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, No. 3:11-CV-787 (JCH)

BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER IN SUPPORT OF
PETITIONER-APPELLEE LUIS NOEL CRUZ AND AFFIRMANCE

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INTEREST AND IDENTITY OF AMICUS CURIAE[1]

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of *amicus* briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

SUMMARY OF THE ARGUMENT

In *Miller v. Alabama*, the United States Supreme Court ruled mandatory life without parole sentences unconstitutional for individuals who were juveniles at the time of their offenses. 567 U.S. 460, 465 (2012). The Court, relying on the same underlying scientific research used to bar the death penalty for juveniles, held that children were less culpable than their adult counterparts because of their immaturity,

[1] No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amicus curiae*, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief. *Amicus curiae* files under the authority of Fed. R. App. P. 29(a). Both parties have consented to this filing.

impetuosity, susceptibility to peer influence, and greater capacity for rehabilitation. *Id.* Further research now indicates that individuals retain these characteristics beyond age 18. Because young adults possess the same adolescent characteristics that the Supreme Court has determined reduce culpability, mandatory life without parole sentences for this population are also disproportionate under the Eighth Amendment. Further, in recognition of the current developmental research, jurisdictions around the country are increasingly raising the age of adulthood above age 18 in situations that implicate the developmental characteristics relied upon in *Miller*, reinforcing that one's 18th birthday is an arbitrary and outdated basis upon which to define the constitutional parameters of our sentencing practices. Indeed, as courts around the country have considered age and its attendant characteristics in sentencing older adolescents and young adults, they have consistently found them less deserving of the harshest available penalties—as the District Court did here. This Court should therefore affirm the lower court's ruling, as Mr. Cruz is developmentally indistinguishable from a defendant under age 18 and cannot constitutionally be sentenced to mandatory life without parole under *Miller*.

ARGUMENT

I. MANDATORY IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON AN 18-YEAR-OLD VIOLATES THE EIGHTH AMENDMENT BECAUSE YOUNG ADULTS POSSESS THE SAME RELEVANT CHARACTERISTICS AS YOUTH UNDER 18

The United States Supreme Court has established, through a series of decisions issued between 2005 and 2016, that children are developmentally different from adults and that these differences require individualized consideration of their youthful characteristics prior to imposition of the harsh punishments given to adults. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that imposing the death penalty on individuals convicted as juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 82, (2010) (holding that imposing life without parole sentences on juveniles convicted of non-homicide offenses is unconstitutional); and *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding that mandatory life without parole sentences for juveniles convicted of homicide are unconstitutional).

The Court's conclusions in each of these cases were predicated on scientific research identifying three developmental differences between youth and adults: youth's lack of maturity and impetuosity; youth's susceptibility to outside influences; and youth's capacity for change. *See Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 733 (2016) (quoting *Miller*, 567 U.S. at 471). These

developmental characteristics establish the diminished culpability of juvenile defendants; their "conduct is not as morally reprehensible as that of an adult." *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)). Empirical research now demonstrates that these physiological and psychological traits of youth are also apparent in young adults—particularly 18-year-olds—rendering this special population less culpable and thus less deserving of the most serious punishments.

A. Research Now Shows Neurodevelopmental Growth Continues For Young Adults Beyond Age 18

Prior to 2010, brain maturation research focused predominantly on individuals under 18 years of age. This research proved critical to the *Roper*, *Graham*, and *Miller* decisions, each of which involved defendants under the age of 18.[2] Since those decisions, researchers have emphasized that this scientific evidence, which has

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[2] In *Roper*, the U.S. Supreme Court relied on three scientific and sociological studies—from 1968, 1992, and 2003—to reach its conclusion that children under age 18 are categorically different from adults. *See* 543 U.S. at 568-72 (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968); Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). The Court looked to the same research in *Graham* and *Miller*, noting that it had continued to grow stronger. *See Miller*, 567 U.S. at 471-72 & n.5; *Graham*, 560 U.S. at 68. In each of these cases, the defendant was under the age of 18, and so there was no need for the Court to consider whether the scientific evidence also applied to older adolescents.

continued to expand, also establishes that the portions of the brain associated with the characteristics relied on in *Roper* continue to mature beyond age 18. *See* Christian Beaulieu & Catherine Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 J. NEUROSCIENCE 31 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 0 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176, 176-193 (2013).

For example, the Court in both *Roper* and *Miller* relied on a 2003 study by Laurence Steinberg and Elizabeth Scott to confirm its understanding that the appropriate line between childhood and adulthood should be set at 18. *See* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003). In the seventeen years since that study, Dr. Steinberg has published numerous papers concluding that research now shows that the parts of the brain active in most "crime situations," including those associated with characteristics of impulse control, propensity for risky behavior, vulnerability, and susceptibility to peer pressure, are still developing at age 21,[3] and he testified to

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[3] Although current research suggests that brain development continues into the mid-twenties, that does not mean that an 18-year-old is developmentally identical to a 21-year-old. "Brain maturation comprises several processes that vary in their

that effect before the District Court in this case. Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine*, 38 J. MED. & PHIL. 256 (2013); *see also* 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) ("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."); *see also* AA587-652 (testimony of Dr. Steinberg before the District Court).

In fact, it is now widely accepted that the characteristics relied upon by the Supreme Court in increasing constitutional protections for juveniles continue "far later than was previously thought," and certainly beyond age 18. Vincent Schiraldi & Bruce Western, *Why 21 year-old Offenders Should Be Tried in Family Court*, WASH. POST (Oct. 2, 2015), https://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html?utm_term=.82fc4353830d. *See, e.g.*, Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death*

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developmental timetable," Scott et al., *supra*, at 651, and research shows that rates of engagement in risky behavior generally peak at around age 18 "and then decline during the early twenties," *id.* at 645. Thus, while development is not complete until at least age 21, 18-year-olds may have more in common with 17-year-olds than with 20-year-olds on specific developmental measures, such as impulse control or risk-taking behaviors. *See* AA645.

Penalty, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 163 (2016); Alexander Weingard et al., *Effects of Anonymous Peer Observation on Adolescents' Preference for Immediate Rewards*, 17 DEVELOPMENTAL SCI. 71 (2013); Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUSTICE: A REVIEW OF RESEARCH 577, 582 (2015).

B. Young Adults, Like Adolescents, Share Hallmark Characteristics That Make Them Less Culpable

Young adults, particularly 18-year-olds, possess the same characteristics as adolescents that make them "less culpable" and "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution" is diminished. *Roper*, 543 U.S. at 571. Specifically, "[y]oung adults are . . . more susceptible to peer pressure, less future-oriented and more volatile in emotionally charged settings." Schiraldi & Western, *supra*.

Researchers have found specifically that two important parts of the brain develop at different times, leading to a "maturational imbalance" in middle to late adolescence. The part of the brain that causes adolescents to be sensation-seeking and reward-seeking develops—or kicks into high gear—around the time of puberty. But the part of the brain that is responsible for self-control, regulating impulses, thinking ahead, evaluating the rewards and costs of a risky act, and resisting peer

pressure is still undergoing dramatic change well into the mid-twenties. *See, e.g.*, Michaels, *supra*, at 163 (citing to research that found antisocial peer pressure was a highly significant predictor of reckless behavior in emerging adults 18 to 25); Weingard et al., *supra*, at 72 (finding that a propensity for risky behaviors, including "smoking cigarettes, binge drinking, driving recklessly, and committing theft," exists into early adulthood past 18, because of a young adult's "still maturing cognitive control system"); Monahan et al., *supra*, at 582 (finding that the development of the prefrontal cortex which plays an "important role" in regulating "impulse control," decision-making, and pre-disposition towards "risk[y]" behavior, extends at least to 21); Elizabeth Shulman et al., *Sex Differences in the Developmental Trajectories of Impulse Control and Sensation-Seeking from Early Adolescence to Early Adulthood*, J. YOUTH & ADOLESCENCE 44, 1-17 (2015) (finding that male adolescents have greater levels of sensation-seeking and lower levels of impulse control than female adolescents, and that the development of impulse control in male adolescents is more gradual than in female adolescents).

For young adults, these limitations in judgment are particularly pronounced in emotionally charged situations. Psychologists distinguish between "cold cognition," which refers to thinking and decision making under calm circumstances, and "hot cognition," which refers to thinking and decision making under emotionally arousing circumstances. Scott et al., *supra*, at 652. Relative to adults, adolescents'

deficiencies in judgment and self-control are greater under "hot" circumstances in which emotions are aroused than they are under calmer "cold" circumstances. Alexandra O. Cohen et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts,* 4 PSYCHOL. SCI. 549 (2016); Marc D. Rudolph et al., *At Risk of Being Risky: The Relationship Between "Brain Age" Under Emotional States and Risk Preference*, 24 DEV. COGNITIVE NEUROSCIENCE 93 (2017). In circumstances of "hot cognition," the brain of an 18- to 21-year-old functions like that of a 16- or 17-year-old. Scott et al., *supra*, at 650.

Young adults also face the same types of susceptibility to peer pressure as younger children. *See* Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731-32 (2007) ("When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual's future behavior and structural brain development.") (citing Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766, 766–67 (2006)). Another study examined a sample of 306 individuals in three age groups—adolescents (13-16), youths (18-22), and adults (24 and older)—and found that "although the sample as a whole took more risks and made more risky decisions in groups than when alone, this effect was more pronounced

during middle and late adolescence than during adulthood" and that "the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions." Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study,* 41 DEV. PSYCHOL. 625, 632, 634 (2005). The presence of friends has also been shown to double risk-taking among adolescents, increasing it by fifty percent among young adults, but having no effect on older adults. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 91 (2008). And, more recently, studies have confirmed that "exposure to peers increases young adults' preference for immediate rewards" and their "willingness to engage in exploratory behavior." Scott et al., *supra*, at 649 (internal citations omitted).

The existing scientific research also addresses differences in brain function development relating to activities involving informed decision-making and logical reasoning, such as voting, and brain function related to impulse control, hot cognition, and susceptibility to peer pressure, such as criminal behavior and the purchase and use of controlled substances. Specifically, research confirms that the portions of the brain associated with the former set of characteristics develop earlier and more quickly, meaning that "adulthood" begins earlier, while the latter set of characteristics—relied on by the Supreme Court—take longer to develop and require

setting the age of "adulthood" past 18, until at least 21. *See, e.g.*, Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMPLE L. REV. 769, 786-87 (2016) (defining "young adulthood" at 21 for purposes of cognitive capacity and the ability for "overriding emotionally triggered actions," and finding that 21 is the "appropriate age cutoff[ ] relevant to policy judgments relating to risk-taking, accountability, and punishment"). As Dr. Steinberg explains:

> [t]o the extent that we wish to rely on developmental neuroscience to inform where we draw age boundaries between adolescence and adulthood for purposes of social policy, it is important to match the policy question with the right science. . . . For example, although the APA was criticized for apparent inconsistency in its positions on adolescents' abortion rights and the juvenile death penalty, it is entirely possible for adolescents to be too immature to face the death penalty but mature enough to make autonomous abortion decisions, because the circumstances under which individuals make medical decisions and commit crimes are very different and make different sorts of demands on individuals' abilities.

Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739, 744 (2009); *cf. Roper*, 543 U.S. at 620 (O'Connor, J., dissenting) (questioning why the age for abortion without parental involvement "should be any different" given that it is a "more complex decision for a young person than whether to kill an innocent person in cold blood").

Overall, young adults are more prone to risk-taking, acting in impulsive ways that likely influence their criminal conduct, and are not yet mature enough to anticipate the future consequences of their actions. *See* Scott et al., *supra*, at 644;

Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 (2009).

C. Because 18-year-olds Possess The Same Developmental Characteristics As Their Younger Peers, They Cannot Be Subject To Mandatory Life Without Parole Sentences Under The Eighth Amendment

In striking the death penalty and limiting life without parole sentences for juveniles, the Supreme Court has emphasized that "[b]ecause juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). Its decisions relied on "what 'any parent knows'" and the science and social science regarding adolescent development. *Id.* (quoting *Roper*, 543 U.S. at 569).

> In *Roper,* [the Court] cited studies showing that [o]nly a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. And in *Graham*, [it] noted that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control. [It] reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed.

Id. at 471-72 (second alteration in original) (internal citations and quotation marks omitted). The scientific research now shows that young adults must likewise be included in the protected class of individuals.

The Supreme Court's own evolving interpretation of the proscriptions of the Eighth Amendment illustrate why older youth must now be included in this modern framework. In first protecting youthful offenders from the death penalty, the Court limited the class to include only those youth who were under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion). The Court reasoned, "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 835. The Court then held in *Roper*:

> [A] plurality of the [*Thompson*] Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles below that age. We conclude that *the same reasoning* applies to all juvenile offenders under 18.

543 U.S. at 570-71 (emphasis added) (internal citation omitted). The developmental differences between juveniles under the age of 18 and adults "render[ed] suspect any conclusion that a juvenile falls among the worst offenders. . . . for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570.

The Court once again relied on these distinct attributes of youth in holding mandatory life without parole unconstitutional in *Miller* as "the mandatory penalty schemes . . . prevent the sentencer from taking account of these central considerations." 567 U.S. at 474. Therefore, "[b]y removing youth from the

balance," mandatory life without parole sentences contradicted the Court's precedent forbidding the imposition of the harshest penalties on juveniles as if they were miniature adults. *Id.* "[N]one of what [the Court] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific," *id.* at 473, but, as current research teaches, nor is it specific to those under 18. As the research grows, it has become indefensible to exclude young adults, who share the identical attributes of younger teens, from the required individualized sentencing and consideration of the mitigating qualities of youth.

This extended protection is in line with the Court's other Eighth Amendment jurisprudence which has also been modified to reflect emerging research on individual culpability. *Hall v. Florida* is instructive. In *Hall*, the Court found unconstitutional a Florida rule that limited evidence of qualifying intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), to proof that the individual had an I.Q. of 70 or lower. 572 U.S. 701, 710-14, 721-24 (2014). While acknowledging the important role of the medical community in defining and diagnosing the condition, the Court struck down the "rigid rule" concerning I.Q. scores because it "creates an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 704, 724. Just as "[i]ntellectual disability is a condition, not a number," *id.* at 723, "youth [also] is more than a chronological fact." *Miller*, 567 U.S. at 476 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

Youth "is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness'" and "a moment and 'condition of life'" that creates an unacceptable risk of a disproportionate sentence when disregarded. *Id.* (alteration in original) (first quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993), then quoting *Eddings*, 455 U.S. at 115). Just as an I.Q. score of 70 is only an approximation of intellectual disability that fails to capture the full cohort of eligible individuals, so too is age 18 too rigid a test to accurately mark the passage from adolescence to adulthood.

As the current research conclusively shows, the age of 18 is not an acceptable proxy for developmental maturity and adult-like culpability. People who commit criminal acts just beyond their eighteenth birthday—like Mr. Cruz—are developmentally indistinguishable from their slightly younger peers. Therefore, mandatory imposition of a sentence of life without parole on an 18-year-old defendant, without any ability for a sentencing court to consider the "mitigating qualities of youth," is unconstitutional under *Miller*. *See* 567 U.S. at 476 (quoting *Johnson v. Texas*, 509 U.S. at 367).

II. THERE IS NOW A CLEAR NATIONAL CONSENSUS THAT THE LINE BETWEEN CHILDHOOD AND ADULTHOOD SHOULD BE SET ABOVE AGE 18 WHEN CONSIDERING THE FACTORS RELIED ON IN *MILLER*

In recognition of these developmental characteristics of youth, jurisdictions around the country have enacted legislation limiting young adults' abilities to engage in risky conduct or offering them additional protection and support. In a wide array of contexts—ranging from tobacco usage to health insurance access—state and federal law now set the boundary between childhood and adulthood above age 18. The situations where the law continues to draw the line at age 18—for instance, voting and serving on juries—are not activities that are highly susceptible to impulsive behavior. The national legal landscape therefore increasingly reflects the current developmental research: drawing the line between childhood and adulthood above age 18 in contexts that implicate the age-related characteristics described in *Miller*.

A. State And Federal Law Increasingly Sets The Age Of Adulthood Above Age 18 In Situations Implicating The Developmental Characteristics Relied On In *Miller*

Over the last decade, state and federal legislatures have consistently raised the age of adulthood above age 18. There are many situations, for instance, in which state and federal law now restrict young adults' access to risky or dangerous activities, reflecting the current understanding that young adults are less mature and

exercise poorer judgment in stressful or emotionally charged situations than their older peers. These laws are growing in number and cover a wide range of domains, including:

- **Controlled Substance Use:** The legal drinking age moved to age 21 in all 50 states following the passage of the federal National Minimum Drinking Age Act of 1984,[4] and the national age for tobacco use rose to meet it in December 2019, *see* Further Consolidated Appropriation Act, 2020, Pub. L. No. 116-94, § 603, 133 Stat 2534, 3123 (2019) (amending 21 U.S.C. § 387f(d)). The federal legislative effort to raise the tobacco use age reflected a trend in states and cities around the country to limit young adult tobacco use.[5] At the time of

[4] *Alcohol Laws by State,* FED. TRADE COMM'N, CONSUMER INFORMATION (2013), https://www.consumer.ftc.gov/articles/0388-alcohol-laws-state. *See also* Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 303, 304 (2006) (describing the history of the minimum drinking age in the United States). Notably, the impetus behind raising the drinking age was to curb drunk driving by young adults. Treuthart, *supra*, at 309-11.

[5] The legislative history behind this trend in tobacco laws is premised on the notion that today, society widely recognizes that certain defining characteristics of youth, including "maturity" and "susceptib[ility]" to "addictive properties," extend to age 21. The Council of the City of New York, *Committee Report of the Human Services Division*, Committee on Health, at 12 (2013); *see also* State of California, Hearing Before the Assembly Committee on Public Health and Developmental Services, 2015 Second Extraordinary Session, at 3 (August 25, 2015) (Bill Analysis) ("[Today,] the evidence and need are clear on the legal age for tobacco and now is time for us to make this change."); Tobacco 21, *Hawaii Voters Favor Raising the Legal Age for the Sale of Tobacco to Age 21*, at 2 (2014), https://tobacco21.org/wp-content/uploads/2016/03/raisetheagepollcombined.pdf.

the federal statute's passage, more than half of the U.S. population lived in a jurisdiction that already restricted tobacco usage to those age 21 and older.[6] Similarly, to date every state that has legalized marijuana has not done so for people under age 21. Cohen et al., *When Does a Juvenile Become an Adult? supra*, at 778.

- **Driving Restrictions:** Federal law bars individuals under age 21 from driving most commercial vehicles across state lines, 49 C.F.R. § 391.11(b)(1), and various states require a person to be at least 21 years of age to operate commercial vehicles, transport hazardous materials, drive a taxi, drive a school bus, or serve as a driving instructor.[7] Ten states that do not otherwise mandate helmet use require that motorcycle riders under age 21 or 19 wear a helmet. *See supra* note 7, at A3. And, while not a statutory restriction, most car rental companies limit or bar rentals to individuals under age 25, recognizing the increased risk posed by this age group.[8]

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[6] Campaign for Tobacco-Free Kids, *States and Localities that Have Raised the Minimum Legal Sale Age for Tobacco Products to 21* (2019), https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf.

[7] *See State Law Restrictions on Young Adults Under Age 21* Table, at A1-A3, attached hereto as App. "A."

[8] *See, e.g.*, *Can You Rent a Car Under 25 in the US and Canada?*, ENTERPRISE, https://www.enterprise.com/en/help/faqs/car-rental-under-25.html (last visited Feb. 5, 2020); *Restrictions and Surcharges for Renters Under 25 Years of Age*, BUDGET,

- **Firearm Ownership and Explosive Use:** Many gun control statutes limit firearm ownership by people under age 21. For example, federal law bars licensed dealers from selling handguns to youth under age 21, 18 U.S.C. § 922(b)(1), and at least 18 states have made 21 the minimum age for some forms of gun ownership or possession, *see Minimum Age to Purchase & Possess,* GIFFORDS LAW CENTER, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/. Relatedly, at least 30 states require that anyone conducting blasting operations—using explosives in the course of mining or other construction, or otherwise handling explosives—to be at least 21 years old. *See supra* note 7, at A4-A5. All but a handful of states now require a minimum age of 21 to operate firework or other pyrotechnic displays. *See supra* note 7, at A5-A7.
- **Access to Credit:** Under federal law, young people cannot obtain credit cards without a cosigner until they turn 21. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 301, 123 Stat. 1734, 1747-48. That statute, passed in 2009, was drafted expressly to protect young consumers from the predations of credit card companies.

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https://www.budget.com/budgetWeb/html/en/common/agePopUp.html (last visited Feb. 5, 2020); *Under 25? We've Got You Covered*, HERTZ, https://www.hertz.com/rentacar/misc/index.jsp?targetPage=Hertz_Renting_to_Drivers_Under_25.jsp (last visited Feb. 5, 2020).

Although as originally introduced the bill would only have protected those under age 18, before its passage the age was raised to age 21, recognizing that young adults are similarly vulnerable. *See* H.R. REP. NO. 111-88, sec. 7, *reprinted in* 2009 U.S.C.C.A.N. 453, 454, 460, 466.

Other state and federal laws recognize young adults' developmental characteristics by extending additional benefits or services to young people over age 18 that are not available to older adults. For example:

- **Healthcare:** Under the Affordable Care Act, young adults are allowed to remain on their parents' health care plans until age 26, in part to combat high rates of uninsurance among young adults. The Ctr. for Consumer Info. & Ins. Oversight, *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Families and Businesses*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/CCIIO/Resources/Files/adult_child_fact_sheet.html (last visited Feb. 5, 2020). Children receiving Medicaid continue to be able to access all medically necessary services under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) guarantee until age 21 (whereas coverage for older adults on Medicaid is more limited). 42 C.F.R. § 441.50.

- **Education:** The federal Individuals with Disabilities Education Act (IDEA) requires states and school districts to offer special education services to children and youth with disabilities up to age 21 (or until the young person graduates). 20 U.S.C. § 1412(a)(1)(A). State laws vary widely in the upper age boundary for entitlement to public education, but most set it above age 20. Stephanie Aragon, *Free and Compulsory School Age Requirements* 3-6 (2015), https://www.ecs.org/clearinghouse/01/18/68/11868.pdf#targetText=22%20Although%20state%20statute%20in,of%204%20and%206%20years.
- **Child Welfare Services:** Federal law incentivizes states to extend foster care services beyond age 18, and now almost all states serve youth who are over age 18 in some fashion, including through extended foster care programs, extended guardianship and/or adoption subsidies, and aftercare services. Juvenile Law Center, *National Extended Foster Care Review: 50- State Survey of Extended Foster Care Law & Policy* (2018), https://jlc.org/sites/default/files/attachments/2018-05/2018-NationalEFCReview-ExecSummary.pdf. This legislation is based on the notion that young people may not be prepared for independent living at age 18, when their character is not yet fully formed and when propensity for risky behavior still exists. *See* Miriam Aroni Krinsky & Theo Liebmann, *Charting*

a Better Future for Transitioning Foster Youth: Executive Summary of Report from a National Summit on the Fostering Connections to Success Act, 49 FAM. CT. REV. 292 (2011).

Increasingly, state and local criminal justice systems have also recognized the developmental characteristics of young adults and modified their policies and practices accordingly. There are at least 50 young adult courts, specialty probation programs, correctional facilities, and other specialized justice services around the country targeted specifically at young adults ages 18 to 21,[9] and many states have adopted "youthful offender" laws extending special protections to individuals ages 18-21.[10] In 2018, Vermont became the first state in the country to expand its juvenile court to include 18- and 19-year-olds, S. 234, 2018 Sess., 2018 Vermont Laws No. 201 § 1 (adding VT. STAT. ANN. tit. 33, § 5101(a)), and several other states have introduced similar legislation.[11] Similarly, California and Illinois have expanded

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[9] *See* CONNIE HAYEK, ENVIRONMENTAL SCAN OF DEVELOPMENTALLY APPROPRIATE CRIMINAL JUSTICE RESPONSES TO JUSTICE-INVOLVED YOUNG ADULTS 6 (2016), https://www.ncjrs.gov/pdffiles1/nij/249902.pdf.

[10] *See, e.g.*, ALA. CODE § 15-19-1; COLO. REV. STAT. ANN. §§ 18-1.3-407; 18-1.3-407.5; FLA. STAT. ANN. §§ 958.011-15; GA. CODE ANN. § 42-7-2(7); N.J. STAT. ANN. § 52:17B-182; N.Y. CRIM. PROC. LAW § 720.15; S.C. STAT. ANN. § 24-19-10; V.I. CODE ANN. tit 5 § 3712; VT. STAT. ANN. tit. 33, §§ 5280; 5287; VA. CODE ANN. § 19.2-311.

[11] *See, e.g.*, H.B. 4581 100th Gen. Assemb. (Ill. 2017), http://ilga.gov/legislation/fulltext.asp?DocName=10000HB4581&GA=100&SessionId=91&DocTypeId=HB&LegID=109512&DocNum=4581&GAID=14&Session=

parole eligibility for young adults.[12]

In short, there is a clear trend around the country toward shifting the legal boundary between childhood and adulthood to reflect the current developmental research.

B. Laws Setting Adult Status At 18 Are Premised On Different Considerations And Rationales Than Those Identified In *Miller*

Although states continue to set 18 as the relevant age marker for certain other regulated activities—including voting, marrying without consent, entering the military and serving on juries—the rationales sustaining those laws are based on different characteristics than those underpinning the U.S. Supreme Court's decision in *Miller*.

For example, voting, marrying without consent, and serving on juries are not activities that are highly susceptible to impulsive behavior: they allow a person time to make a decision, and center on characteristics of "logical reasoning," which society and the medical community explain develop at a much earlier age. Laurence Steinberg, Op-Ed: *A 16-year-old Is as Good as an 18-year-old—or a 40-year-old—*

&print=true; Proposed Bill No. 57, Conn. Gen. Assembly, January Session 2019, https://trackbill.com/bill/connecticut-senate-bill-57-an-act-concerning-the-jurisdiction-of-the-juvenile-court/1631245/.

[12] CAL. PENAL CODE §§ 3051, 3051.1; Ill. Public Act 110-1182, http://www.ilga.gov/legislation/billstatus.asp?DocNum=531&GAID=14&GA=100&DocTypeID=HB&LegID=100727&SessionID=91.

at Voting, L.A. TIMES (Nov. 3, 2014), http://www.latimes.com/opinion/op-ed/la-oe-steinberg-lower-voting-age-20141104-story.html (explaining that there is a difference when considering laws such as "voting or granting informed consent for medical procedures" where "[a]dolescents can gather evidence, consult with others and take time before making a decision" because while "[a]dolescents may make bad choices . . . statistically speaking, they won't make them any more often than adults"). By contrast, the purchase or use of tobacco or alcohol, firearm and explosive use, and motor vehicle operation are all potentially emotionally arousing activities where maturity, vulnerability and susceptibility to influence, and underdeveloped character come into play—much as they do when young people engage in criminal acts.

Thus, the fact that the legal boundary for adulthood remains 18 in some instances does not undercut the trend toward raising the age of majority, but instead reflects the growing national census that the line for adulthood should be set at age 18 (or lower) for activities characterized by considered, logical decision-making, and should be raised above age 18 for circumstances characterized by "emotionally arousing conditions." Scott et al., *supra*, at 652.

III. SINCE *MILLER*, COURTS CONSIDERING THE DEVELOPMENTAL CHARACTERISTICS OF YOUTH HAVE CONSISTENTLY FOUND OLDER ADOLESCENTS AND YOUNG ADULTS LESS DESERVING OF THE HARSHEST PENALTIES

Since the U.S. Supreme Court's decision in *Miller*, lower courts have had the opportunity to consider the effect of the mitigating qualities of youth on individual sentences in hundreds of cases. In the overwhelming majority of these cases—including cases involving older adolescents and young adults—courts have concluded that age and its attendant characteristics counsel against imposing the harshest available penalties.

A. Individuals Resentenced Under *Miller* Have Rarely Received Life Without Parole

The Campaign for Fair Sentencing of Youth (CFSY) has collected data on *Miller* resentencings in states nationwide. At the time of *Montgomery*, approximately 2,800 individuals were serving life without parole sentences for offenses that occurred when they were children. CFSY, *Montgomery v. Louisiana Anniversary: Four Years Since the U.S. Supreme Court Decision in Montgomery v. Louisiana* (Jan. 25, 2020), http://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-1.24.pdf. To date, approximately 2,000 juvenile life without parole sentences have been altered through judicial resentencing or legislative reform. *Id.* For these modified sentences, the median is 25 years' incarceration before parole or release eligibility. *Id.* Notably, this median

is the same when the data is isolated to include only those who committed offenses at age 17.[13] Modified sentences have thus not been harsher for 17-year-olds.

Further, judges are rarely imposing life without parole on juvenile offenders when they have the ability to take youth into account. Nationwide, fewer than 100 individuals have been resentenced to life without parole following *Miller*. CFSY, *supra*. Slightly more than half of the resentencings completed thus far (approximately 1086 of the 2041 total resolved cases) involve individuals who committed offenses at age 17, and life without parole has been re-imposed in fewer than 50 of these cases.[14] Accordingly, judges are concluding that life without parole is an excessive sentence for 17-year-olds just as frequently as they are in cases involving younger teens.

B. Courts Considering The Current Research Have Found Age And Its Attendant Characteristics To Be Mitigating When Sentencing Youth Who Were 18 Or Older At The Time Of Their Offense

In light of the current developmental research demonstrating that young adults possess the same immaturity, susceptibility to influence, and impulsivity in emotionally charged situations as their younger peers, a growing number of courts have applied that research when sentencing defendants who were 18 at the time of

[13] Data collected by Campaign for Fair Sentencing of Youth (available upon request).
[14] *See supra* note 13.

their offense, and have concluded that it renders them less deserving of the harshest penalties.

For example, in *Commonwealth v. Bredhold*, a Kentucky Circuit Court found that the state's death penalty statute was unconstitutional as applied to individuals under the age of 21 because of research demonstrating that those individuals were "psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty." *Commonwealth of Kentucky v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 at 1* (Ky. Cir. Ct. Aug. 1, 2017).[15] A New Jersey appellate court similarly relied on *Miller* to support its decision to remand for resentencing a 75-year aggregate sentence imposed for murder committed by a 21-year-old defendant, reasoning that where the sentence is the practical equivalent of 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." *State v. Norris*, No. A-3008-15T4, 2017 WL 2062145, at *5 (N.J. Super. Ct. App. Div. May 15, 2017) (quoting *Miller*, 567 U.S. at 476-77).

Other courts have similarly concluded that age-related characteristics must be taken into account when sentencing 18-year-old defendants. In *State v. O'Dell*, the

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[15] Commonwealth of *Kentucky v. Bredhold*, No. 2017-SC-000436 (Ky. 2017), is currently on appeal before the Kentucky Supreme Court.

Washington Supreme Court held that the trial court erred in failing to consider the youthfulness of an 18-year-old offender as a mitigating factor justifying an exceptional sentence under the state's sentencing scheme. 358 P.3d 359, 363 (Wash. 2015). Citing *Roper*, *Graham*, and *Miller*, the court noted that the Washington Legislature "did not have the benefit of psychological and neurological studies showing that the 'parts of the brain involved in behavior control' continue to develop well into a person's 20s" when it drafted the definition of "offender," roughly 25 years before *Roper*. *Id.* at 364 (quoting *Miller*, 567 U.S. at 471-72). The court noted that "[t]hese studies reveal 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." *Id.* (footnotes omitted). Because these factors can come into play even when a defendant is over age 18, the court held that trial courts "must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender . . . who committed his offense" shortly after he turned 18. *Id.* at 366.

Similarly, an Illinois appellate court recently held that a trial court's failure to consider age as a mitigating factor when sentencing a barely 19-year-old defendant to mandatory life imprisonment violated the State Constitution. *People v. House*, No. 1-11-0580, 2019 WL 2718457, at *9-13 (Ill. App. Ct. June 27, 2019) (unreleased

opinion).[16] Looking to the developmental and social science research, the court in *House* concluded that the defendant could not be constitutionally sentenced to life without parole due his age, minimal role in the offense, and lack of prior violent criminal history. *Id.* at *14.

Other courts have made findings of developmental immaturity and other mitigating characteristics in cases involving 18-year-old defendants. For example, in *Pike v. Gross*, a Sixth Circuit judge concluded in a concurring opinion that "society's evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense," explaining how "empirical research has found 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.'" *Pike v. Gross*, 936 F.3d 372, 385 (6th Cir. 2019) (Stranch, J.,

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[16] This is the second time that the intermediate appellate court has thus ruled in this case. In 2015, a different panel of the appellate court similarly ruled that the defendant's youthfulness was relevant and must be taken into account as a mitigating factor in sentencing, thus rendering invalid the defendant's mandatory life sentence. *See People v. House*, 72 N.E.3d 357, 388-89 (Ill. App. Ct. 2015). The Illinois Supreme Court vacated that decision and directed the appellate court to consider the effect its ruling in *People v. Harris*, 120 N.E.3d 900 (Ill. 2018). *People v. House*, 111 N.E.3d 940 (Table) (Ill. 2018). In 2019, the appellate court did so, and concluded that *Harris* was distinguishable. *House*, 2019 WL 2718457. That ruling is currently on appeal. *People v. House*, No. 125124, 2020 WL 473514 (Table) (Ill. Jan. 29, 2020).

concurring) (alteration in original) (quoting Scott et al., *supra*, at 645). The judge further noted that "we already recognize 21 as the age of majority in a number of contexts," demonstrating our societal understanding that development continues beyond age 18. *Id. See also* Order at 10, *State v. Vicks* (Fl. Cir. Ct. Aug. 3, 2018) (No. F13-19313A)[17] (citing Dr. Steinberg's testimony and concluding that an 18-year-old defendant's age was a "mitigating fact that diminishes his moral culpability" for the crime); Under Advisement Ruling at 3, *State v. Beasley* (Ariz. Sup. Ct. July 10, 2018) (No. CR2012-008302-001)[18] (finding that Dr. Steinberg's research "makes it apparent that brain development continues throughout adolescence and likely reaches a 'plateau' when most individuals are approximately 22-23 years of age").

In short, when considering the latest research on adolescent development, courts around the country have concluded that age is a mitigating factor that counsels against the harshest sentences, even when a defendant is over age 18.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court affirm the ruling of the District Court.

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[17] Attached hereto as App. "B."

[18] Attached hereto as App. "C."

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Dated: February 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2020, I filed, and served by mail on anyone unable to accept electronic filing, the foregoing Brief of *Amicus Curiae* Juvenile Law Center and Notice of Appearance with the Clerk of the Court for the United States Court of Appeals for the Second Circuit via CM/ECF Filing System.

/s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: February 6, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29 and 32 and Local Rule 28.1.1 and 29.1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,825 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief was prepared using Microsoft Word Times New Roman font.

/s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: February 6, 2020

APPENDIX A:

STATE LAW RESTRICTIONS ON YOUNG ADULTS UNDER AGE 21

STATE LAW RESTRICTIONS ON YOUNG ADULTS UNDER AGE 21

Selected Examples of Driving Restrictions on Young Adults	
Alaska	ALASKA STAT. § 28.15.046(b) (school bus driver license)
Arizona	ARIZ. ADMIN. CODE § R17-7-301 (driver's license examiner)
Arkansas	ARK. CODE ANN. §§ 14-57-402; 14-57-404 (bus or taxicab driver's license) ARK. ADMIN. CODE 142.00.1-XIV(2)(F) (driver education instructor)
California	CAL. VEH. CODE § 12515(b) (driving vehicle engaged in interstate commerce or transportation of hazardous material) CAL. VEH. CODE §§ 11102.5(a)(3), 11102.6(a)(3) (driving school operator)
District of Columbia	D.C. MUN. REGS. tit. 18, § 1302 (operation of a school bus and transportation of hazardous materials, among others)
Florida	FLA. ADMIN. CODE r. 5J-20.033(3) (drive liquid petroleum commercial motor vehicle) FLA. ADMIN. CODE r. 15A-11.006(2)(a) (commercial driving school instructor)
Hawaii	HAW. CODE R. § 19-139-10 (driver education instructor)
Idaho	IDAHO CODE ANN. § 54-5406 (driving instructor license)
Indiana	IND. CODE § 20-27-8-1 (school bus driver)
Kansas	KAN. ADMIN. REGS. § 91-38-6 (school bus driver)

Kentucky	KY. REV. STAT. ANN. § 332.204 (teach at a driving school) 601 KY. ADMIN. REGS. 1:005 (transport hazardous materials in interstate commerce) 702 KY. ADMIN. REGS. 5:080 (school bus driver)
Louisiana	LA. ADMIN. CODE tit. 28, pt. CXIII, § 303 (school bus driver)
Maine	ME. STAT. ANN. tit. 29-A, § 1304(4-A)(E) (commercial driver license) ME. STAT. ANN. tit. 29-A § 1354 (driver's education instructor)
Maryland	MD. CODE ANN., TRANSP. § 16-817 (commercial driver's license)
Michigan	MICH. COMP. LAWS ANN. § 480.12d (transportation of hazardous materials)
Nebraska	NEB. ADMIN. CODE tit. 250, ch. 3, § 006 (driving instructor)
Nevada	NEV. REV. STAT. ANN. § 483.720 (driving instructor license)
North Carolina	N.C. GEN. STAT. ANN. § 20-37.13 (commercial driver's license)
North Dakota	N.D. CENT. CODE § 15.1-07-20 (school vehicle driver)
Ohio	OHIO REV. CODE ANN. § 4506.05 (commercial driver's license for interstate commerce)
Oklahoma	OKLA. ADMIN. CODE 595:40-1-4 (driving instructor)
Pennsylvania	53 PA. CONS. STAT. ANN. § 57B02 (taxi cab driver)

Rhode Island	R.I. GEN. LAWS § 31-10-5 (school bus driver)
Utah	UTAH CODE ANN. § 53-3-213 (drive a school bus or commercial motor vehicle, or transport hazardous materials)
Vermont	VT. ADMIN. CODE 22-1-2 (driver training)
Virginia	VA. CODE ANN. § 46.2-341.9 (commercial driver's license)
Washington	WASH. REV. CODE ANN. § 46.82.330 (driver training)
Wisconsin	WIS. STAT. § 343.06(3) (commercial driver license)
Motorcycle Helmet Requirements for Young Adults	
Arkansas	ARK. CODE ANN. § 27-20-104
Delaware	DEL. CODE ANN. tit. 21, § 4185
Florida	FLA. STAT. § 316.211
Kentucky	KY. REV. STAT. ANN. § 189.285
Michigan	MICH. COMP. LAWS § 257.658
Pennsylvania	75 PA. CONS. STAT. ANN. § 3525
Rhode Island	R.I. GEN. LAWS § 31-10.1-4
South Carolina	S.C. CODE ANN. § 56-5-3660
Texas	TEX. TRANSP. CODE ANN. § 661.003
Utah	UTAH CODE ANN. § 41-6a-1505

Explosives and Blasting Use Restrictions for Young Adults	
Alabama	ALA. CODE § 8-17-243
California	CAL. CODE REGS. tit. 8, § 5238
Colorado	7 COLO. CODE REGS. 1101-9.3-3
Connecticut	CONN. AGENCIES REGS. § 29-349-205
Delaware	DEL. CODE ANN. tit. 16 § 7107
Georgia	GA. COMP. R. & REGS. 120-3-10.05
Hawaii	HAW. CODE R. § 12-58-1
Idaho	IDAHO ADMIN. CODE r. 18.08.01 (adopting the International Fire Code (IFC), which sets minimum age for handling explosives at twenty-one. IFC § 5601.4)
Illinois	ILL. ADMIN. CODE tit. 62, § 200.98
Indiana	675 IND. ADMIN. CODE 26-2-2
Iowa	IOWA ADMIN. CODE r. 661-235.5(5)
Kansas	KAN. ADMIN. REGS. 22-4-5
Kentucky	KY. REV. STAT. ANN. § 351.315
Maryland	MD. CODE REGS. 26.20.22.08
Massachusetts	527 MASS. CODE REGS. 1.05
Missouri	MO. REV. STAT. § 319.306
Nebraska	NEB. REV. STAT. § 28-1229
New Hampshire	N.H. CODE R. Saf-C 1604.03
New Jersey	N.J. ADMIN. CODE § 12:190-3.6
New York	N.Y. COMP. CODES R. & REGS. tit. 12, § 61-4.4
Oregon	OR. REV. STAT. § 480.225
Pennsylvania	25 PA. CONS. STAT. § 210.14
Rhode Island	R.I. GEN. LAWS § 23-28.28-5

Tennessee	TENN. CODE ANN. § 68-105-106(c)
Texas	16 TEX. ADMIN. CODE § 12.702
Utah	UTAH ADMIN. CODE r. 645-105-300
Virginia	13 VA. ADMIN. CODE. § 5-51-150 (adopting IFC § 5601.4)
Washington	WASH. REV. CODE § 70.74.360
West Virginia	W. VA. CODE. R. § 199-1-4
Wisconsin	WIS. ADMIN. CODE SPS § 305.20(2)
Fireworks Restrictions for Young Adults	
Alabama	ALA. CODE § 8-17-231
Alaska	ALASKA ADMIN. CODE tit. 13, § 50.025 (adopting the IFC, which sets the minimum age for operating fireworks and pyrotechnic displays at twenty-one. IFC § 5601.4)
Arizona	ARIZ. ADMIN. CODE §§ R4-36-201, -310 (adopting IFC § 5601.4)
Arkansas	ARK. CODE ANN. § 20-22-707
California	CAL. HEALTH & SAFETY CODE § 12517
Colorado	8 COLO. CODE REGS. 1507-101:3 (adopting National Fire Protection Association ("NFPA") 1123, Code for Fireworks Display, which sets the minimum age for operating fireworks at twenty-one)
Delaware	1 DEL. ADMIN. CODE 704-2-5.0 (adopting NFPA 1123)
Florida	FLA. STAT. § 791.012 (adopting NFPA 1123)
Georgia	GA. COMP. R. & REGS. 120-3-22-.07 (adopting NFPA 1123)

Hawaii	Haw. Code R. § 12-58-1
Idaho	Idaho Admin. Code r. 18.01.50.041 (adopting IFC § 5601.4)
Illinois	225 Ill. Comp. Stat. § 227/35
Indiana	675 Ind. Admin. Code 22-2.2-26
Kansas	Kan. Stat. Ann. §31-503
Louisiana	La. Rev. Stat. Ann. § 51:655
Maine	Me. Rev. Stat. Ann. tit. 8, § 231
Maryland	Md. Code Regs. 29.06.01.09 (adopting NFPA 1123)
Massachusetts	527 Mass. Code Regs. 1.05 (adopting NFPA 1123)
Michigan	Mich. Comp. Laws § 28.466 (adopting NFPA 1123)
Minnesota	Minn. Stat. § 624.22
Mississippi	Miss. Code Ann. § 45-13-11 (adopting NFPA 1123)
Missouri	Mo. Code Regs. Ann. tit. 11, § 40-3.010
Nevada	Nev. Admin. Code § 477.636
New Hampshire	N.H. Rev. Stat. Ann. § 160-B:6
New Jersey	N.J. Admin. Code 5:70-3.2 (adopting IFC § 5601.4)
New York	N.Y. Penal Law § 405.10
North Carolina	N.C. Gen. Stat. § 58-82A-10
North Dakota	N.D. Admin. Code 10-07-01-04 (adopting NFPA 1123)
Ohio	Ohio Rev. Code Ann. § 3743.50
Oklahoma	Okla. Stat. tit. 68, § 1636
Oregon	Or. Admin. R. 837-012-0780

Pennsylvania	72 PA. CONS. STAT. § 9402
Rhode Island	450 R.I. CODE R. 00-00-7.1
South Carolina	S.C. CODE ANN. REGS. 71-8300.2 (adopting NFPA 1123)
South Dakota	S.D. CODIFIED LAWS § 34-37-13 (adopting NFPA 1123)
Tennessee	TENN. CODE ANN. § 68-104-208
Texas	TEX. OCC. CODE ANN. § 2154.101
Utah	UTAH ADMIN. CODE R710-2-8
Virginia	13 VA. ADMIN. CODE § 5-51-150 (adopting IFC 5601.4)
Washington	WASH. ADMIN. CODE § 212-17-220
West Virginia	W. VA. CODE R. § 103-4-4 (adopting NFPA 1123)

APPENDIX B:

Order at 10, State v. Vicks (Fl. Cir. Ct. Aug. 3, 2018)
(No. F13-19313A)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY

CASE NO.: F13-19313A
SECTION: 15

THE STATE OF FLORIDA,

Plaintiff,

v.

QUINTIN VICKS,

Defendant.
_____________________________/

ORDER DENYING DEFENDANT'S
MOTION FOR AN INDIVIDUALIZED SENTENCING HEARING

THIS CAUSE came before the Court on Defendant, Quintin Vicks' ("Vicks"), Motion for an Individualized Sentencing Hearing ("Motion"). The Court has reviewed the Motion, the State of Florida's ("State") Response, held an evidentiary hearing on the Motion ("Hearing"), heard argument of Counsel, and the Court is fully advised in the premises. The Motion is **DENIED**.

I. VICKS' TRIAL AND CONVICTION.

Vicks was charged with first-degree murder, armed robbery, and conspiracy to commit armed robbery. Vicks was born on May 25, 1995, and the offense occurred on August 17, 2013. He was eighteen years and eleven weeks old at the time of the offense. Had he been born a mere three months earlier, there is no question that the Eighth Amendment would require this Court to hold an individualized sentencing hearing in this case. *See Miller v. Alabama*, 567 U.S. 460 (2012).[1]

[1] Moreover, Vicks would be entitled to judicial review of his sentence after 25 years. *See* § 921.1402, Fla. Stat. (2017).

Vicks proceeded to trial in June of 2017. The evidence against him included his statement to the police, where he confessed to being the getaway driver to the robbery; the testimony of a codefendant, Gregory Lewis, who alleged that Vicks was one of the shooters; some of the victim's property which was found on Vicks' person; and a pair of shoes worn by Vicks that tested positive for the victim's blood. Vicks did not test positive for gunshot residue.

The jury convicted Vicks of all counts as charged. The verdict form included special interrogatories regarding the use of a firearm during the crime. For both the murder and robbery conviction, the jury specifically found that Vicks did *not* possess a firearm, did *not* discharge a firearm, and did *not* personally cause death or great bodily harm. At the State's request, and over defense objection, the jury was not given an interrogatory verdict form requiring it to find whether it was convicting Vicks of premeditated murder, felony murder, or under both theories.

II. VICKS' MOTION AND THE HEARING ON THE MOTION.

Because Vicks was convicted of first-degree murder, he faces an automatic sentence of life in prison without parole. §§ 775.082(1)(a), 782.04(1)(a), Fla. Stat. (2017). Prior to sentencing, Vicks filed the instant Motion objecting to the mandatory nature of this sentence. The Motion asserts that the imposition of an automatic life sentence in this case would constitute disproportionate punishment in violation of the Eighth Amendment. *See* U.S. Const. amend VIII. Vicks argues that his culpability was twice-diminished, given that he was only 18 years old at the time of the offense, and he did not kill, intend to kill, or foresee that life would be taken.[2] He concludes that this significant mitigation entitles him to an individualized sentencing hearing

[2] In murder cases where the defendant is under 18 years of age at the time of the charged crime, it is this Court's practice to give jurors an interrogatory verdict form asking whether the defendant killed, intended to kill, or attempted to kill. *See* § 775.082(b)1, Fla. Stat. (2017). The Court did not do so in this case because Vicks was not under 18 at the time of the crime, and neither party asked it to give such a verdict form.

where the Court would have the discretion to impose a sentence other than life in prison without parole.

The Court held the Hearing on the Motion on April 25, 2018. The defense presented the testimony of Dr. Laurence Steinberg, a professor of psychology.[3] Dr. Steinberg has published approximately 400 scientific papers, authored seventeen books, and has received awards from the American Psychological Association ("APA"), the Society for Research on Adolescence, and the Society for Adolescent Medicine. He was also the legal scientific consultant for the amicus briefs submitted by the APA in *Roper v. Simmons*, 543 U.S. 551, 569 (2005), *Graham v. Florida*, 560 U.S. 48, 68 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012).

Dr. Steinberg testified persuasively, authoritatively, and without contradiction, that adolescence is the state of human development between childhood and adulthood. He defined this period as beginning at the age of 10 and ending at 21. This period has three substages: early adolescence (10-13); middle adolescence (14 -17); and late adolescence (18-21). Dr. Steinberg testified that the human brain finishes development by the age of 22 or 23. Perhaps most importantly, he explained that recent advances in brain imaging technology help show the major changes that the adolescent brain undergoes, which were previously undetectable by merely examining the external structure of the adolescent brain.

The first studies on adolescent brain development did not happen until 2000. Dr. Steinberg testified that the science regarding adolescent brain development has significantly progressed since *Roper*. In the last thirteen years, thousands of articles on adolescent brain development

[3] Vicks also introduced into evidence the scholarly articles cited in its Motion. These articles were consistent with Dr. Steinberg's testimony regarding the ongoing brain development that occurs in late adolescence.

have been published. Although the early research focused on brain development before the age of 18, studies in the last ten years have focused on brain development after that age.

Dr. Steinberg opined that a person who was 18 years and 11 weeks old would be closer to a 17-year-old rather than a 21-year-old in terms of brain development, impulse control, and susceptibility to peer pressure. He emphasized that there is no meaningful difference between a 17-year-old and an 18-year-old in terms of adolescent brain development. Dr. Steinberg testified that the APA amicus briefs and his opinions in *Roper*, *Graham*, and *Miller* would not have been any different had those defendants been 18.

Dr. Steinberg testified that there are two important brain systems which undergo changes during adolescence. The first is the cognitive control system, located in the prefrontal cortex, which governs logical reasoning and higher-order thinking, and helps a person self-regulate their behavior. The other system that changes during adolescence is the emotional reward system of the brain, responsible for processing emotions, social information, and experiences related to reward and punishment. The dual systems theory is based on the observation that these two separate brain systems mature at different rates. Dr. Steinberg testified that the system governing emotions develops sooner and is easily aroused even into late adolescence. The cognitive control system develops more slowly, resulting in a period during adolescence where a teenager's emotions are easily triggered while his or her self-regulation systems remain immature. This "maturational imbalance" is at its most intense during middle adolescence into the early part of late adolescence, the periods in which people are most likely to engage in reckless behavior.

Dr. Steinberg testified that this imbalance helps explain why otherwise smart teenagers and young adults often do "stupid and reckless things." Most people are intellectually mature by the

age of 17, and do not tend to get any smarter in terms of cognitive ability after they reach this point. On the other hand, "there is tremendous growth in emotional maturity between ages 19 and 22 to 25," which explains how teenagers capable of logical reasoning can nevertheless engage in immature conduct. Dr. Steinberg noted that most reckless behavior, including criminal activity, peaks in the late adolescent years somewhere between 18 and 20, and thereafter declines.

The fact that the social brain develops in adolescents before the cognitive control system renders teenagers and young adults "super-sensitive to what is going on in their social world." Dr. Steinberg testified that the increased activity in the adolescent social brain "helps explain why [young adults are] more susceptible to peer pressure," due to them placing great importance on what other people think of them. Dr. Steinberg cited controlled experiments which show that adolescents are more prone to risky behavior when their actions are observed by their peers or other people, which is not the case with fully mature adults.

Dr. Steinberg concluded that late adolescents, like juveniles, are less able to control their behavior and therefore less culpable and less susceptible to deterrence compared to adults. He testified that deterrence requires an appreciation of future consequences, yet the cognitive control system that helps a person think through consequences continues to develop into the early twenties. Regarding the potential for rehabilitation, Dr. Steinberg stated that the adolescent brain is very malleable and able to change from experience, making adolescents better candidates for rehabilitation and change relative to fully mature adults.

The State presented no testimony or scholarly research to rebut Dr. Steinberg's testimony. The State conceded at the hearing that Dr. Steinberg was "well regarded in the scientific community." It further conceded it was not contesting his scientific work or opinions. The State's

opposition to this Court conducting an individualized sentencing hearing for Vicks boils down to the fact that he was 18 years old (by eleven weeks) at the time of the offense – no more, no less.

III. FACTUAL AND LEGAL CONCLUSIONS.

"The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010). The right to be free from excessive punishment "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (citations omitted). In determining whether a punishment is excessive or disproportionate, the judiciary retains the ultimate responsibility of construing the Eighth Amendment. *Graham*, 560 U.S. at 67.

The question in this case is whether imposing an automatic life without parole sentence on an 18-year-old convicted of murder, who did not kill, intend to kill, or attempt to kill the victim, would constitute disproportionate punishment. For the reasons that follow, this Court finds that Vicks has diminished moral culpability relative to a fully mature adult offender who either killed, intended to kill, or acted with reckless disregard for human life and that a mandatory life sentence might amount to excessive punishment, which will likely someday require an individualized sentencing hearing. However, binding precedent prohibits this Court from today providing the individualized sentencing hearing Vicks seeks.

A. AN 18-YEAR-OLD OFFENDER HAS THE SAME RECKLESSNESS, LACK OF MATURITY, VULNERABILITY TO PEER PRESSURE, AND CAPACITY FOR REFORM AS A 17-YEAR-OLD OFFENDER.

In a trilogy of decisions, the United States Supreme Court has ruled that juveniles are "constitutionally different from adults for sentencing purposes." *Miller*, 567 U.S. at 471. Because juveniles have "lessened culpability," they are "less deserving of the most severe punishments." *Graham*, 560 U.S. at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

Their reduced culpability stems from the fact that they "have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Id.* (quoting *Roper*, 543 U.S. at 569-70). These characteristics make juveniles less susceptible to deterrence and less culpable for their actions, undermining the penological justifications for the most severe punishments, such as the death penalty or life in prison without parole.

These decisions do not rest "only on common sense—on what 'any parent knows'—but on science and social science as well." *Miller*, 567 U.S. at 471. "[A]dolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper*, 543 U.S at 569 (quoting Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)). *Roper* further noted that "[o]nly a relatively small proportion of adolescents'" who engage in crime "'develop entrenched patterns of problem behavior.'" *Id.* at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

Graham, in turn, emphasized that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham*, 560 U.S. 48 at 68. Citing to the APA's amicus brief, which Dr. Steinberg helped prepare, *Graham* relied on the fact that the "parts of the brain involved in behavior control continue to mature through late adolescence," giving rise to a greater possibility of rehabilitation later in life. *Id.*

Although only two years elapsed between *Graham* and *Miller*, the scientific evidence presented to the Court in *Miller* "indicates that the science and social science supporting *Roper's*

and *Graham's* conclusions have become even stronger." *Miller*, 567 U.S. at 472, n.5. Again quoting from the APA amicus brief, *Miller* recognized that "an ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions," including research establishing that "adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *Id.*

In the same way that scientific developments between *Graham* and *Miller* reaffirmed the Supreme Court's conclusions regarding juveniles, further developments since *Miller* establish the categorical diminished culpability of adolescents like Vicks. Dr. Steinberg's testimony, summarized above, establishes that an 18-year-old in the midst of ongoing brain development exhibits a lack of maturity; makes impetuous and ill-considered decisions in stressful situations; is more susceptible to negative influences and outside pressures, including peer pressure; and does not have a fully formed character the way mature adults do. These qualities mirror those exhibited by juveniles and undermine the penological rationales for the harshest punishments. *See Roper*, 543 U.S. at 569–70; *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 471–72.

Dr. Steinberg specifically testified that there is no meaningful scientific difference between a 17-year-old and an 18-year-old in terms of brain development. He opined that an 18-year-old was comparable to a juvenile of terms of brain development, impulse control, and susceptibility to peer pressure. Dr. Steinberg noted that his opinions and the APA amicus briefs in *Roper*, *Graham*, and *Miller* would not have been materially different had those defendants been 18 rather than 17. This unrebutted testimony supports Vicks' contention that, as a categorical matter, a late adolescent has diminished culpability relative to a fully mature adult offender.

Dr. Steinberg's testimony is consistent with the scientific literature regarding adolescent brain development and the impulsivity of 18-year-olds. Over the last few years, "developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of maturity." Scott, Bonnie, & Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (2016). Human brain development does not abruptly cease at 18; rather, "researchers have found that eighteen to twenty-one-year-old adults are more like younger adolescents than older adults in their impulsivity under conditions of emotional arousal." *Id.* This impulsivity "likely influence[s] their criminal conduct," since "development of brain systems that regulate impulse control is more protracted" than development of the brain's "reward pathways." *Id.* at 644, 647; *see also* Smith, Chein, & Steinberg, *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known*, Dev. Psych., Vol. 50 No. 5, 1564-1568 (2014) (discussing results of controlled experiment showing that adolescents, unlike adults, are prone to higher levels of risky behavior when peers observe their actions). Critically, these developmental changes, "which continue into the early twenties" and are responsible for "impetuous, short-sighted decisions," are "driven by processes of brain maturation that are not under the control of young people." *Steinberg*, 85 Fordham L. Rev. at 647.

Much of what explains the impulsivity of young adults is the incomplete development of the portions of their brain that regulate emotional responses. Connectivity between the "prefrontal cortex and brain regions that process rewards and respond to emotional and social stimuli" is "not complete until the mid-twenties, which is why aspects of social and emotional functioning, such as impulse control and resistance to peer influence, are slower to mature." *Id.* at 651-52. These

neuroscientific studies show that while young adults often exhibit mature "cold cognition" (i.e. decision-making under ideal conditions), they remain immature when operating under "hot cognition" (*i.e.*, decision making in emotional or stressful situations). *See id.*

The Court concludes that Dr. Steinberg's testimony, and the science underlying it, is credible and persuasive. The Court finds, based on the testimony and research regarding adolescent brain development and behavior, that 18-year-olds as a class are more impulsive in their decision-making and less cognizant of tangible consequences when compared to a fully mature adult. These differences are the product of ongoing brain development, including maturation of the prefrontal cortex and other brain systems which regulation impulse control. Although a young adult may at times be similar to a fully-grown adult in controlled environments, the Court accepts Dr. Steinberg's opinion that stressful or emotional situations bring out impulsive decision making in young adults akin to the impetuosity described by *Roper*, *Graham*, and *Miller*.

In sum, the fact that Vicks was a mere eleven weeks past his eighteenth birthday does not change the fact that, as a young adult experiencing ongoing brain development, he was more susceptible to peer pressure, more impulsive, and less able to appreciate the consequences of his actions. Accordingly, legitimate penological goals such as deterrence and retribution have lessened force when applied to offenders such as him. Therefore, Court agrees that Vicks' young age is a mitigating fact that diminishes his moral culpability for this crime.

B. A DEFENDANT WHO DOES NOT KILL, INTEND TO KILL, OR FORESEE THAT LIFE WILL BE TAKEN IS LESS CULPABLE THAN A DEFENDANT WHO DOES.

If this Court were writing on a clean slate, the transient nature of Vicks' 18-year-old brain would – alone – justify an individualized sentencing hearing in this case. *See Cruz v. United*

States, 2018 WL 1541898 (D. Conn., Mar. 29, 2018) (applying *Miller* to an 18-year-old relying in large part on Dr. Steinberg's testimony and research). But this is not an issue of first impression in Florida, and the slate is *not* clean. *See Pinestraw v. State*, 238 So. 3d 918, 921 (Fla. 1st DCA 2018) ("Appellant was 19 years old at the time of the commission of the offenses, he was not a juvenile; thus, Miller and its related progeny [do] not apply"); *Janvier v. State*, 123 So. 3d 647, 648 (Fla. 4th DCA 2013) ("To the extent Janvier asks this Court to expand these holdings to other 'youthful offenders' under the age of 21, this Court is bound by the pronouncements of the Supreme Court of the United States."); *Romero v. State*, 105 So. 3d 550, 553 (Fla. 1st DCA) ("Not a single court in this country has extended *Graham* to an adult offender. On the contrary, several courts have reaffirmed that *Graham* is inapplicable to adult offenders."), *rev. denied*, 131 So. 3d 789 (Fla. 2013); *Jean-Michael v. State*, 96 So. 3d 1043, 1045 (Fla. 4th DCA 2012) (declining to extend *Graham* to a 19-year-old). In the absence of a contrary opinion from the Third District Court of Appeal, this Court is bound by these decisions.

> This Court has stated that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *Stanfill v. State,* 384 So. 2d 141, 143 (Fla. 1980). Thus, in the absence of interdistrict district conflict, district court decisions bind all Florida trial courts. *Weiman v. McHaffie,* 470 So. 2d 682, 684 (Fla. 1985).

Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992).

Moreover, in the context of capital punishment, the Florida Supreme Court has held that *Roper* can only be applied to those under the age of 18 "unless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended." *Branch v. State*, 236 So. 3d 981, 987 (Fla. 2018); *see also Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) ("*Roper* only prohibits the execution of those defendants whose *chronological* age is below

eighteen."). It logically follows that Florida courts cannot extend *Miller* to 18-year-olds absent further action by the United States Supreme Court.

This Court acknowledges that Eighth Amendment jurisprudence may eventually agree with Vicks' argument that he is entitled to an individualized sentencing hearing. The United States Supreme Court has long recognized that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment…" *Graham*, 560 U.S. at 69. Consequently, a defendant convicted of felony murder "who neither took life, attempted to take life, nor intended to take life" is categorically ineligible for the death penalty. *Enmund v. Florida*, 458 U.S. 782, 787 (1982). Absent proof that the defendant intended that "lethal force [would] be employed" or "participate[d] in a plot or scheme to murder," executing a defendant for accomplice liability to a felony murder is disproportionate and excessive punishment. *Id.* at 795, 797.

In reaching its holding, *Enmund* found that capital punishment does not advance any legitimate penological goal when applied to a defendant who lacked "any intention of participating in or facilitating a murder." *Id.* at 798. Execution in such circumstances did not serve as a deterrent, "for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not 'enter into the cold calculus that precedes the decision to act.'" *Id.* at 799 (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). The Court likewise found that retribution was not a justification for a capital sentence, since "[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Id.* at 801. *Enmund* noted that "American criminal law has long considered a

defendant's intention-and therefore his moral guilt-to be critical to "the degree of [his] criminal culpability," and extreme criminal penalties can be "unconstitutionally excessive in the absence of intentional wrongdoing." *Id.* at 800.

Enmund was clarified by *Tison v. Arizona*, 481 U.S. 137, 151 (1987), which held that a defendant who did not kill or intend to kill can nevertheless be eligible for the death penalty, provided his or her "degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life." It is now well-settled that in a capital case, the jury must be instructed "before its penalty phase deliberations that in order to recommend a sentence of death, the jury must make findings satisfying *Enmund* and ... *Tison*." *Perez v. State*, 919 So. 2d 347, 366 (Fla. 2005) (internal quotations and citations omitted). As a prerequisite to such punishment, "the finding required by *Enmund* and *Tison* must be established beyond a reasonable doubt." *Id.* at 369.

In this case, the jury found that Vicks did not kill the victim. In the firearm interrogatories for both the homicide and robbery charges, the jury specifically found that Vicks did not possess a firearm or discharge a firearm during the commission of these offenses. This finding not only precludes imposition of any 10-20-life minimum mandatory sentence, but further precludes this Court from finding for purposes of sentencing that Vicks was the shooter. *See, e.g., McCloud v. State*, 208 So. 3d 668, 688 (Fla. 2016) (where "the jury explicitly determined by special interrogatory that McCloud was not the shooter," the court was required to treat him as the non-triggerman for purposes of proportionality analysis).

There is likewise no jury finding that Vicks had the intent to kill. The first-degree murder charge alleged both premeditated murder and felony murder. The defense requested that the jury be given a special interrogatory designating whether it had found felony murder or premeditated

murder or both as a basis for its verdict of first-degree murder, but such an instruction was not given at the State's behest. And, frankly, against this Court's better judgment.[4]

The absence of such an interrogatory makes it impossible to determine whether the jury convicted Vicks under a premeditation theory or a felony murder theory, and the intent to kill is not required for conviction of felony murder. *See Gurganus v. State*, 451 So. 2d 817, 822 (Fla. 1984) ("In order to prove first-degree felony murder the state need not prove premeditation or a specific intent to kill but must prove that the accused entertained the mental element required to convict on the underlying felony."); *Adams v. State*, 341 So. 2d 765, 767-68 (Fla. 1976). It is therefore impossible on this record to say beyond a reasonable doubt that Vicks acted with the intent to kill. It is certainly impossible to say that the jury made such a finding.

The final question in assessing *Enmund/Tison* culpability is whether Vicks was a major participant in the offense and acted with reckless disregard for life or foresight that death would likely occur. The facts at trial cannot support a finding, beyond a reasonable doubt, that Vicks acted with this culpable mindset. As the Florida Supreme Court has stated,

> Mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." *Tison*, 481 U.S. at 151 … Courts may consider a defendant's "major participation" in a crime as a factor in determining whether the culpable state of mind existed. However,

[4] Concerns about the lack of special verdict forms when the State proceeds on both premeditated and felony murder theories are not new. *See Castro v. State*, 472 So. 2d 796, 797 (Fla. 3d DCA 1985) ("we agree that the better practice would include submission of a special verdict form permitting a jury to disclose its grounds for finding a defendant guilty of first degree murder"). *Matter of Use by Trial Courts of Standard Jury Instructions*, 431 So. 2d 594, 597-98 (Fla. 1981) ("[W]e recognize there could be improvement in the manner in which a case is presented to the jury on alternate theories of felony murder and premeditated murder. One possible solution would be the use of special verdict forms for such cases . . ..").

> such participation alone may not be enough to establish the requisite culpable state of mind. *Id.*, 481 U.S. at 158 n.12.

Jackson v. State, 575 So. 2d 181, 191 (Fla. 1991).

Jackson found insufficient evidence of a culpable mindset rising to the level of reckless indifference to life where it was unclear which codefendant fired the gun, and there was no "evidence that Jackson carried a weapon or intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery." *Id.* at 192. The court juxtaposed the case with situations where the defendant was armed and discharged a weapon, or watched his codefendant beat the victim to death in a "long, drawn-out episode." *Id.* (citing *DuBoise v. State*, 520 So. 2d 260 (Fla. 1988), and *Diaz v. State*, 513 So. 2d 1045 (Fla. 1987)). The Florida Supreme Court held that even though Jackson was a "major participant in the crime," the absence of proof of a reckless indifference to taking life precluded imposition of the death penalty. *Id.*

In this case, the jury was presented with two different theories of Vicks' participation in the offense. In his statement to the police, Vicks asserted that he did not mean for the homicide to happen and lamented that it was not the outcome he expected. He told the police he did not have a firearm and was just the getaway driver to the robbery.[5]

In sum, the record is clear that Vicks voluntarily participated in an armed robbery that resulted in a death. Standing alone, that fact is insufficient to establish beyond a reasonable doubt that Vicks "subjectively appreciated that [his] acts were likely to result in the taking of innocent life." *Tison*, 481 U.S. at 152. Even if it could be said that Vicks was a major participant in the offense, the evidence "does not show beyond every reasonable doubt that his

[5] Lewis testified that Vicks was one of the shooters. However, the jury's finding that Vicks did not cause death or great bodily harm, discharge a firearm, or even possess a firearm, necessarily means the jury rejected Lewis' testimony regarding how the offense unfolded and Vicks' role in it.

state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder." *See Jackson*, 575 So. 2d at 192. Had the State sought the death penalty, this record would not support the culpability finding required by *Enmund*/*Tison*. To give a defendant the ultimate punishment on these facts "would qualify every defendant convicted of felony murder for the ultimate penalty. That would defeat the cautious admonition of *Enmund* and *Tison*, that the constitution requires proof of culpability great enough to render" the defendant eligible for the most severe punishment. *See id.* at 193. The Court accordingly finds that on this record, Vicks is categorically less culpable than a defendant convicted of first-degree murder who killed, intended to kill, or otherwise acted with a culpable and reckless disregard for human life.

IV. A FINAL OBSERVATION.

As this Order should make clear, the Court disagrees with the result but feels bound to render it. "As someone — probably either St. Thomas More or George Costanza — must have said, the law is the law. Notwithstanding the distasteful consequences of applying it in this case, it must be served." *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257, 262 (Fla. 3rd DCA 2012) (Schwartz, J. concurring). It would be improper for this Court to get ahead of jurisprudence in this area and render a decision based on how the Court thinks the United States Supreme Court will one day rule.

None of the foregoing discussion should be taken to mean that this Court would not impose a sentence of life in prison after an individualized sentencing hearing, however. *See Miller*, at 480 ("[W]e do not foreclose a sentencer's ability to [impose a life sentence] in homicide cases…"). After all, at the time of the offense, Vicks was on juvenile probation for armed robbery and the jury convicted him of first degree murder. It simply means that the Court

believes Eighth Amendment jurisprudence will someday develop, as it should, to require this Court to consider the mitigation in this case, and whether that mitigation "counsel[s] against irrevocably sentencing [Vicks] to a lifetime in prison." *See id.* Were this Court not bound by precedent, it would hold an individualized sentencing hearing to consider all sentencing factors, including Vick's youth and immaturity at the time of the offense, the extent of his participation in the crime, and the aggravating factors which would justify imposition of a life sentence.

DONE and ORDERED in Miami-Dade County, Florida, this 3rd day of August, 2018.

MIGUEL M. DE LA O
Circuit Judge

APPENDIX C:

Under Advisement Ruling at 3, State v. Beasley
(Ariz. Sup. Ct. July 10, 2018) (No. CR2012-008302-001)

Chris DeRose, Clerk of Court
*** Electronically Filed ***
07/10/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-008302-001 DT 07/05/2018

HONORABLE JAY RYAN ADLEMAN

CLERK OF THE COURT
A. Schmidt
Deputy

STATE OF ARIZONA

v.

SHAVONTE DESHAWN BEASLEY (001)

KIRSTEN VALENZUELA

MICHAEL S REEVES
PATRICIA A HUBBARD

CAPITAL CASE MANAGER

MINUTE ENTRY

The Court has reviewed and considered the Defendant's Motion to Preclude the Death Penalty Based on Age, the State's response, and the Defendant's reply.

The Court has further considered the evidence, testimony, and legal arguments presented at the time of the hearing on June 29, 2018. The Court took the matter under advisement and promised to issue a ruling in due course. This is that ruling.[1]

[1] The Defendant's motion is procedurally flawed. The motion necessarily argues that Arizona's capital sentencing scheme, set forth in A.R.S. § 13-751(A)(1) *et seq.,* is unconstitutional as applied to him. In spite of this argument, the Defendant's motion fails to provide the prerequisite statutory notice for all potentially interested state actors. ***See*** A.R.S. § 12-1841(A)(requiring notice of any claims of unconstitutionality to be served on the attorney general, speaker of the house, and president of the senate). In spite of this error, the Court will rule on the merits of the motion.

I. LEGAL ANALYSIS

As the parties are well aware, the Defendant is charged – among other things – with First Degree Murder in the shooting death of Brandon Gongora on May 9, 2011. At the time of the shooting incident, the Defendant was 18 years, 9 months old.[2]

The U.S. Supreme Court plainly established in ***Roper v. Simmons,*** 543 U.S. 551 (2005), that the execution of individuals under 18 years of age at the time of their capital offenses is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. ***Id.***; ***see also Atkins v. Virginia,*** 536 U.S. 304 (2002)(extending similar protections to mentally disabled offenders).

The Defendant's motion argues that the Eighth Amendment analysis from the ***Roper*** decision should be extended to protect offenders between 18-21 years of age. In making this argument, the Defendant largely argues that: **(1)** evolving standards of decency and national sentencing trends would support the abolition of the death penalty for offenders within that age range; and **(2)** the neuroscience considered in ***Roper*** should be applied to this classification of offenders.[3]

The Defendant further cites various criminological studies, state-by-state sentencing statistics, journal publications, newspaper articles, as well as an ABA committee resolution urging jurisdictions to prohibit capital punishment in these cases. The Defendant asserts that this sort of evidence is indicative of evolving standards in our jurisprudence.

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[2] The Defendant's date of birth is August 13, 1992.

[3] The Defendant further argues that – while ***Roper*** abolished the death penalty for offenders under the age of 18 – the ***Roper*** court never determined whether it was *per se* constitutional to execute offenders who were 18 and older. ***Id.*** (***see*** Defendant's motion; page 14, at FN 5). While ***Roper*** never addressed that issue, it is quite clear that the U.S. Supreme Court has plainly permitted the imposition of the death penalty in those cases for quite some time. ***See, e.g., Gregg v. Georgia,*** 428 U.S. 153, 168-69 (1976)(finding that capital punishment does not constitute a *per se* violation of the Eighth and Fourteenth Amendments).

Additionally, the Defendant offered expert testimony from Dr. Laurence Steinberg. He is a developmental psychologist and professor at Temple University. Among his achievements, he was part of a collaborative effort in drafting an *amicus* brief for the U.S. Supreme Court for the ***Roper*** case. In short, his testimony makes it apparent that brain development continues throughout adolescence and likely reaches a "plateau" when most individuals are approximately 22-23 years of age. Dr. Steinberg further noted that adolescents generally engage in riskier behaviors, have less mature self-regulation abilities, and can be easily motivated by emotion and perceived rewards. (Steinberg, Laurence; ***A Social Neuroscience Perspective on Adolescent Risk-Taking*** (National Institute of Health, March 2008)).

For the purpose of this ruling, the Court finds that the information provided by Dr. Steinberg is essentially undisputed. In point of fact, this research into an ongoing field of study is worthy of serious consideration by those who implement a wide range of policies affecting adolescents.

Although the Defendant's argument certainly introduces a worthwhile and compelling discussion regarding the intersection of social policy and neuroscience, this Court lacks the necessary *legal* authority to find – as a matter of law – that Arizona's capital sentencing scheme violates our constitutional protections against "cruel and unusual" punishments. ***See generally*** U.S. Const. Amend. VIII; Ariz. Const. Art. 2 § 15.[4]

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[4] Both parties offer examples of state and federal age restrictions pertaining to the regulation of any number of things, including but not limited to: alcohol, marijuana, handguns, credit cards, driver's licenses, education, military service, etc. This illustration – while interesting – merely delineates the *social policy* decisions that regulate various aspects of our lives. These social policy determinations do not amount to any sort of constitutional directive. Conversely, the United States Constitution *does* contain a directive that expressly impacts our younger population, *i.e.,* permitting citizens 18 years of age and older to vote in all elections. ***See*** U.S. Const. Amend. XXVI.

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Quite simply, the U.S. Supreme Court drew a clear line prohibiting capital punishment for offenders under 18 years of age. ***See Roper, supra.*** Arizona's legislature has chosen to follow – and not to extend – that clear line. ***See*** A.R.S. § 13-751(A)(1). This Court lacks the necessary legal authority to extend ***Roper*** by countermanding the clear expression of our elected representatives.[5]

Finally, it is worth noting that Arizona's current capital sentencing scheme has survived *all* other forms of attacks under the Eighth Amendment. ***See, e.g., State v. Carlson,*** 237 Ariz. 381, 394-95, 351 P.3d 1079, 1092-93 (2015); ***State v. Rose,*** 231 Ariz. 500, 514-15, 297 P.3d 906, 920-21 (2013); ***State v. Hidalgo,*** 241 Ariz. 543, 549-51, 390 P.3d 783, 789-91 (2017)(finding that Arizona's capital sentencing scheme "genuinely narrows" the class of persons eligible for the death penalty); ***State v. Ovante,*** 231 Ariz. 180, 185, 291 P.3d 974, 979 (2013)(discretion afforded to prosecutors under Arizona's capital sentencing scheme does not violate the Eighth Amendment).[6]

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[5] In his dissent in ***Roper***, Justice Scalia cautioned that the Courts should be reticent to act as an arbiter of moral consensus. While this view might not have carried the day in ***Roper***, his reasoning undoubtedly set forth a proper understanding of our separation of powers:

> The reason for insistence on legislative primacy is obvious and fundamental: "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." ***Gregg v. Georgia,*** 428 U.S. 153, 175-76 (1976)(citations omitted). For a similar reason we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries: "maintain a link between contemporary community values and the penal system" that this Court cannot claim for itself. ***Id.*** at 181 (quoting ***Witherspoon v. Illinois,*** 391 U.S. 510, 519, n.15 (1968)).
>
> ***Roper v. Simmons,*** 543 U.S. 551, 616 (2005)(Scalia, J., dissenting).

[6] Whether it is in this case or another one, this issue is clearly destined for higher ground.

II. CONCLUSION

Given all of the above considerations, this Court finds that Arizona's capital sentencing scheme – as applied to this Defendant – is constitutionally sound within the framework of the United States and Arizona Constitutions.[7]

For all of these reasons,

IT IS ORDERED DENYING the Defendant's motion in its entirety.

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[7] Arizona courts have interpreted this state's cruel and unusual punishment provision consistently with the related provision in the federal constitution. ***See State v. Davis,*** 206 Ariz. 377, 380-81, 79 P.3d 64, 67-68 (2003); ***State v. McPherson,*** 228 Ariz. 557, 563, 269 P.3d 1181, 1187 (App. 2012).