Commonwealth of Kentucky
Supreme Court

CASE NO. 2017-SC-000436-TG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. Ernesto Scorsone, Judge
Indictment No. 14-CR-161

TRAVIS M. BREDHOLD — APPELLEE

Brief for Commonwealth

Submitted by,

ANDY BESHEAR
Attorney General of Kentucky

JASON B. MOORE
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky. 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2018, the foregoing Brief for the Commonwealth was served, first class, postage pre-paid, U.S. mail to Hon. Ernesto Scorsone, Judge, Fayette Circuit Court, Robert F. Stephens Circuit Courthouse, 120 North Limestone, Lexington, Kentucky 40507; and via state messenger mail to Hon. Timothy G. Arnold and Hon. Brandon Neil Jewell, Asst. Public Advocates, Dept. Of Public Advocacy, 5 Mill Creek, Section 100, Frankfort, Kentucky 40601, counsel for appellee, and via electronic mail to Hon. Lou Anna Red Corn, Fayette County Commonwealth Attorney. I further certify that the record on appeal has been returned to the Clerk of this Court.

Jason B. Moore
Assistant Attorney General

INTRODUCTION

The Commonwealth brings this interlocutory appeal from an order of the Fayette Circuit Court declaring the death penalty may not be constitutionally imposed against person who were over eighteen but less than twenty-one years of age at the time of the offense. This appeal is brought pursuant to KRS 22A.020(4), and this Court accepted jurisdiction upon granting the Commonwealth's motion to transfer under CR 74.02.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth requests oral argument in this matter as the case presents a question of first impression with great implication on the lower courts.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellee, Travis Bredhold, was indicted by a Fayette County grand jury on February 11, 2014, and charged with one count each of murder, first-degree robbery, theft by unlawful taking over $10,000.00, trafficking in less than eight ounces of marijuana, possession of drug paraphernalia, and carrying a concealed deadly weapon (TR I, 40-42).

The events leading to the charges began on December 7, 2013, when Bredhold stole a 2011 Nissan Altima which he proceeded to drive for a couple of days (TR I, 22). During that time, on December 9, 2013, police officers responded to a Marathon gas station on Alexandria Drive in response to a reported unresponsive person in the building (TR I, 9). The person, Mukeshbhai Patel, was found to be suffering from a gunshot wound to his chest, and died as a result of his injuries (Id.).

Officers obtained surveillance video from the store which showed "a male white subject wearing a camouflage jacket, a black shirt, blue jeans, and a black/red bomber hat" inside the store "armed with a handgun." (Id.). Mr. Patel was working behind the counter, and the video showed the white male demanding money from the cash register (Id.). While Mr. Patel was getting money from the register, "the subject was observed shooting [Mr. Patel] and then making his way behind" the counter to remove money from the register (Id.). The white male then fled the scene "in a vehicle described to be a Nissan Altima." (Id.).

The vehicle was found shortly after the robbery and shooting, and clothing observed on the white male was found inside of it (Id.). Upon learning that an Altima fitting the description of the one fleeing the station had been reported stolen, detective obtained a photo of a suspicious person from the victim of the car theft which appeared to be a photo of the person involved in the robbery and shooting at the Marathon station (Id.). Bredhold's foster parents identified the person in the photo as their foster child, Travis Bredhold (Id.).

Bredhold was born on June 25, 1995 (Id.). At the time of the robbery and murder of the Marathon station, he was eighteen years, five months, and fourteen days old. Criminal complaints and arrest warrants were issued for murder and first-degree robbery against Bredhold on December 10, 2013 (TR I, 6-11). Bredhold was arrested on the warrants at Fayette Mall that same day (TR I, 23 and 49). When he was arrested, he was in possession of a .380 caliber handgun, marijuana, scales and a pipe, and $568.77 (TR I, 49). On January 1, 2014, a .380 caliber shell casing was discovered "in the cigarette dispenser behind the sales counter" by an employee of the Marathon station and collected by police (Id).

Bredhold was arraigned on the charges in the indictment on February 21, 2014, and entered a plea of not guilty (TR I, 84). The Commonwealth gave notice of aggravating circumstance and intent to seek the death penalty on May 1, 2014 (TR I, 99). Specifically, the Commonwealth alleged the

aggravating circumstance that the murder of Mr. Patel was committed during the commission of first-degree robbery (Id.). On July 26, 2016, the trial court scheduled this matter for a jury trial beginning September 5, 2017, through September 26, 2017 (TR II, 229).

On May 17, 2017, Bredhold filed a motion to exclude the death penalty as a sentencing option at trial (TR III, 386-387), and memorandum of law in support of the motion (TR III, 308-368). Specifically, Bredhold moved the trial court to extend the holding of *Roper v. Smimons*, 543 U.S. 551 (2005), wherein the United States Supreme Court held capital punishment was unlawful for persons under the age of eighteen at the time of the offense (Id.). Brehold requested the trial court extend this prohibition to include persons under the age of twenty-one at the time of the offense (Id.). A renewed memorandum in support of the motion was filed by Bredhold on June 7, 2017 (TR III 422 – TR IV 483).

At the same time this motion and memorandum was filed in Bredhold's case, identical motions were filed on behalf of Efrain Diaz, Jr., in *Commonwealth v. Diaz*, Fayette Circuit Court No. 15-CR-000584-001, and Justin Smith, in *Commonwealth v. Smith*, Fayette Circuit Court No. 15-CR-000584-002.[1] An evidentiary hearing on the motions were held in those cases on July 17, 2017, where the trial court heard testimony from Dr. Laurence

[1] The Fayette Circuit Court granted Diaz and Smith's motions to exclude the death penalty because they were under twenty-one at the time of the offense also. The Commonwealth's appeals in those cases are pending before this Court. *Commonwealth v. Diaz*, 2017-SC-000537-TG and *Commonwealth v. Smith*, 2017-SC-000538-TG.

Steinberg regarding maturational differences between adolescents and adults (VR, 7/17/17, 8:27:56-9:26:13). The trial court *sua sponte* supplemented the record in this case with the testimony presented at the *Diaz/Smith* evidentiary hearing (TR V, 660).

On August 1, 2017, the trial court entered an "order declaring Kentucky's death penalty statute as unconstitutional." (TR V, 662-674). In so holding, the trial court concluded there was a national consensus against imposing the death penalty on offenders under the age of twenty-one, and that scientific evidence "support[ed] the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable." (Id. at 667).

The Commonwealth filed its notice of appeal from the interlocutory order on August 18, 2017 (TR V, 710-711), and this Court granted the Commonwealth's motion to transfer the appeal from the Court of Appeals.

Additional facts will be set forth below in support of the Commonwealth's argument.

ARGUMENT

I.

THE TRIAL COURT ERRED BY EXTENDING THE "BRIGHT-LINE RULE" FROM *ROPER* TO OFFENDERS BETWEEN THE AGE OF EIGHTEEN AND TWENTY-ONE AT THE TIME OF THE OFFENSE

In its order declaring the death penalty unconstitutional for offenders older than eighteen but younger than twenty-one at the time of the offense, the trial court made an extension of the holding of *Roper* and its progeny that every state appellate court and federal court has rejected in the twelve years since *Roper* was decided. This Court should follow those courts, and reverse the trial court's decision.

A. Preservation and Standard of Review

The issue presented in this matter is properly preserved for review by this Court by the Commonwealth's responses to the motion and renewed motion to exclude death penalty (TR III, 398 and TR IV, 486-489). As this case presents an issue of the lower court finding a statute unconstitutional, this Court's standard of review is *de novo* with a presumption the statute is constitutional. *Burke v. Commonwealth*, 506 S.W.3d 307, 313 (Ky. 2016).

B. *Roper* and its progeny

In 2005, the United States Supreme Court reconsidered whether it was permissible under the Eighth and Fourteenth amendments "to execute a juvenile offender who was older than 15 but younger than 18 when he

committed a capital crime." *Roper*, 543 U.S. at 551. The Court had previously considered this question in a case from this Court, *Stanford v. Kentucky*, 492 U.S. 361 (1989), and held there was no constitutional violation.

In *Roper*, the Court noted its framework for evaluating "which punishments are so disproportionate as to be cruel and unusual" looks to " 'evolving standards of decency that mark the progress of a maturing society.' " *Roper*, 543 U.S. at 561 quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion). In applying this framework, a court must begin with "a review of the objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." *Roper*, 543 U.S. at 564. The court "then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles." *Id.*

In *Roper*, the Court noted in considering the first prong of the framework that "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach." 543 U.S. at 564. Additionally, since the Court's decision in *Stanford*, only six states had carried out an execution of a defendant who was a juvenile at the time of the offense. *Id.* Based on these statistics, the Supreme Court concluded "the objective indicia of consensus in this case ... provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the

mentally retarded, as 'categorically less culpable that the average criminal.' " *Roper*, 543 U.S. at 567 quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

The Supreme Court then turned to the question of whether the death penalty was disproportionate for juvenile capital offenders. There, the Court noted "three differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569. The first difference was "[a] lack of maturity and an underdeveloped sense of responsibility" which "often result in impetuous and ill-considered actions and decisions." *Id.* Based on this lessened maturity and sense of responsibility, "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Id.*

Secondly, the Court found juveniles "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* And thirdly, "the character of a juvenile is not as well formed as that of an adult." *Id.* at 570. The Court then adopted the recognition of these character differences from the *Thompson v. Oklahoma*, 487 U.S. 815, 833-838 (1988), plurality opinion to prohibit the imposition of the death penalty on juvenile offenders under the age of eighteen. *Roper*, 543 U.S. at 570.

The Court, however, recognized the problem with setting a categorical rule that the death penalty could not be imposed on offenders under the age of

eighteen, and, at least implicitly anticipated and rejected, the claim now being made in this case. In doing so, the Court stated:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 will have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Id. at 574.

The Supreme Court returned to a consideration of juvenile sentencing in *Graham v. Florida*, 560 U.S. 48 (2010). There, the Court consider whether it violated the Eighth Amendment to sentence juvenile offenders to life without the possibility of parole for non-homicide offenses. *Id.* at 52-53. Relying on the same character differences between juveniles under eighteen and adults noted in *Roper*, the Court again imposed a categorical rule that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82.

Importantly, the Court in *Graham* continued to draw the line between a juvenile and an adult offender at the age of eighteen that had been drawn in *Roper*. This is so, despite the Court's recognition that "parts of the brain

involved in behavior control continue to mature through late adolescence." *Id.* at 68.

In 2012, in *Miller v. Alabama*, 567 U.S. 460, 465 (2012), the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " There, the Court was considering two cases where two fourteen years olds had been convicted of murder and sentenced to life without parole pursuant to a statutory mandate. *Id.*

The Supreme Court's concern in *Miller* was that a mandatory LWOP sentencing scheme "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id.* In other words, the mandatory nature of the sentencing scheme precluded the sentencer from considering the character differences between juveniles and adults established in *Roper*.

"By removing youth from the balance – by subjecting a juvenile to the same life-without-parole sentence applicable to an adult – these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender" in contravention to the foundational principle of *Roper* and *Graham*, "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474. Again, as in *Graham*, the

Court continued to draw the line of demarcation between juvenile offenders and adults at the bright-line age of eighteen established in *Roper*.

Most recently, the Supreme Court considered the retroactivity of its decision in *Miller* and further held that offenders under the age of eighteen at the time of their offenses are entitled to a hearing where "youth and its attendant characteristics – the same characteristics developed in *Roper* – are considered as sentencing factors. *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016). *Montgomery* described that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' – that is, juvenile offenders *whose crimes* reflect the transient immaturity of youth." *Id.* at 734. The Court, however, continued to limit the reach of its decision to those offenders under the age of eighteen at the time of the offense.

C. Attempts to extend *Roper* and its progeny to offenders over the age of eighteen have been uniformly rejected by the courts

In the immediate aftermath of the *Roper* decision, predictably, attempts began to extend it to offenders over the age of eighteen. Those attempts have been resoundingly rejected, including by this Court.

In *Hill v. State*, 921 So.2d 579 (Fla. 2006), the Florida Supreme Court rejected a claim that *Roper* should be extended to a death sentenced defendant whose "mental and emotional age places him in the category of persons for whom it is unconstitutional to impose the death penalty under *Roper*." *Id.* at 584. The Florida court rejected the claim summarily. "*Roper* does not apply to Hill. Hill was twenty-three years old when he committed the crimes at issue.

Roper only prohibits the execution of those defendants whose *chronological* age is below eighteen." *Id.* (emphasis original).

That same year, this Court was asked to extend *Roper* in *T.C. Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006). In that case, Thomas Clyde Bowling moved to vacate his death sentence pursuant to *Roper* by alleging "that he mentally functions at a level equivalent to an eleven-year-old child." *Id.* at 579. In seeking to have *Roper* apply, Bowling argued "that unlike the Supreme Court's prior decisions dealing with the juvenile death penalty, *Roper* defines 'juvenile' and 'youthful person' in terms of the mental development and impairments that are inherent in anyone that functions as a juvenile, not just those who are chronologically juvenile." *Id.* at 582.

In support of his argument, Bowling noted that *Roper* "focuse[d] on the immaturity, irresponsibility, and susceptibility to negative influences in juveniles," and, therefore, "the Court was clearly imposing a broad restriction against the execution of any offender who mentally functions" as a juvenile. *Id.* This Court, however, rejected that argument because "the plain language of *Roper* compels the conclusion that its prohibition is limited to 'the execution of an offender for any crime committed before his 18th birthday...." *Id.* at 583 quoting *Roper*, 543 U.S. at 588 (O'Connor, J. dissenting).

Following this Court's decision in *Bowling*, and relying heavily upon it, the Oklahoma Court of Criminal Appeals rejected a claim seeking to extend *Roper* to a defendant "only two weeks past his eighteenth birthday when he

killed the deceased[.]" *Mitchell v. State*, 235 P.3d 640, 658-659 (Okla Crim. App. 2010). In that case, the defendant "assert[ed] his lack of maturity and underdeveloped sense of responsibility, his vulnerability to outside influences, and character deficiencies exclude him from the death penalty." *Id.* at 658.

The Oklahoma court rejected the defendant's argument in large part based upon this Court's decision in *Bowling*, *supra*. In so holding, the Oklahoma court stated plainly:

> We find the *Bowling* decision well reasoned and persuasive. Appellant has not cited any authority to the contrary. The U.S. Supreme Court has drawn a bright line at eighteen (18) years of age for death eligibility and we therefore reject Appellant's argument that being two weeks beyond his eighteenth birthday at the time of the murder exempts him from capital punishment. Under the plain language of Roper, the prohibition against capital punishment is limited to the execution of an offender for any crime committed before his 18th birthday.

Id. at 659.

In *Thompson v. State*, 153 So.3d 84 (Ala. Crim. App. 2012), the Alabama Court of Criminal Appeals likewise joined this Court in rejecting an argument to extend *Roper* to a death sentence imposed against a defendant who was eighteen at the time of the offense. In rejecting this argument, the Alabama court adopted the reasoning of this Court in *Bowling* and the Florida Supreme Court in *Hill*, *supra*, that "*Roper* establishes a bright-line rule based on the chronological age of the defendant[.]" *Thompson*, 153 So.3d at 178.

Defendants did not simply seek to have the rationale of *Roper* extended to exclude capital punishment for defendants over the age of eighteen at the

time of the offense. They have also repeatedly sought to have the cases following in *Roper*'s wake – *Graham*, *Miller*, and *Montgomery* – extended to defendants beyond the chronological age of eighteen. Again, their attempts have been uniformly rejected.

In *Romero v. State*, 105 So.3d 550 (Fla. 2012), the Florida Supreme Court rejected an attempt to apply the holding of *Graham* to declare his sentence of life without parole for second-degree murder committed when he was eighteen unconstitutional. In making his argument, the defendant asserted that – while he was eighteen at the time of the offense – the court should "overlook this fact by focusing on the juvenile nature of his mental and emotional development. He argues, in essence, that he was a juvenile in all but age." *Id.* at 552.

The Florida court rejected this argument, noting "[n]ot a single court in this country has extended *Graham* to an adult offender." *Id.* at 553. The court also rejected the defendant's contention that *Graham* be applied "on a case-by-case approach." *Id.* at 554.

> Presumably, this would require us to scrutinize appellant's life sentence based on his purported juvenile characteristics: low IQ, emotional immaturity, and low level education. * * * Were we to apply this novel analysis and find for appellant, we would be bound to find, for example, that a life sentence for a 49 year old offender with similar juvenile traits would also be unconstitutional under the theory of diminished capacity due to his youth.
>
> We apply *Graham* as written. We decline to take the extreme act of extending *Graham* to adult offenders in the

> absence of a clear and explicit directive from the Supreme Court.

105 So.3d at 554.

In *United States v. Marshall*, 736 F.3d 492 (6th Cir. 2013), the Sixth Circuit rejected a defendant's argument to hold a mandatory minimum five year sentence was unconstitutional under *Miller*. Specifically, the defendant argued the mandatory sentence was "unconstitutional because it did not allow the district judge to sentence him based on his individual characteristics." *Id.* at 498. At the time of the offense, the defendant was between the ages of 18 and 22. *Id.*

The Sixth Circuit rejected this argument, holding "[u]nder the Supreme Court's jurisprudence concerning juveniles and the Eighth Amendment, the only type of 'age' that matters is chronological age. The Supreme Court's decisions limiting the types of sentences that can be imposed upon juveniles all presuppose that a juvenile is an individual with a chronological age under 18." *Id.*

The Sixth Circuit continued:

> The Supreme Court treats juveniles differently because they "have diminished culpability and greater prospects for reform." *Miller*, 132 S.Ct. at 2464. They are often immature and irresponsible, peculiarly susceptible to bad influences, and their character is still malleable. *Id.* Marshall apparently thinks that he shares these traits and therefore believes there is no reason not to treat him differently as well. But he has ignored the crucial role that chronological age plays in our legal system and in the Supreme Court's jurisprudence. The reasons for according

> special protections to offenders under 18 cannot be used to extend the same protections to offenders over 18.

Id. The Court then concluded that "Marshall is at the very most an immature adult. An immature adult is not a juvenile. Regardless of the source of the immaturity, an immature adult is still an adult. Because Marshall is not a juvenile, he does not qualify for the Eighth Amendment protections accorded to juveniles." *Id.* at 500.

Next, the United States District Court for the Southern District of New York considered a motion by three defendants convicted of at least one count each of murder in aid of racketeering which carried a mandatory sentence of life in prison seeking to extend *Miller* to their cases. *United States v. Lopez-Cabrera*, 2015 WL 3880503 (S.D.N.Y. June 23, 2015). There, the defendants "were each between the ages of 18 and 22 when they committed or participated in the murders at issue." *Id.* at *1.

In seeking to extend the holding of *Miller* to their cases, the defendants argued "that the factors that led the Supreme Court to rule as it did in *Miller* also apply to them because, like juveniles, persons between the ages of 18 and 22 are 'well within a period of time of great change in the parts of the brain associated with risk assessment, impulse control, and emotional regulation,' and the 'capriciousness and diminished capacity of youth' render them less morally culpable than a fully mature adult." *Id.* quoting Defendants Brief 1-2. In other words, the defendants made the same argument Bredhold makes in this matter.

In rejecting this claim, the court noted "*Miller* unambiguously applies only to juveniles, as the Court's holding was that 'mandatory life-without-parole sentences for juveniles violate the Eight Amendment," and its analysis repeatedly referred either to juveniles or to children[.]" *Id.* at *2. The court further noted the fact that "in the line of cases upon which *Miller* drew, the Supreme Court consistently has drawn the line at age 18 in announcing Eighth Amendment limitations on sentencing based on the defendant's age." *Id.* In reaching its decision not to extend *Miller*, the district court noted "every federal court of appeals to consider the issue has held that *Roper, Graham,* and *Miller* apply only to defendants who were younger than 18 at the time of their crimes." *Id.* at *3 (citations omitted).

In *Otte v. State*, 96 N.E.3d 1288 (Ohio Ct. App. 2017), the Eighth District Ohio Court of Appeals rejected an argument made by a death sentenced defendant based upon the order of the Fayette Circuit Court in this matter. In that case, the defendant sought to have the death penalty declared unconstitutional for persons under the age of twenty-one at the time of the offense. *Id.* at 1291. He based his argument on the same claims Bredhold made below, *i.e.* "(1) recent scientific discoveries concerning human cognitive development, (2) intervening legal developments, and (2) society's evolving standards of decency for defining cruel and unusual punishments." *Id.*

Noting that the Sixth Circuit had "recently observed that 'no authority exists at the present time,' to support the argument that the defendant in that

case, Ronald Phillips, was ineligible for the Ohio death penalty because he was 19 years old at the time he committed the capital offense," the Ohio appellate court likewise rejected Otte's attempt to assert this claim for relief. *Id.* at 1292-1293 quoting *In re Ronald Phillips*, 6th Cir. No. 17–3729 (July 20, 2017), *5. Otte was executed on September 13, 2017. Ronald Phillips was executed on July 26, 2017. Both were under the age of twenty-one when they committed the offenses leading to their death sentences.

Finally, the Florida Supreme Court once again rejected a defendant's argument to extend *Roper* to defendants who committed their crimes in their early twenties. *Branch v. State*, 236 So.3d 981, 985-987 (Fla. 2018). In that case, the defendant "argue[d] for an expansion of *Roper* on the basis that newly discovered evidence – in the form of scientific research with respect to development of the human brain, as well as evolution of state and international law – mandates that individuals who committed murder in their late teens and early twenties be treated like juveniles." *Id.* at 985-986.

While holding that Branch's claim regarding "scientific research with respect to brain development does not qualify as newly discovered evidence," *Id.* at 986, the Florida court noted that "the United States Supreme Court has continued to identify eighteen as the critical age for purposes of Eighth Amendment jurisprudence." *Id.* at 987. The court concluded that "unless the United States Supreme Court determines that the age of ineligibility for the

death penalty should be extended, we will continue to adhere to *Roper*." *Id.* Branch was executed on February 22, 2018.

As seen from the cases above, while courts throughout the nation – federal and state – have repeatedly been asked to extend *Roper* and its progeny to offenders over the age of eighteen such as Bredhold, every court has rejected the suggestion. This includes rejecting arguments that new scientific developments show brain development continues past the age of eighteen. The courts, however, have rightly recognized that the Supreme Court in *Roper* acknowledged such development continues, but made a decision to draw the line for considering juveniles different under the Eighth Amendment at that age. This Court should follow those courts, and its own prior precedent in *Bowling*, *supra*.

D. The trial court erred in finding a national consensus against imposing the death penalty on persons under the age of twenty-one

In its order granting Bredhold's motion that the death penalty is unconstitutional for offenders under the age of twenty-one, the trial court found there was a national consensus against such sentences. That finding is not supported by the evidence presented to the trial court.

In reaching its decision, the trial court first noted that nineteen states and the District of Columbia have completely abolished the death penalty (TR V, 665). As such, there are thirty-one states that currently employee the death

penalty as a potential sentence for a capital offense (Id.). As such, since *Roper*, only six additional states have moved to abolish the death penalty.

The main distinguishing fact between this case and the indicia of national consensus the Supreme Court found in *Roper* and *Atkins* is that none of the thirty-one states with the death penalty exclude persons between the ages of eighteen and twenty-one from the provisions of the penalty. In *Atkins*, by contrast, eighteen of the thirty-eight states with the death penalty at the time excluded the intellectually disabled from its reach. 536 U.S. at 313-315. As such, a majority of the states – thirty out of fifty – precluded the death penalty for intellectually disabled persons when *Atkins* was before the Court.

Likewise, in *Roper*, the Court was confronted with evidence that thirty states precluded the death penalty for persons under the age of eighteen at the time of the offense. 543 U.S. at 564. That included the twelve states with outright prohibition and eighteen states "that maintain it by, by express provision or judicial interpretation, exclude juveniles from its reach." *Id.* The Court in *Roper* also was able to account for the "slower pace of abolition of the juvenile death penalty" in the years since its decision in *Stanford*, than what the Court encountered between its decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Atkins*.

> When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows the impropriety of executing juveniles between 16 and 18 years of age

> gained wide recognition earlier than the impropriety of executing the [intellectually disabled].

Roper, 543 U.S. at 566-567 (alteration added).

There is simply nothing approaching the level of national consensus for prohibiting the death penalty for persons under the age of twenty-one like the Supreme Court found in *Roper* and *Atkins*. As opposed to the evidence that a majority of the states precluded the classes of people under consideration in those cases from the reach of the death penalty, in this case there are only the nineteen states that have abolished the penalty for all offenders in support of the purported consensus. There are also no states that maintain the penalty that have moved to preclude its application to those under twenty-one at the time of the offense.

In order to try to increase the number of states in an attempt to create a showing of consensus in this matter, the trial court had to engage in logical acrobatics. First, the trial court noted that four states – Pennsylvania, Washington, Colorado, and Oregon – currently have moratoriums on executions that have been imposed during the last five years. While that is certainly true, the moratoriums are simply to prohibit the carrying out of executions. There are no moratoriums in those states as to new death sentences being imposed, much less moratoriums on death sentences being imposed on offenders under the age of twenty-one. Oregon, for example, had a death sentence imposed in 2014, after the moratorium on carrying out

executions was put in place. Washington had a death sentence imposed in 2013.

Secondly, the trial court found seven states – including Kentucky – "have *de facto* prohibitions on the executions of offenders under twenty-one (21) years of age[.]" (TR V, 665). That is simply not a valid finding of fact. In Kentucky, for example, there is not a *de facto* prohibition on executing persons under twenty-one. In fact, there is a temporary injunction issued by the Franklin Circuit Court enjoining the Commonwealth from carrying out any executions pending the review of its execution protocol following the rulemaking procedure. That injunction is in no way connected to the execution of offenders under the age of twenty-one, it applies to all offenders.

As for the other six states, the fact they have not carried out executions since 1977 (Kansas and New Hampshire) or have not carried out executions of persons under the age of twenty-one at the time of the offense, does not change the fact that those states have the death penalty as a sentencing option and do not preclude its application to offenders between the ages of eighteen and twenty-one. Rather, those facts are more likely attributable to the small numbers of persons those states have on their death rows in general.[2] Additionally, the lack of executions being carried out in these states is more likely a result of the increasing difficulty states face in obtaining drugs with

[2] Kansas and Idaho each have nine persons on death row, Utah has eight, and Montana, New Hampshire, and Wyoming each have one. Not surprisingly, those states also have relatively small populations in general

which to carry out executions than any *de facto* bar on the execution of persons under the age of twenty-one as the trial court found. *See Glossip v.* Gross, 135 S.Ct. 2726, 2733-2734 (2015).

It was clearly erroneous for the trial court to include these eleven states in its calculation of the number of states prohibiting the execution of persons under the age of twenty-one. Simply put, these states do not preclude the death penalty nor do they preclude persons under the age of twenty-one from its reach.

The trial court's order also shows there is not a declining trend of the practice of carrying out death sentences imposed upon defendants between the ages of eighteen and twenty-one. As the trial court noted, between 2011 and 2016, nine states carried out death sentences of defendants who were under the age of twenty-one at the time of the offense (TR V, 666). The trial court found this indicia of a national consensus, but it pales in comparison to *Roper* where the Supreme Court noted only three states had executed juvenile defendants in the ten years prior to the decision, and only six had done so in the sixteen years between *Roper* and *Stanford*. *Roper*, 543 U.S. at 564-565. Going back to the year *Roper* was decided – 2005 – thirteen states have carried out death sentences against defendants who were under twenty-one at the time of the offense. In other words, forty-two percent of the states permitting the death penalty have carried out executions of persons under twenty-one at the

time of the offense since *Roper* was decided. That is a far cry from an indicia of national consensus against the practice.

In its order, the trial court relied upon idea that the number of executions carried out against persons under the age of twenty-one since 2011 "has been cut in half from the two (2) previous five (5) year periods" as proof of a national consensus, but that ignores the fact that states have encountered extreme difficulties in carrying out executions at all since 2011 which corresponds to the year when Hospira – "[t]he sole American manufacturer of sodium thiopental" – ceased production of the drug. *See Glossip,* 135 S.Ct. at 2733. As the first drug in the protocol approved by the Court in *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion), the inability to obtain the drug made it simply impossible for many states to carry out executions at all since that time.

Despite this, the record in this matter shows that executions of persons under the age of twenty-one remain a steady percentage of the number of executions annually. In 2011 (excluding Texas), seven of thirty executions were of persons under twenty-one. In 2016, the number was two out of thirteen; in 2017, four out of sixteen persons were executed for crimes committed when they were twenty-one or younger. Thus, the number of persons executed remains about the same percentage of the total number of executions carried out while excluding Texas.

The trial court was clearly erroneous to look at this information and determine there was indicia of a national consensus against the execution of

persons under the age of twenty-one. That is simply not the case when the evidence is looked at objectively, and in light of the difficulties states have in carrying out executions at all. In no way does the evidence present a picture remotely near what the Supreme Court found when it decided *Atkins* and *Roper*. This Court must find the trial court erred.

E. The science the trial court relied upon is simply not new

In its order, the trial court also concluded the death penalty was disproportionate for persons under the age of twenty-one based upon "studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable." (TR V, 667). The problem with the trial court's conclusion is the science underlying those studies is simply not recent. In fact, it is the same science that was presented to the Supreme Court in *Roper*, *Graham*, and *Miller* which the Court reviewed and determined to draw its line at eighteen years of age.

In its order, the trial court noted that "study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties[.]" (TR V, 668). However, this same information was presented to the Supreme Court in the *Amicus Curiae* brief of the American Psychological Association, et. al. filed with the Court in *Roper*.

Therein, it was stated "[r]ecent research suggests a biological dimension to adolescent behavioral immaturity: the human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood." *Roper*, Brief of *Amici Curiae* for the American Psychological Association, 2004 WL 1636447, * 9. The brief went into great detail of the processes discussed by the trial court herein – synaptic pruning and myelination. *Id.* at *10. The brief further explicitly stated "[l]ate maturation of the frontal lobes is also consistent with elctroencephalogram (EEG) research showing that the frontal executive region matures from ages 17 to 21 – after maturation appears to cease in other brain regions." *Id.* at *14.

The research laid out in the *Amicus* brief in *Roper* is the same as what Dr. Steinberg presented to the trial court in this matter. Again, it is simply not a new development. In *Morton v. State*, 995 So.2d 233 (Fla. 2008), a death sentenced defendant asserted the trial court had "erred in denying his claim that newly discovered evidence from a 2004 brain mapping study, which establishes that sections of the human brain are not fully developed until age twenty-five, warrants a reweighing of his age as a mitigating factor. *Id.* at 245. The Florida court concluded the 2004 study was not newly discovered evidence because similar research existed at the time of his trial.

> Although this 2004 brain mapping study had not yet been published at the time of Morton's trials, Morton or his counsel could have discovered similar research at that time that stated that the human brain was not fully developed until early adulthood. See Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 Psychol.

> Pub. Pol'y & L. 115, 120 (2007) ("In the past few decades ... neuroscientists have discovered that two key developmental processes, myelination ... and pruning of neural connections, continue to take place during adolescence and well into adulthood.... [B]rain regions responsible for basic life processes and sensory perception tend to mature fastest, whereas the regions responsible for behavioral inhibition and control, risk assessment, decision making, and emotion maturing take longer (Yakovlev & Lecours, 1967).").

Morton, 995 So.2d at 245-246. As the 2007 Aronson paper shows, research had shown the two key processes relied upon by Dr. Steinberg in his testimony – myelination and pruning "take place ... well into adulthood" as early as 1967.

The idea that brain maturity and development continue into late adolescence and young adulthood, particularly in "parts of the brain involved in behavior control," *Graham*, 560 U.S. at 80, has been well presented and documented to the Supreme Court and other courts throughout the country long before this matter appeared in the trial court. The Supreme Court explicitly recognized this in *Roper* when it stated "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574.

Despite this recognition, the Supreme Court elected to draw a bright line at the age of eighteen for purposes of its juvenile sentencing jurisprudence. The Court has not seen fit to move that live as its case have progressed from *Roper* despite being presented with the continuing research of the American Psychological Association under the guidance of Dr. Steinberg who oversaw the research for that groups *Amicus* briefs in *Roper*, *Graham*, and *Miller*.

The Supreme Court's election to draw the bright line rule for juvenile sentencing purposes at age eighteen was also proper as it is the age "where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574. That distinction remains true today as eighteen is the age at which most are provided the right to vote, the right to marry without parental consent, the right to enter into contracts, the right to sue and be sued, and the right to join the armed forces.

Simply put, the age eighteen is the age of majority for most purposes in this country today just as it was when the Court decided *Roper*. This is true despite the fact a person's brain continues to mature for some period of years past that age. For that reason, this Court should reverse the order of the trial court in this matter, and maintain the line drawn by the United States Supreme Court – adopted by this Court in *Bowling* – that an offender over the age of eighteen at the time of the offense may be subject to the death penalty.

CONCLUSION

Based upon the foregoing, the order of the Fayette Circuit Court declaring Kentucky's death penalty statute unconstitutional must be reversed.

Respectfully submitted,

ANDY BESHEAR
Attorney General of Kentucky

JASON B. MOORE
Assistant Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

Counsel for the Commonwealth

APPENDIX

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
SEVENTH DIVISION
CASE NO. 14-CR-161

COMMONWEALTH OF KENTUCKY — PLAINTIFF

v.

TRAVIS BREDHOLD — DEFENDANT

ORDER DECLARING KENTUCKY'S DEATH PENALTY STATUTE AS UNCONSTITUTIONAL

This matter comes before the Court on Defendant Travis Bredhold's Motion to declare the Kentucky death penalty statute unconstitutional insofar as it permits capital punishment for those under twenty-one (21) years of age at the time of their offense. Mr. Bredhold argues that the death penalty would be cruel and unusual punishment, in violation of the Eighth Amendment, for an offender under twenty-one (21) at the time of the offense. The defense claims that recent scientific research shows that individuals under twenty-one (21) are psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty, in *Roper v. Simmons*, 543 U.S. 551 (2005). The Commonwealth in turn argues that Kentucky's death penalty statute is constitutional and that there is no national consensus with respect to offenders under twenty-one (21). Having the benefit of memoranda of law, expert testimony, and the arguments of counsel, and being otherwise sufficiently advised, the Court sustains the Defendant's motion.

14CR161

FINDINGS OF FACT

Travis Bredhold was indicted on the charges of Murder, First Degree Robbery, Theft by Unlawful Taking $10,000 or More, and three Class A Misdemeanors for events which occurred on December 9, 2013, when Mr. Bredhold was eighteen (18) years and five (5) months old.

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg in the case of Commonwealth v. Diaz, et al., No. 15-CR-584.[1] Dr. Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."[2] Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.[3]

[1] See Order Supplementing the Record. Com. v. Diaz is also a Seventh Division case. The Commonwealth was represented by Commonwealth Attorney Lou Anna Red Corn, and her assistants in both cases, 14-CR-161 & 15-CR-584. Dr. Steinberg was aptly cross-examined by the Commonwealth Attorney.
[2] Hearing July 17, 2017 at 9:02:31.
[3] Defendant's Supplement to Testimony of Laurence Steinberg, July 19, 2017.

14CR161

On May 25th and 26th, 2016, an individual assessment of Mr. Bredhold was conducted by Dr. Kenneth Benedict, a clinical psychologist and neuropsychologist. A final report was provided to the Defendant's counsel and the Commonwealth and has been filed under seal. After reviewing the record, administering multiple tests, and conducting interviews with Mr. Bredhold, members of his family, and former teachers, Dr. Benedict found that Mr. Bredhold was about four years behind his peer group in multiple capacities. These include: the development of a consistent identity or "sense of self," the capacity to regulate his emotions and behaviors, the ability to respond efficiently to natural environmental consequences in order to adjust and guide his behavior, and his capacity to develop mutually gratifying social relationships.[4] Additionally, he found that Mr. Bredhold had weaknesses in executive functions, such as attention, impulse control, and mental flexibility.[5] Based on his findings, Dr. Benedict diagnosed Mr. Bredhold with a number of mental disorders, not the least being Attention Deficit Hyperactivity Disorder (ADHD), learning disabilities in reading and writing, and Post Traumatic Stress Disorder (PTSD).[6]

CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A. Const. Amend. VIII. This provision is applicable to the states through the Fourteenth Amendment. The protection flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen the consistent reference to "the evolving standards of decency that mark the progress of a maturing

[4] *Id* at 6.
[5] *Id* at 3.
[6] *Id* at 5.

society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the "evolving standards of decency" test are: (1) objective indicia of national consensus, and (2) the Court's own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper v. Simmons*, 543 U.S. 551 (2005).

I. Objective Indicia of National Consensus Against Execution of Offenders Younger than 21

Since *Roper*, six (6) states[7] have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states[8] have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven[9] (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.[10]

[7] The states that have abolished the death penalty since *Roper* and year of abolition: Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007).
[8] The governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively. The governor of Oregon extended a previously imposed moratorium in 2015. The governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013.
[9] Kansas and New Hampshire have not executed anyone since 1977. Montana and Wyoming have never executed anyone who was under twenty-one (21) years of age at the time of their offenses, and they currently have no such offenders on death row. Utah has not executed anyone who was under twenty-one (21) years of age at the time of their offense in the last fifteen (15) years, and no such offender is currently on Utah's death row. Idaho and Kentucky have not executed anyone who was under twenty-one (21) years old at the time of their offense in the last fifteen (15) years.
[10] Chart of Number of People Executed Who Were Aged 18, 19, or 20 at Offense from 2000 to Present, By State [current as of February 29, 2016]

14 CR 161

Those nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011 – nineteen (19) of which have been in Texas alone.[11] Considering Texas an outlier, there have only been fourteen (14) executions of defendants under the age of twenty-one (21) between 2011 and 2016, compared to twenty-nine (29) executions in the years 2006 to 2011, and twenty-seven (27) executions in the years 2001 to 2006 (again, excluding Texas).[12] In short, the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods.

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.[13] Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20).

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to

[11] *Id.*
[12] *Id.*
[13] Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from https://deathpenaltyinfo.org/documents/FactSheet.pdf.

14 CR 101

twenty-one (21. "[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles ... as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

2. The Death Penalty is a Disproportionate Punishment for Offenders Younger than 21

As the Supreme Court in *Roper* heavily relied on scientific studies to come to its conclusion, so will this Court. On July 17, 2017, in the case of Commonwealth of Kentucky v. Diaz, this Court heard expert testimony on this topic. Dr. Laurence Steinberg testified and was also allowed to supplement his testimony with a written report. The report cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable. It is based on those studies that this Court has come to the conclusion that the death penalty should be excluded for defendants who were under the age of twenty-one (21) at the time of their offense.

If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late

14 CR 161

teens.[14] Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.[15]

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.[16] First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.[17] Second, they are more likely to engage in "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).[18] Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because gains in impulse control continue to occur during the early twenties (20s).[19] Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the

---

[14] B. J. Casey, et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104-110 (2005).

[15] N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358-1361 (2011); D. Fair, et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); A. Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies*, 33 HUM. BRAIN MAPPING 1987-2002 (2012); A. Pfefferbaum, et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176-193 (2013); D. Simmonds, et al., *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*. 92 NEUROIMAGE 356-368 (2014); L. Somerville, et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124-133 (2010).

[16] For a recent review of this research, see: LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

[17] T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).

[18] E. Cauffman, et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc.12532. (2017).

[19] L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28-44 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

14CR101

ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.[20] As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.[21] The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.[22] In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).[23]

Recent neurobiological research parallels the above psychological conclusions. This research has shown that the main cause for psychological immaturity during adolescence and the early twenties (20s) is the difference in timing of the maturation of two important brain systems. The system that is responsible for the increase in sensation-seeking and reward-seeking—sometimes referred to as the "socio-emotional system"—undergoes dramatic changes around the time of puberty, and stays highly active through the late teen years and into the early twenties (20s). However, the system that is responsible for self-control, regulating impulses, thinking ahead,

---

[20] L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[21] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[22] D. Albert, et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114-120 (2013).

[23] B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the "cognitive control system"—is still undergoing significant development well into the mid-twenties (20s).[24] Thus, during middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual's twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.[25]

There are considerable structural changes and improvements in connectivity across regions of the brain which allow for this development. These structural changes are mainly the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, allowing for more efficient transmission of information) and myelination (insulation of neuronal connections, allowing the brain to transmit information more quickly). While synaptic pruning is mostly complete by age sixteen (16), myelination continues through the twenties (20s).[26] Thus, while the development of the prefrontal cortex (logical reasoning, planning, personality) is largely finished by the late teens, the maturation of connections between the prefrontal cortex and regions which govern self-regulation and emotions continues into the mid-twenties (20s).[27] This supports the psychological findings spelled out above which conclude that even intellectual young adults

[24] B. J. Casey, et al., *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEV. PSYCHOL. 225-235 (2010); L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78-106 (2008); L. Van Leijenhorst, et al., *Adolescent Risky Decision-making: Neurocognitive Development of Reward and Control Regions*, 51 NEUROIMAGE 345-355 (2010).
[25] D. Albert & L. Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211-224 (2011); S-J Blakemore & T. Robbins, *Decision-Making in the Adolescent Brain*, 15 NAT. NEUROSCIENCE 1184-1191 (2012).
[26] S-J, Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397-406 (2012); R. Engle, *The Teen Brain*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).
[27] L. Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NAT. REV. NEUROSCIENCE 513-518 (2013).

may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

Perhaps one of the most germane studies to this opinion illustrated this development gap by asking teenagers, young adults (18-21), and mid-twenties adults to demonstrate impulse control under both emotionally neutral and emotionally arousing conditions.[28] Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen– (18) to twenty-one– (21) year–olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens.[29] Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty– (20) year–old functions similarly to a sixteen– (16) or seventeen– (17) year–old.

In addition to this maturational imbalance, one of the hallmarks of neurobiological development during adolescence is the heightened plasticity—the ability to change in response to experience—of the brain. One of the periods of the most marked neuroplasticity is during an individual's late teens and early twenties (20s), indicating that this group has strong potential for behavioral change.[30] Given adolescents' ongoing development and heightened plasticity, it is difficult to predict future criminality or delinquent behavior from antisocial behavior during the teen years, even among teenagers accused of committing violent crimes.[31] In fact, many

[28] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOL. SCI. 549-562 (2016).
[29] *Id.*
[30] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).
[31] T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, 3(2) DEV. & PSYCHOPATHOLOGY (2016).

researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.[32]

Travis Bredhold was eighteen (18) years and five (5) months old at the time of the alleged crime. According to recent scientific studies, Mr. Bredhold fits right into the group experiencing the "maturational imbalance," during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses. He also fitsinto the group described in the study above which was found to act essentially like a sixteen– (16) to seventeen– (17) year–old under emotionally arousing conditions, such as, for example, robbing a store. Most importantly, this research shows that eighteen– (18) to twenty-one– (21) year–olds are categorically less culpable for the same three reasons that the Supreme Court in *Roper* found teenagers under eighteen (18) to be: (1) they lack maturity to control their impulses and fully consider both the risks and rewards of an action, making them unlikely to be deterred by knowledge of likelihood and severity of punishment; (2) they are susceptible to peer pressure and emotional influence, which exacerbates their existing immaturity when in groups or under stressful conditions; and (3) their character is not yet well formed due to the neuroplasticity of the young brain, meaning that they have a much better chance at rehabilitation than do adults.[33]

Further, the Supreme Court has declared several times that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568

[32] K. Monahan, et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093-1105 (2013); E. Mulvey, et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453-475 (2010).
[33] *Roper*, 543 U.S. at 569-70.

14CR1101

(quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("the death penalty must be reserved for 'the worst of the worst'"). Given Mr. Bredhold's young age and development, it is difficult to see how he and others his age could be classified as "the most deserving of execution."

Given the national trend toward restricting the use of the death penalty for young offenders, and given the recent studies by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age. Accordingly, Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense.

It is important to note that, even though this Court is adhering to a bright–line rule as promoted by *Roper* and not individual assessment or a "mental age" determination, the conclusions drawn by Dr. Kenneth Benedict in his individual evaluation of Mr. Bredhold are still relevant. This evaluation substantiates that what research has shown to be true of adolescents and young adults as a class is particularly true of Mr. Bredhold. Dr. Benedict's findings are that Mr. Bredhold operates at a level at least four years below that of his peers. These findings further support the exclusion of the death penalty for this Defendant.

So ORDERED this the 1 day of August, 2017.

JUDGE ERNESTO SCORSONE
FAYETTE CIRCUIT COURT

14CR161

CERTIFICATE OF SERVICE

The following is to certify that the foregoing was served this the 1st day of August, 2017, by mailing same first class copy, postage prepaid, to the following:

Lou Anna Red Corn
Commonwealth Attorney
116 North Upper Street, Suite 300
Lexington, KY 40507

Joanne Lynch
Assistant Public Advocate
487 Frankfort Road, Suite 2
Shelbyville, KY 40065

Audrey Woosnam
Assistant Public Advocate
487 Frankfort Road, Suite 2
Shelbyville, KY 40065

By: MKuller D.C.

A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT
BY MKuller DEPUTY