prisoner [like petitioner], who entered a conspiracy in his juvenile years and exited it in adulthood, goes to the merits of the motion").

Cruz's motion obviously relies on *Miller*, and the case provides the basis for the relief he is seeking. Accordingly, there can be no question that Cruz's motion "contains" *Miller*'s rule, made retroactive by the Supreme Court, that "youth matters" in sentencing.

CONCLUSION

Because the District Court properly considered Mr. Cruz's successive motion and correctly determined that the reasoning of *Miller* applies to his case, the judgment vacating his original sentence should be affirmed.

Dated: January 30, 2020

Respectfully submitted,

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