UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

19-989

LUIS NOEL CRUZ, aka Noel,
Petitioner-Appellee,

v.

UNITED STATES OF AMERICA,
Respondent-Appellant

On Appeal from the United States District Court
for the District of Connecticut,
Nos. 11-cv-7878, 3:94-cr-112-16

BRIEF OF *AMICUS CURIAE* PROFESSOR DOUGLAS A. BERMAN IN SUPPORT OF LUIS NOEL CRUZ

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Douglas A. Berman is the Newton D. Baker-Baker & Hosteller Chair in Law and Director of Drug Enforcement and Policy Center at The Ohio State University Moritz College of Law. Professor Berman's principal teaching and research focus is in the area of criminal law and criminal sentencing. He is the co-author of a leading casebook, *Sentencing Law and Policy: Cases, Statutes and Guidelines*, and has served as an editor of the *Federal Sentencing Reporter* for over two decades. He is also the sole creator and author of the widely read and cited blog, *Sentencing Law and Policy*.

SUMMARY OF THE ARGUMENT

Appellee originally received a mandatory sentence of life without the possibility of parole for an offense he committed when he was eighteen years and twenty weeks old. GA118–19. After the District Court held that this sentence was unconstitutional in light of *Miller v. Alabama*, 567 U.S. 460 (2012), he was resentenced to a term of thirty-five years. GA56; GA174. This Court should affirm.

Because Appellee's original sentence was mandatory, once the Government elected to bring charges, there was no further possibility of individualized

[1] Undersigned avers that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money to fund preparing or submitting the brief, and that no person other than counsel for *amicus curiae* contributed money that was intended to fund this brief. On January 28, 2020, counsel for Mr. Cruz and the Government each consented to the filing of this brief.

consideration of the appropriate sentence. Thus a "death in prison" sentence was imposed without any opportunity for a sentencer to consider Appellee's history and characteristics or his distinctive role in the offense. The fact that prosecutors functionally selected this extreme sentence through their charging and bargaining decisions is especially problematic in this case because it deprived the sentencing authority and this Court any chance to assess whether the appellant's respective age and immaturity or any distinctive aspects of the offense may have warranted a less extreme and more proportionate sentence. In light of the District Court's conclusions about Appellee, including his "extraordinary" rehabilitation (GA174), the lack of other inputs undermines its constitutional bona fides.

This brief proceeds from the premise, drawn from a series of constitutional rulings, that when there are fewer constitutionally significant actors[2] with input into the propriety of a severe punishment, courts must have greater constitutional suspicion concerning that punishment. The Supreme Court has recognized that input from multiple proper actors concerning the sentence—e.g., where sentencing judges or juries have discretion to consider a wide range of evidence before recommending the appropriate sentence, where there is plenary appellate review of

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[2] As discussed *infra,* "constitutionally significant actor" refers to those identified in the Constitution or in decisions interpreting it as having an important role in establishing the constitutionality of a particular sentence.

sentence proportionality, and where the statutory framework for imposing any extreme sentence narrows the range of offenders based on the characteristics of the offense and the offender—justifies appellate courts reviewing sentences more deferentially, so as to respect the propriety and proportionality of judgments made by these other actors. *See Gregg v. Georgia*, 428 U.S. 153, 188–96 (1976); *Zant v. Stephens*, 462 U.S. 862, 878–79 (1983); *see also Ewing v. California*, 538 U.S. 11, 25 (2003) (stressing that the "three strikes law" was enacted by both the California legislature and California voters and that state prosecutors and trial judges had considerable discretion to avoid application of sentencing mandates on various grounds). Conversely, where inputs from multiple constitutionally significant actors are lacking, the Eighth Amendment requires a more searching assessment of the constitutionality of a severe sentence because that punishment has not been previously subject to multiple judgments of propriety and proportionality.

The Supreme Court has long expressed its concern that the harshest penalties under law should be administered free from any "substantial risk of arbitrariness or caprice." *Gregg*, 428 U.S. at 203. Having more criminal justice actors assess the propriety and proportionality of a sentence reduces the risk of arbitrariness. The Supreme Court has given greatest effect to these principles in rulings concerning the administration of the death penalty, the most extreme of all punishments. *See Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (declaring mandatory

capital sentencing unconstitutional in part because "the penalty of death is qualitatively different from a sentence of imprisonment"). But over the last two decades, the Court has repeatedly expressed its concern that the application of the harshest prison sentences to youthful defendants may also suffer from the same disproportionalities affecting the reliability of the death penalty. *See Miller*, 567 U.S. 460 (barring mandatory life without the possibility of parole sentences for juvenile offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring capital punishment for juveniles); *Graham v. Florida*, 560 U.S. 48 (2010) (barring life without the possibility of parole sentences for nonhomicide juvenile offenses).

The sentencing circumstances in this case implicate the constitutional concerns raised in the Supreme Court's Eighth Amendment categorical rulings regarding those under age eighteen because Mr. Cruz's age—barely over age eighteen—and other potential mitigating factors mean that the lack of any individualized sentencing determination before the mandatory imposition of a life without parole sentence raises a substantial risk of arbitrariness and disproportionality. As the Supreme Court indicated in *Miller*, the problematic risk of disproportionate application of a life without parole sentence may be constitutionally mitigated if and when a neutral judge had authority to select and could justify on the record a severe sentence after the prosecution and defense have marshaled arguments for or against various sentencing options. But this risk

becomes constitutionally intolerable if and when a prosecutor, perhaps based only on whim or caprice, dictates the imposition of a life sentence solely through his own charging and bargaining choices. Informed by sound constitutional concerns, the district court's decision to exercise its discretion to resentence Mr. Cruz should be affirmed.

ARGUMENT

A. The Eighth Amendment Requires More Searching Scrutiny Where Fewer Constitutionally Significant Actors Have Had Input on the Propriety and Proportionality of an Extreme Punishment

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U.S. at 560. That right flows from the basic "'precepts of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). The Supreme Court's concern with "proportionate punishment" has prompted two responses: substantive bans on certain punishments for certain classes of offenders or offenses; and procedural regulations to minimize the risk of arbitrary and disproportionate punishments being unduly imposed. *See Miller*, 567 U.S. at 470.

First, the Court has "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a

penalty." *Id.* For example, imposing a sentence of death on juveniles or the intellectually disabled violates the constitution as a categorical matter regardless of how the punishment is imposed. *See Roper*, 543 U.S. at 578-79; *Atkins*, 536 U.S. at 321. Similarly, the death penalty has been deemed unconstitutional for offenses of adult rape and child rape, *see Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 554 U.S. 407 (2008), and young offenders may never be subject to a life-without-parole sentence for any non-homicide offenses. *See Graham*, 560 U.S. 48.

But the Court has also addressed constitutional concerns about disproportionate punishment by demanding that a greater number of constitutionally significant actors have substantive input before certain extreme sanctions may be imposed. As Justice Stewart famously observed, the Eighth Amendment prohibits arbitrary punishment because haphazardly imposed punishment is "cruel and unusual in the same way that being struck by lighting is cruel and unusual." *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring). Time and again, particularly and justifiably in cases involving the imposition of the most extreme punishment under law, the Supreme Court has observed that the presence of greater input from constitutionally significant actors reduces the risk of arbitrary punishment and can thereby render constitutional a punishment that might otherwise be contrary to evolving standards of decency.

The Supreme Court has identified "constitutionally significant actors" as those tasked with enacting criminal laws and ensuring that criminal justice is meted out consistent with the demands of the Eighth Amendment. So, for example, the *Furman* Court invalidated capital sentencing systems that required juries on their own to pick who would and would not be sentenced to die without any structured rules or guided discretion enacted by legislatures. *See id.* at 314 (Stewart, J., concurring) (finding constitutionally problematic the "recurring practice of delegating sentencing authority to the jury [which] may refuse to impose the death penalty no matter what the circumstances of the crime" so that "[l]egislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them").

By striking down extreme mandatory sentencing schemes but still allowing the imposition of extreme sentences in some cases, the Supreme Court has indicated that compliance with the Eighth Amendment sometimes requires a sentencing regime to include individualized consideration of offense and offender by judges or juries to assess whether the extreme sanction is warranted. The Eighth Amendment prohibits some mandatory sentences precisely because they pose a risk that for "[an] individual offender and the circumstances of the particular offense," the sentence will run contrary to the "fundamental respect for humanity

underlying the Eighth Amendment." *Woodson*, 428 U.S. at 304; *see also Miller*, 567 U.S. at 474 (by mandating life without parole, "these laws [unconstitutionally] prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender."). To ensure and safeguard the punishment proportionality that the Eighth Amendment demands, the Supreme Court has required the sentencer's consideration of a wide range of information, the "diverse frailties of humankind," *Woodson*, 428 U.S. at 304, which must include, at a minimum, "the circumstances of the crime and the record and character of the offender," *Lockett v. Ohio*, 438 U.S. 586, 589 (1978), including the "mitigating qualities of youth." *Johnson v. Texas*, 509 U.S. 250, 267 (1993).

Attentive to these constitutional concerns, most states have adopted jury sentencing in capital cases, a sentencing process that Justices Stevens and Breyer, among others, have long opined is required by the Eighth Amendment to ensure the harshest penalties under law are limited to the most deserving. *See Ring v. Arizona*, 536 U.S. 584, 614-15 (2002) (Breyer, J., concurring); Death Penalty Information Center, *Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings* (Jan. 17, 2018) *available at* https://deathpenaltyinfo.org/stories/life-verdict-or-hung-jury-how-states-treat-non-unanimous-jury-votes-in-capital-sentencing-proceedings (noting 70% of

jurisdictions that permit capital punishment require a unanimous jury verdict recommending death before such a sentence may be imposed). Notably, when a jury unanimously recommends a death sentence after hearing arguments for and against this punishment by counsel, this judgment reflects a reasoned determination of the propriety and proportionality of an extreme punishment by multiple members of the community.

In this context, the Supreme Court has repeatedly stressed that, to ensure proportionality and reasoned determination of fitting punishments, sentencers must be able to consider the defendant's youthfulness and other appropriate mitigating circumstances before imposing extreme punishments. *See Eddings v. Oklahoma*, 455 U.S. 104, 115–17 (1982). This is both because (1) those defendants whose actions reflect the "transient immaturity" of youth are inherently less blameworthy, and (2) youth have a unique capacity for rehabilitation and reform. *Miller*, 567 U.S. at 471–72, 479. Enabling and requiring sentencers to weigh this information in the sentencing process reduces the risk that an extreme and disproportionate punishment will be imposed on the undeserving in violation of the Eighth Amendment.

Beyond having sentencers empowered to consider with discretion all relevant factors in selecting an appropriate sentence, the Supreme Court has noted the importance of appellate review as a necessary safeguard against the arbitrary

imposition of extreme sanctions. For example, the Court has called for a robust record at sentencing to permit more searching appellate review and thus check against improper or inadequate reasons for imposing a sentence. *Woodson*, 428 U.S. at 303 (holding unconstitutional North Carolina's mandatory capital sentencing statute in part because without a sentencing record, "there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of [sentencing] power through a review of death sentences."); *see also United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc) (remanding for resentencing of juvenile sentenced to life without the possibility of parole where District Court failed to make a record of its consideration of evidence of the defendant's potential for rehabilitation). Review for both legal error and proportionality of the sentence allows appellate courts (usually state appellate courts) to reduce the risk of arbitrariness by providing a second set of legal actors to ensure that the harshest penalties under law are reserved only for the most heinous offenders. *See Gregg*, 428 U.S. at 204–07 (appellate "proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.").

Finally, the Court has required, at the level of legislative definition, that the harshest punishments be limited by objective criteria designed to limit those punishments to the worst-of-the-worst. That is, states seeking to retain capital

punishment must legislatively enumerate aggravating circumstance that "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877.

Each of these Eighth Amendment protections ensures that before imposing the harshest penalties under law, multiple constitutionally significant actors have input on the propriety of the sentence, thereby diminishing the risk that those penalties will be arbitrarily imposed contrary to the bar on cruel and unusual punishments.

B. The Original Death-in-Prison Sentence Here Lacked Meaningful Input from Constitutionally Significant Actors

The original sentence here was imposed at the discretion of the prosecutors and as mandated based on their unilateral decisions about the applicable charges. Neither the judge, the jury, nor counsel for the defense had any means to address whether life without the possibility of parole was a proportionate sentence. This is particularly problematic given Appellee's age and other potential mitigating circumstances.

Vesting such power with the prosecution to unilaterally impose extreme sentences is contrary to the requirements of the Eighth Amendment. Defense counsel and the defendant were not able to provide mitigating evidence at

sentencing. No judge had a say in the original sentence.[3] The jury played no role.[4] And here the Congress has made no attempt to genuinely narrow the pool of those eligible for the sentence based on particularized aggravating offense or offender facts. Instead, it was the prosecutor alone who decided to bring charges that, if proven, would dictate a sentence to die in prison. Sidelining the other constitutionally significant actors—while allowing the prosecutor to serve as both advocate and sentencer—raises substantial concerns about whether the sentences here are arbitrary or otherwise disproportionate. Those concerns were recognized by the court below in its re-sentencing decision:

> The sentence reflects the grave seriousness of the offenses; that the guidelines do not reflect the 3553(a) factors of the *Miller* decision; and the court's efforts to avoid unwarranted sentencing disparities; the defendant's history and characteristics, including his extraordinary demonstration of rehabilitation over 24 years and his acceptance of responsibility.

GA174. The District Court was justified in reconsidering Appellee's extreme sentence; its decision to impose a more appropriate sentence after an individualized

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[3] Of course once a judge did have input, she found that the constitution required a sentence less than life without the possibility of parole.

[4] If the jurors harbored doubts about imposing a sentence of life without the possibility of parole, they would have had no mechanism for expressing those doubts other than jury nullification, which has long been condemned by the courts. *See United States v. Manzano*, 945 F.3d 616, 624–29 (2d Cir. 2019) (granting mandamus in order to direct district court to deny defense counsel's request for leave to argue in favor of jury nullification).

consideration of relevant sentencing facts bolsters the constitutional soundness of the ultimate outcome below. GA174.

It is no answer to suggest that the constitutional skepticism outlined *supra* is limited to the death penalty or juvenile life without the possibility of parole, for it is a fundamental precept of the Eighth Amendment applicable to all cases "that punishment for crime should be graduated and proportioned to offense." *Weems*, 217 U.S. at 367; *see also Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019) (stressing that the Eighth Amendment "guards against abuses of government's punitive or criminal-law-enforcement authority"). As the District Court recognized, the Supreme Court has not only explained that "death is different" for purposes of the Eighth Amendment, but so too are sentences imposed on defendants who exhibit a "lack of maturity" or an "underdeveloped sense of responsibility" and engage in "recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 U.S. at 471; *see* GA164, 166. Moreover, the Court has now recognized that if "'death is different,' children are different too." *Miller*, 567 U.S. at 481. Because those individuals still in the developmental period are now recognized as "constitutionally different from adults for sentencing purposes," *Miller*, 567 U.S. at 471, the deference often shown to any non-death sentence is no longer appropriate when extreme prison terms are imposed on youthful offenders.

The teachings of *Miller* and its concern for proportionality safeguards before imposition of extreme sentences is particularly salient in light of the age of Appellee. He was well within the developmental period and, as the re-sentencing proceeding demonstrates, was able to provide significant evidence calling into question the proportionality of his original sentence. To re-impose a mandatory sentence selected only by prosecutorial fiat would be unjust and unconstitutional. The District Court recognized that thirty-five years was appropriate in light of the circumstances of the offender and offense and that a sentence to die in prison was unnecessary to meet the demands of justice.

In light of the stakes involved—sending a young person to die in prison—as well as the District Court's careful consideration of the proportionality of Appellee's sentence, this Court should affirm his sentence of thirty-five years.

CONCLUSION

Amicus urges the Court to affirm.

Respectfully submitted,

February 6, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2020, the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing and its viewing and downloading are thereby provided to all counsel of record by cooperation of the CM/ECF system.

I further certify that (1) this Brief was prepared in fourteen-point Times New Roman font using Microsoft Word software, (2) this Brief consists of 3,134 words, excluding the parts of the Brief exempted by the rules of the court, and (3) this Brief and has been scanned for viruses and the Brief is virus-free.

s/John R. Mills
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