No. 20-1155

IN THE

Supreme Court of the United States

JONAS DAVID NELSON,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

BRIEF OF THE DUE PROCESS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Due Process Institute (DPI) is a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system. This case concerns DPI because it raises vital questions about the right of just-barely chronological adults to present evidence mitigating against a sentence of life without the possibility of parole.[1] DPI has an interest in ensuring that the citizens of this country—and especially its young people—are afforded the rights guaranteed to them by our Constitution.

SUMMARY OF ARGUMENT

Seven days cost Petitioner Jonas Nelson the opportunity for a chance at parole. Jonas committed the offense for which he was convicted seven days after his 18th birthday. Had Jonas been just seven days younger, he would not have been eligible for a sentence of mandatory life without parole under this Court's decision in *Miller v. Alabama*. But because those seven days had passed, the Minnesota Supreme Court found that he was not entitled to receive the

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief. Counsel of record for Respondent received timely notice of DPI's intent to file this brief under Supreme Court Rule 37.2(a) and consented to its filing.

protections of *Miller*, including the opportunity to present mitigating evidence bearing upon his family's troubled circumstances, his psychological condition, and the history of abuse at the hands of his father.

The Court's mandate in *Miller* was born out of one fundamental principle: youth matters. This Court repeatedly has announced that "youth matters" for purposes of the Eighth Amendment's prohibition on cruel and unusual punishments. That judgment is not only the product of parental wisdom; it is a conclusion built on modern science. Listening to the science, this Court has declared that young people are less morally culpable and more likely to be reformed.

In recent years, a division has grown in the lower courts about the application of *Miller* to young adults who have passed the age of 18. Based on current science and the principle that "youth matters," state and federal courts have extended *Miller* to young adults, including 18-, 19-, and 20-year-olds. But other courts, like the Minnesota Supreme Court below, have interpreted this Court's precedents as establishing a bright-line rule, one which strips away the rights guaranteed by *Miller* the moment the clock strikes midnight on the juvenile's 18th birthday. Now is the time for the Court to resolve the divide and answer the question whether *Miller* extends to barely chronological adults.

The *Miller* protections should extend, at a minimum, to young adults ages 18, 19, and 20. First, it is not only society that recognizes that youth continues past the age of 18; the latest scientific findings confirm that the brain continues to mature

in key areas of decision-making well into our twenties. Second, extending *Miller* to young adults ages 18 to 20 will curb the unfair allocation of rights between young-adult defendants who possess mitigating qualities of youth and juvenile defendants who are afforded the chance to present evidence as to those qualities. Lastly, extending *Miller* in this way will not place any significant burden on the courts.

The Court should grant certiorari and extend *Miller*, at the very least, to young adults who committed an offense at ages 18, 19, or 20 years old.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO ANSWER THE QUESTION WHETHER *MILLER* EXTENDS TO YOUNG ADULTS

In *Miller v. Alabama*, this Court ruled that a court must consider a juvenile's youth before sentencing him to life without parole ("LWOP"). 567 U.S. 460, 465 (2012). In the wake of *Miller*, the lower courts have repeatedly wrestled with whether *Miller* extends to young adults once they pass the age of 18—even by as little as seven days, as in the case of Petitioner. In light of this Court's announcement that "youth matters" for Eighth Amendment purposes, and considering what today's neuroscience tells us about the brains of adolescents and young adults, state and federal courts are divided on this question. The Court should grant certiorari to answer it.

A. *Miller* Grew Out of the Common-Sense and Science-Driven Judgment that "Youth Matters" for Eighth Amendment Purposes

In 2012, this Court held in *Miller* that mandatory LWOP for juveniles convicted of homicide violates the Eighth Amendment's prohibition on cruel and unusual punishments. *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 725 (2016) (describing *Miller*). The Court thus "mandate[d]" that sentencing authorities "consider[] an offender's youth and attendant characteristics" before determining that LWOP is a proportionate sentence. *Id.* at 734. At the heart of this mandate was the Court's recognition—one born of both common sense and modern science—that "youth matters" for purposes of the Eighth Amendment. *Miller*, 567 U.S. at 473.

Miller was compelled by two lines of precedents. *Id.* at 470. In one, the Court prohibited the mandatory imposition of the death penalty, requiring sentencing authorities to consider the details of the offense and the characteristics of the defendant, including any "mitigating qualities of youth." *Id.* at 476 (citation omitted). In the eyes of the Court—and especially in the eyes of any young defendant—a sentence of life without parole is just a death sentence by another name. *See id.* at 474–75.

A second line of precedents held that certain punishments are disproportionate when applied to juveniles: *Roper v. Simmons* barred capital punishment for juveniles, and *Graham v. Florida* barred LWOP for juveniles for all crimes but homicide. *Roper v. Simmons*, 543 U.S. 551, 569

(2005); *Graham v. Florida*, 560 U.S. 48, 82 (2010). Together, these decisions established that juveniles are "constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471.

The Court's recognition that juveniles are different was driven not only by common sense—what "any parent knows"—but also by "science and social science." *Id.* As the science taught in *Roper* and *Graham*, there are three primary ways that juveniles are different from adults, including (i) an "undeveloped sense of responsibility"; (ii) a "vulnerab[ility] to negative influences"; and (iii) a "less fixed" character and lower likelihood of "irretrievable depravity." *Id.* at 461 (citation, alterations, and internal quotations omitted). And by the time of *Miller*, the science supporting these conclusions had grown "even stronger." *Id.* at 471 n.5.

The Court has recognized that youth is far more than a "chronological fact." *Id.* at 476. It "is a time of immaturity"; it is a moment of life "when a person may be most susceptible to influence and psychological damage"; and "its signature qualities are all transient." *Id.* (citation and internal quotations omitted). These distinctive qualities of youth, moreover, have constitutional consequences: they diminish moral culpability, enhance the prospect of reformation, and collapse the penological justifications for sentencing young people to die in prison. *See id.* at 472.

The Court thus held in *Miller* that the Eighth Amendment forbids mandatory LWOP sentences for

juvenile defendants. "By removing youth from the balance," a sentencer is unable to "assess[] whether the law's harshest form of imprisonment proportionately punishes a juvenile offender." *Id.* at 474. Before *Miller*, a sentencer could be precluded from assessing five key factors, including (i) the defendant's failure to appreciate consequences; (ii) his family and home environment; (iii) his lack of legal competency; (iv) his possibility of rehabilitation; and (v) the circumstances of his offense. *See id.* at 477–78. But *Miller* mandated that sentencers engage these considerations before condemning a juvenile to LWOP. *See id.* at 465. And *Miller* determined that such a sentence "is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery*, 136 S. Ct. at 734 (internal quotations omitted) (quoting *Miller*, 567 U.S. at 479–80).

Miller grew out of one fundamental principle: that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Miller*, 567 U.S. at 473. The rule of law only prevails if "a lower court in a system of absolute vertical stare decisis headed by one Supreme Court follow[s] both the words and the music of Supreme Court opinions." *United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting). As shown below, young, barely-chronological adult defendants across the nation are asking courts to follow not just the words of *Miller*, but its guiding principle. Youth matters.

B. The Principle that "Youth Matters" in Sentencing Has Proven To Be an Important Constitutional Safeguard

Miller has caused a sea change in the sentencing of juveniles to LWOP. In the decade since that decision, the number of states that prohibit LWOP sentences for juveniles has grown from 5 in 2012 to 24 today. *See* CFSY, *National Trends in Sentencing Children to Life Without Parole* (Feb. 2021), https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf. The balance of the states have adopted *Miller*'s mandate that sentencers consider a juvenile's youth before handing out that harshest sentence.

State and federal courts now require sentencing authorities to consider youth and its hallmark features before sentencing a juvenile to die in prison, often requiring consideration of the five "*Miller* factors."[2] Sentencing proceedings now consider a wealth of evidence, including not only evidence personal to the individual (such as his family

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[2] *See*, *e.g.*, *State v. Riley*, 110 A.3d 1205 (Conn. 2015) (remanding for resentencing considering "youth and its hallmark features"); *accord People v. Gutierrez*, 324 P.3d 245 (Cal. 2014); Fla. Stat. § 921.1401 (requiring consideration of youth, including the five *Miller* factors). *See also Tatum v. Arizona*, __ U.S. __, 137 S. Ct. 11, 12-13 (2016) (Sotomayor. J. concurring) (remanding for resentencing to determine whether the defendant's actions reflected "irreparable corruption" warranting LWOP).

background and psychological condition),[3] but also research in neuroscience and adolescent psychology.[4] That research, as elaborated below, shows that "the areas of the human brain dealing with judgment and decision-making continue to mature well into our 20s." *See, e.g., United States v. Rosario*, No. 99-CR-533 (ARR), 2018 U.S. Dist. LEXIS 134657, at *3 (E.D.N.Y. Aug. 9, 2018).

Miller has had a significant impact on sentencing. Following the Court's announcement in *Montgomery v. Louisiana* that *Miller* applies retroactively, individuals who had previously been sentenced to juvenile LWOP became eligible for a *re*-sentencing that considered their youth and reformation. *See* 136 S. Ct. at 736. In addition, many states passed legislation guaranteeing a chance of parole after a term of years. *See* Josh Rovner, *Juvenile Life Without Parole: An Overview* (The Sentencing Project) at 3 (Mar. 8, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/. Consequently, the population of defendants serving juvenile sentences of LWOP has been reduced by 75 percent since 2016. CFSY,

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[3] *See*, *e.g.*, *United States v. Rosario*, 2018 U.S. Dist. LEXIS 134657, No. 99-CR-533 (ARR), (E.D.N.Y. Aug. 9 2018) (considering defendant's youth and psychological evaluation); *People v. McKinley*, 2020 IL App 191907 (Ill. App. Ct. 2020).

[4] *See, e.g., State v. Null,* 836 N.W.2d 41, 55 (Iowa 2013) (considering science showing that "the human brain continues to mature into the early twenties.").

National Trends in Sentencing Children to Life Without Parole (Feb. 2021).

But there is another category of people whose lives have been changed by *Miller*: juvenile defendants who have avoided an LWOP (or other similarly harsh) sentence at their *original* sentencing. Tyree Walker is one of them. Tyree was facing a possible 50-year sentence for crimes committed when he was 16 years old. *State v. Walker*, No. F07-4947, 2015 WL 7184661, at *7 (Fla. Cir. Ct. Nov. 13, 2015). However, due to changes adopted in Florida in the wake of *Miller*, Tyree was able to present evidence of his traumatic upbringing and an expert psychological assessment finding that he suffered from mental disorders. Consequently, the court sentenced Tyree to only 30 years in prison, with the possibility of parole after 15. *Id.* at *4–6.

This Court predicted in *Miller* that the "appropriate occasions" for sentencing juveniles to LWOP would be "uncommon." 567 U.S. at 479. That has proven prescient. In this sense, the opportunity to present evidence concerning a defendant's youth and his individual characteristics is hardly a meaningless luxury; it is a proven safeguard against the violation of a young defendant's Eighth Amendment rights.

C. Courts Are Divided on the Question of Whether *Miller* Extends to Young Adults Over the Age of 18

Since *Miller*, courts have wrestled with reconciling this Court's clear command that "youth matters," and the scientific understanding that "youth" in many senses continues far into an individual's twenties, with the apparent bright-line rule that *Miller*'s protections do not apply to individuals who are just barely chronological adults, but are still juveniles for all purposes relevant to sentencing. Owing to an absence of guidance from this Court, state and federal courts have produced conflicting decisions on whether *Miller* extends to young adults, including 18-, 19- and 20-year-olds.

In recent years, both state and federal courts have extended *Miller* to young adults over the age of 18, finding that scientific research demonstrates that an 18-year-old brain is virtually identical to that of a 17-year-old. *See, e.g.*, *State v. O'Dell*, 358 P.3d 359, 695 (Wash. 2015). Where courts have declined to extend *Miller* to young adults over 18, their decisions have been rooted not in independent constitutional analysis—or science—but rather in deference to this Court. *See, e.g.*, *People v. Montelongo*, 269 Cal. Rptr. 3d 833, 896 (Ct. App. 2020) ("Unless and until the United States Supreme Court . . . change[s] the law, we are bound to apply it."). Indeed, as scientific research has progressed, courts continue to highlight the constraints caused by *Miller* and its progeny, a jurisprudence that has failed to keep pace not only with today's standards of decency but also with evolving neuroscience.

The case of *Cruz v. United States* is one example. In *Cruz*, the U.S. District Court for the District of Connecticut applied *Miller* to vacate an LWOP sentence as applied to a defendant who was 18 years and 20 weeks old when he committed the crime. *Cruz v. United States*, No. 11-CV-787, 2018 WL 1541898, at *23 (D. Conn. Mar. 29, 2018). The court's conclusion relied heavily on scientific evidence, including both studies and testimony from a psychology expert who opined that "he was not aware of any statistically significant difference between 17-year-olds and 18-year-olds" from a psychological perspective. *Id.* at *66. The court thus held that 18-year-olds are no different from 17-year-olds for purposes of *Miller*'s considerations of youth. *See, e.g. id.* at *70. While the Second Circuit vacated the district court's decision, it took no pleasure in the outcome. Rather, the court found that it was limited by the Court's bright-line cut-off at the age of 18. *See Cruz v. United States*, 826 Fed. App'x 49, 52 (2d Cir. 2020) ("[A]lthough Cruz committed his offense only five months after his eighteenth birthday . . . the Supreme Court drew a categorical line at age eighteen between adults and juveniles."); *accord United States v. Williston*, 862 F.3d 1023, 1040 (10th Cir. 2017) (finding the "crude . . . tool of an age cutoff" to be arbitrary, but declining to extend *Miller* because it is the "province" of the Supreme Court to do so) (internal citations omitted).

By contrast, the Washington Supreme Court determined that this Court's precedents compel the extension of *Miller* to those ages 18, 19, and 20. First, the court held in 2015 that a sentencer *may*

consider youth as a mitigating factor when sentencing a defendant who, like Petitioner, was only a few days past 18 at the time of the offense. *O'Dell*, 358 P.3d at 366. In view of the science, the court agreed with this Court's declaration in *Roper* that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* at 366 (quoting *Roper*, 543 U.S. at 574). More recently, the Washington Supreme Court considered whether a 19- and 20-year-old were also entitled to present mitigating evidence of youth. *See In re Pers. Restraint of Monschke*, No. 96772-5, 2021 Wash. LEXIS 152 at *29 (2021). Observing that "[n]euroscientists now know that all three of the 'general differences between juveniles under 18 and adults' recognized by *Roper* are present in people older than 18," the court ruled that sentencing courts *must* extend *Miller*'s protections to those aged 18 through 20. *Id.* at *24.

Other courts have similarly questioned whether mandatory LWOP is constitutionally permissible for young adults. For example, a California appellate judge recently observed that "the changes in the legal and scientific landscape since . . . *Roper* . . . suggest [that] we should reconsider the propriety, wisdom, and perhaps even the constitutionality of imposing a mandatory sentence of life without the possibility of parole on an 18 year old." *Montelongo*, 269 Cal. Rptr. 3d at 901 (Segal, J., concurring). And in the underlying Minnesota Supreme Court opinion here, Judge Thissen declared in dissent that "*Miller*'s logic provides no explanation why [Petitioner] should not be entitled to individualized consideration of his age

while an offender who is 17 years and 364 days old is so entitled." *Nelson v. State*, 947 N.W. 2d 31 (Minn. 2020) (Thissen, J. dissenting). As Judge Thissen observed, the lack of guidance from this Court has left lower courts "stuck with the line that the [ ] Court drew at 18 years old in *Roper* in 2005." *Id.* at 903.

As these opinions illustrate, while many courts believe *Miller* properly extends to young adults, some courts interpret this Court's precedents as establishing a bright-line cut-off of at age 18. Naturally, the endeavor to reconcile the Court's jurisprudence with today's science has led to a growing conviction that it is time for the Court to weigh in. *See, e.g., People v. Manning*, 951 N.W. 2d 905, 910 (Mich. 2020) (McCormack, C.J., dissenting) (noting that there is a "compelling argument that the advances in studies of brain development . . . demonstrate that the 'distinctive attributes of youth' that formed the basis for the *Miller* decision continue beyond age 18.") (citation omitted). As this Court has declared, the guarantees of the Eighth Amendment must be viewed through the prism of the "evolving standards of decency that mark the progress of a maturing society." *Miller*, 567 U.S. at 469 (quotation marks omitted). The time has come to clarify for the lower courts that *Miller* extends, at least, to 18, 19, and 20-year-olds.

II. THE *MILLER* PROTECTIONS SHOULD EXTEND, AT A MINIMUM, TO YOUNG ADULTS AGES 18, 19, AND 20

At the very least, 18- to 20-year-olds should be spared from automatic LWOP sentences. First, sentencing data show that only a small portion of those sentenced to LWOP were between 18 and 20 years old at the time of their crimes. This low rate reflects an effective consensus against sentencing 18- to 20-year-olds to prison for the rest of their lives without any opportunity to present mitigating circumstances. Second, sentencing 18- to 20-year-olds to automatic LWOP is a disproportionate punishment because scientific research shows that this class of individuals shares the same mitigating characteristics as juvenile offenders. These characteristics diminish culpability and thus are likely to make life without parole a disproportionate sentence for these offenders. Finally, allowing mitigation hearings for this group would pose a minimal burden on the court system, as there would not be an unmanageable number of existing sentences that could be challenged based on such a ruling.

A. The *Miller* Rule Left a Discrepancy Between Young Offenders Who Possess Mitigating Qualities of Youth, and Juvenile Offenders Who Are Allowed Consideration of Those Qualities in Sentencing

This Court's decision in *Miller* established that "mandatory life without parole *for those under the age of 18* at the time of their crimes violates the

Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465 (emphasis added). Yet to reduce the entirety of the *Miller* holding to this narrow precept is to ignore the complex underlying rationale built upon this Court's repeated recognition in *Roper*, *Graham*, and *Miller*, that when "determining the appropriateness" of a potential LWOP sentence, "youth matters." *Id.* at 473.

The obstacle of *Miller* is that, despite creating a flexible legal standard that requires consideration of youth and its attendant characteristics in sentencing, a standard prefaced on the recognition that "youth is *more* than a *chronological* fact," *Miller* concludes by severely limiting the applicability of that standard (it would appear) with a bright-line cut-off based *solely* on chronological age. 567 U.S. at 476 (emphasis added). By applying the standard exclusively to "juveniles"—those younger than 18 years old—*Miller* inadvertently undermined the very principles it sought to implement, by creating an arbitrary cut-off as to *when* an offender's youth matters. Put simply, while most, if not all, juvenile offenders may possess "characteristics of youth," not all offenders with "characteristics of youth" are juveniles. *See* 567 U.S. at 473 (noting that it is "the characteristics of youth, and the way they weaken rationales for punishment, [that] can render a life-without-parole sentence disproportionate").

The most telling source of this discrepancy lies in the Court's recognition that youth is composed of a wide swath of transient qualities that fluctuate and become more "well-formed" over time, and that it is

those "characteristics" of youth "that render juveniles less culpable than adults." *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 72).

Consequently, the result of the Court's holding in *Miller*—that the attendant characteristics of youth simply cease to be relevant the moment an offender reaches his or her 18th birthday—is an arbitrary limitation that is fundamentally inconsistent with the reasoning that underlies the holding. *See Miller*, 567 U.S. at 472; *In re Pers. Restraint of Monschke*, 2021 Wash. LEXIS 152, at *20 ("[T]here is no distinctive scientific difference . . . between the brains of a 17-year-old and an 18-year-old.").

Indeed, this Court's jurisprudence on the diminished culpability of juveniles has repeatedly made clear that the basis for this reduced culpability derives not merely from an offender's legal status as a juvenile, but rather "from the fact that the *signature qualities* of youth are *transient*; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). Moreover, *Miller* itself recognizes that the circumstance of "youth," and the requisitely diminished culpability that attends it, are not tied to a rigid happenstance of chronological age, but rather "a *time* . . . a *moment* and '*condition* of life when a person may be most susceptible to influence and to psychological damage.'" *Miller*, 567 U.S. at 476 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)) (emphasis added).

The inevitable result of *Miller* is that a young person who commits a crime with a potential LWOP sentence just *one day shy* of his 18th birthday, as a result of his chronological age, is assumed to possess sufficiently "diminished culpability and heightened capacity for change" so as to necessitate consideration of those "hallmark features" of his youth as mitigating factors in sentencing, whereas a young person who commits his crime merely *one day later in age* is inexplicably assumed to have attained sufficient maturity as to render such considerations unnecessary. *See Roper*, 543 U.S. at 574.

Thus, by invoking an arbitrary, chronological-age cut-off point for a sentencing judge's consideration of qualities associated with youth—qualities which this Court has acknowledged are of their nature transient and gradual in their evolution—*Miller* has created foreseeable frustration for state legislatures and sentencing courts as to *when* "youth matters." *See Williston*, 862 F.3d at 1040.

B. The Court Should Resolve the *Miller* Inconsistency by Recognizing and Incorporating the Well-Established Range of Ages that Society Associates with Youth

This case presents a paradigmatic example of the inconsistency and potential injustice resulting from *Miller*'s bright-line cut-off. Specifically, Petitioner represents the prototypical case of individuals who are "just barely chronological adults," and as such, are likely to possess all the attendant characteristics of youth, as well as the diminished culpability ascribed thereto, yet are denied consideration of these

mitigating factors in sentencing as a result of a chronological accident of birth. The Court should grant certiorari in this case to resolve the arbitrary application of the *Miller* rule and provide the necessary concrete guidance to sentencing courts and state legislatures.

If this Court feels that "a line must be drawn" somewhere between young and adult offenders, that line should be at age 21. *Roper*, 543 U.S. at 574. *Amicus* DPI submits that *Miller*'s line—18 years of age—is insufficiently faithful to the Court's holding that culpability increases as an offender matures out of youth and into adulthood, and that the line is more appropriately drawn, in light of *Miller*'s principles, at 21. Considering the transient and evolving nature of youth and its attendant characteristics, the ideal line for consideration of the 'mitigating qualities of youth' is the range of ages society commonly associates with "youth," rather than a strict cut-off at "legal" adulthood. This age range not only provides a more flexible cut-off which takes into account the transient and gradual process of maturity into one's twenties, but also reflects a view of proportionality of punishment that is consistent with society's "evolving standards of decency," considering that in the years since *Miller* was decided, "the science and social science supporting *Roper*'s and *Graham's* conclusions have become even stronger." *Miller*, 567 U.S. at 469 (internal quotations omitted)); *see also id.* at 472 n.5.

C. Neurological and Psychosocial Science Support This Standard

Neurological and psychosocial scientific findings support providing emerging adults a constitutional

right to demonstrate they are indistinguishable from juveniles when challenging LWOP sentences under the Eight Amendment.

An individual's brain continues to develop into his or her twenties. Elizabeth S. Scott, et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 642 (2016); *see also* Selen S. Perker & Lael Chester, *Emerging Adults: A Distinct Population That Calls for an Age-Appropriate Approach by the Justice System,* EMERGING ADULT JUSTICE IN MASS. (June 2017) at 3. Several neurological studies support this conclusion. For example, research reveals that the dorsolateral prefrontal cortex, which is "linked to the ability to inhibit impulses, weigh consequences of decisions, prioritize, and strategize," does not fully develop and mature until an individual reaches his or her twenties. Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCIS. 77, 83 (2004). A related study observes white matter in the brain—which provides essential connectivity for performing mental operations—endures prolonged maturation beyond adolescence. Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10946 (2011). A third study concludes that the mean age for functional brain maturity is 22 years old. Nico U.F. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCIENCE 1358, 1361 (2010). These findings are "consistent with relatively protracted development of the prefrontal cortex into the early twenties" and reflect "less adultlike recruitment of prefrontal

circuitry." Alexandria O. Cohen, et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMPLE L. REV. 769, 786 & fig.5 (2016).

It is not a coincidence, therefore, that studies have observed behaviors in emerging adults that are more consistent with the behaviors of juveniles than mature adults.

One study observed that emerging adults 21 years of age and younger have a preference for "immediate rewards" and do not fully appreciate "the longer term consequences of their actions," as compared to older adults. Laurence Steinberg, et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 36 fig.2, 40 (2009). Similarly, emerging adults are less equipped to self-regulate immediate desires than mature adults. Laurence Steinberg, et al., *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. (2017) (an individual's "capacity to deliberately modulate one's thoughts, feelings, or actions in pursuit of planned goals" does not reach full development until his or her mid-twenties).

When compared with mature adults, emerging adults are more susceptible to peer pressure and other outside influences. Graham Bradley & Karen Wildman, *Psychosocial Predictors of Emerging Adults' Risk and Reckless Behaviors*, 31 J. YOUTH & ADOLESCENCE 253, 263–64 (2002); *see also* Cohen et al., *supra* p. 20, at 787 (emerging adults, like juveniles, are "still vulnerable to negative emotional influences"). Emerging adults also suffer from increased impulsiveness. *See* Kathryn Monahan, et al., *Juvenile Justice Policy and Practice: A*

Developmental Perspective, 44 CRIME & JUSTICE 557, 582 (2015) ("the region charged with controlling impulses . . . is one of the last parts of the brain regions to mature").

Findings from neurological and psychosocial research, therefore, suggest emerging adults share developmental and behavioral characteristics similar to those of their juvenile peers. Accordingly, there is a deep "inequity in drawing a bright line at eighteen for considering youthfulness in mitigating punishment." *See* Kelsey B. Shust, *Extending Sentencing for Deserving Youth Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667, 670 (2014).

D. Recognition of the Right to a Sentencing Mitigation Hearing for 18-20 Year-Olds Would Not Lead to a Significant Burden on the Courts

Sentencing data suggests only a small percentage of individuals currently sentenced to life without parole were between 18 and 20 years of age at the time of their crime.[5] In addition to illustrating a general-consensus apprehension about imposing automatic life sentences on 18- to 20-year-olds, this data should assuage any concern that offering mitigation hearings to individuals in this age group

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[5] *See* Ann Carson & William J. Sabol, U.S. Dep't of Justice, *Aging of the State Prison Population, 1993–2013*, at 21 tbl.15 (2016) (basing data on prisoners sentenced to more than one year in state prison on new court commitments).

before imposing LWOP sentences would lead to an unreasonable burden on the courts.

A holding confirming that the Constitution guarantees a right to a mitigation hearing for 18- to 20-year-olds prior to the imposition of an LWOP sentence will impact only a handful of states. Only nine states still impose LWOP with no opportunity for a mitigation hearing.[6] As of 2020, approximately 13,728 individuals were serving LWOP sentences in those jurisdictions.[7] Based on data regarding the age of prisoners and the percentage of homicides committed by 18- to 20-year-olds,[8] the number of individuals in that age group serving LWOP sentences in those jurisdictions is presumably a fraction of that number.[9] Thus, offering mitigation hearings to this group is unlikely to put an unreasonable strain on the jurisdictions that would be impacted. Even if the percentage of 18- to 20-year-

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[6] These states impose automatic LWOP sentences for premeditated murder with no aggravating factors. *See* Pet. App. G for more details.

[7] *See* Ashley Nellis, The Sentencing Project, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, at 10 tbl.1 (2021), http://bit.ly/3qzTd13.

[8] Arrests of 18- to 20-year-olds constituted approximately 15 percent of homicide arrests in 2019, according to the U.S. Department of Justice. *See* OJJDP Statistical Briefing Book, *Estimated number of arrests by offense and age group, 2019* (Nov. 16, 2020), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1.

[9] *See* Carson & Sabol, *supra* note 5.

olds serving life sentences in those states were the same as the percentage of homicide arrests of individuals in that age group, offering mitigation hearings to this group would still be less onerous for courts than the holding in *Montgomery v. Louisiana*, which was estimated to retroactively affect approximately 2,300 cases nationwide.[10]

Moreover, as this Court noted in *Montgomery v. Louisiana*, making mitigation hearings available to this group would not require these jurisdictions to re-litigate sentences in every case where an 18- to 20-year-old offender received an automatic LWOP sentence. Instead, courts could remedy some violations by permitting offenders in that age group to be considered for parole, rather than by resentencing them.[11] This available flexibility ensures that the few states still imposing automatic LWOP would not struggle to comply with a ruling prohibiting this sentencing practice.

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[10] As of 2017, "[m]ore than 2,300 juveniles [were] serving life without parole." *See* Matt Ford, *The Reckoning over Young Prisoners Serving Life Without Parole*, THE ATLANTIC (July 14, 2017), https://www.theatlantic.com/politics/archive/2017/07/juvenilelife-without-parole/533157/ [https://perma.cc3YJV-RUCD].

[11] *See Montgomery v. Louisiana*, 577 U.S. at 736 (2016) ("Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them . . . .").

Data from the federal prison system, while not perfectly tailored to the question at issue, is also instructive. Data on offenders ages 25 or younger who were sentenced in the federal system between 2010 and 2015 suggests that the total number of individuals between the ages of 18 and 20 sentenced to LWOP is minimal.[12] In fact, a total of 11 individuals between the ages of 18 and 20 were sentenced to LWOP in the federal system between 2010 and 2015, which represents 0.0127 percent of the total number of offenders ages 25 or younger. These statistics suggest the rarity with which life sentences are imposed on 18-year-olds like Petitioner, at least in the federal system.[13]

More importantly, any potential burden on courts in the jurisdictions imposing automatic LWOP is heavily outweighed by countervailing Eighth Amendment concerns. For over one century, this Court has consistently risen above these

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[12] *See* United States Sentencing Commission, *Youthful Offenders in the Federal System, Fiscal Years 2010 to 2015* (May 26, 2017). Note that the report tracks age at sentencing rather than at the time of the crime, and reflects sentencing practices in the federal system, so it is at best an approximation. DPI is not aware that organizations performing sentencing data analyses have collected comparable information for the states.

[13] Note that the percentage of youthful offenders receiving automatic mandatory sentences of LWOP is unlikely to meet or exceed the generous assumptions herein, as the category of offenders receiving life sentences also includes those receiving discretionary life sentences.

administrative considerations to recognize and enforce the protections offered by the Eighth Amendment, ensuring that our criminal justice system reflects modern societal values and science, and does not become a nullity in protecting citizens from cruel and unusual punishment. In the early 20th century, this Court held that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). The ethos expressed in that case over 100 years ago continues to prove relevant today. "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Hall v. Florida*, 572 U.S. 701, 708 (2014).

Considering that the potential concern about burdening the courts here is in fact less significant than in prior landmark Eighth Amendment cases, the Eighth Amendment rights of individuals between the ages of 18 and 20 should outweigh any such concerns, and this Court should accordingly grant certiorari to allow Petitioner a mitigation hearing to present evidence of his youthfulness and level of culpability.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to reverse the holding below with respect to the automatic sentence of LWOP for Petitioner, and recognize that *Miller*'s protections extend, at a minimum, to young adults ages 18, 19, and 20.

Respectfully submitted,

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