COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2017-SC-000436

COMMONWEALTH OF KENTUCKY **APPELLANT**

v. **APPEAL FROM FAYETTE CIRCUIT COURT**
HON. ERNESTO SCORSONE, JUDGE
INDICTMENT NO. 2014-CR-00161

TRAVIS M. BREHOLD **APPELLEE**

BRIEF FOR APPELLEE, TRAVIS M. BREDHOLD

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Ernesto Scorsone, Circuit Judge, Robert F. Stephens Circuit Courthouse, 120 North Limestone, Lexington, Kentucky 40507; the Hon. Lou Anna Red Corn, Commonwealth's Attorney, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507-1330; to be electronically mailed to the Hon. Joanne Lynch, Assistant Public Advocate; the Hon. Audrey Woosnam, Assistant Public Advocate; the Hon. Robert Friedman, Assistant Public Advocate; and to be served by messenger mail to Hon. Jason B. Moore, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on October 12, 2018. The record on appeal has been returned to the Kentucky Supreme Court.

Timothy G. Arnold

Introduction

After hearing substantial scientific evidence, the trial court concluded that a scientific consensus has emerged that the brains of older adolescents (i.e., individuals aged 18-20) suffered from the same psychological and neurological deficiencies a juvenile offenders. Based on this finding, and a finding that a national consensus had emerged against its use on older adolescents, the trial court declared the death penalty unconstitutional for individuals who were 18-20 at the time of their offense. This Commonwealth took this interlocutory appeal to challenge that ruling.

Statement Concerning Oral Argument

Mr. Bredhold agrees with the Commonwealth that oral argument is appropriate in this case.

Counterstatement of Points and Authorities

Counterstatement of the Case

The Commonwealth's Statement of the Case fails to address the scientific testimony that lies at the heart of this case in any substantial way. As such, while Bredhold does not dispute the Commonwealth's description of the procedural history of this case, he cannot accept the Statement of the Case as a fair basis on which to adjudicate his claims.

Mr. Bredhold ("Travis") is presently charged with murder and robbery in the first degree, along with other lesser offenses, arising out of a robbery that resulted in the death of a store clerk. The offense occurred when Travis was eighteen (18) years and five and one-half (5 ½) months of age.[1] Less than three months after the indictment, the Commonwealth filed notice of its intention to seek the death penalty.[2] In response, Travis filed a motion seeking to declare the death sentence unconstitutional for older adolescents.[3] Similar motions were filed in the cases of *Commonwealth v. Efrain Diaz* and *Commonwealth v. Justin Smith*.[4] Smith and Diaz were heard together on July 17, 2017. At that time, lawyers for those defendants presented the testimony of Dr. Laurence Steinburg, whose testimony the trial court later incorporated into the record of this case.[5]

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[1] TR 1, 41.
[2] TR 1, 99
[3] TR 3, 422 – TR IV, 485.
[4] Diaz and Smith are co-defendants who are before the Fayette Circuit Court in case nos. 15-CR-584-001 and 002. Similar orders were entered in those cases, and both were appealed by the Commonwealth and transferred to this Court in *Commonwealth v. Diaz*, 2017-SC-536, and *Commonwealth v. Smith*, 2017-SC-537.
[5] VR 7/7/17, 8:33:20-9:31:21. TR V, 660, 687 (orders incorporating and filing record). While the video record of the hearing was filed in this case, a transcript of Dr. Steinburg's testimony was prepared and filed in the record in *Commonwealth v. Diaz*. That transcript is included in the Appendix ("Apx.") at Tab 2. For the

Dr. Steinburg directed the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Brain Development from 1997-2007, and authored or co-authored approximately 400 scientific articles and 17 books on the subject of Adolescent Brain Development.[6] An article he co-wrote with Elizabeth Scott on the relationship between brain development and culpability was quoted repeatedly by the majority opinion in *Roper v. Simmons*, 543 U.S. 551, 569-573 (2005), and cited again by the majority in *Miller v. Alabama*, 567 U.S. 460, 471 (2012).[7] Dr. Steinburg is eminently qualified to describe the state of the science on brain development in older adolescents (i.e., those 18-20 years of age) and how the scientific consensus has emerged during the years after *Roper*.

At the time Dr. Steinburg began his career over 40 years ago, scientists believed that the brain stopped developing around the time it reached full size, i.e., around 10 years of age.[8] This conclusion began to be challenged in the late 1990's, as a result of the emergence of new technologies, most significantly Functional Magnetic Resonance Imaging (fMRI) that permitted scientists to see the brains of living individuals and observe their responses to stimuli.[9] The first major fMRI study of young adolescents (i.e., those under 18) was published in 1999.[10]

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purposes of this brief, references to Dr. Steinburg's testimony are cited as "Tr., [pg. #]." Dr. Steinburg was permitted to supplement his testimony in writing, which he did several days later. TR V, 691 *et seq.*, included in the Appendix at Tab 3.

[6] TR V, 691-692, ¶¶ 3-6.

[7] *See* Steinberg, L. & Scott, E., Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 *Am. Psychologist* 1009 (2003).

[8] Tr. 3-4.

[9] Tr. 4.

[10] *Id.*

Studies focusing on older adolescents (18-20 year olds) did not begin to emerge until the years after *Roper*, many supported by funding from the National Institutes for Health.[11] As a result, in contrast to the state of the science at the time of *Roper*, today "there are literally thousands more studies of adolescent brain development . . . [and] multiple . . . scientific journals that are devoted exclusively to the study of adolescent brain development."[12] While "it hadn't been known at the time of *Roper* that there was this brain maturation that extended past eighteen . . . that is now well established in the scientific literature."[13]

This evolution in scientific thinking is due to the fact that today,

> [w]e know much, much more about the timetable of different aspects of brain maturation. . . . [O]ne of the important lessons we've learned in the last ten years is that the maturation that is taking place during the teen years continues to take place as people move into their early and towards their mid 20's. . . . [A]t the same time there's been a lot of psychological research on development during this time period as well. . . . [I]n our studies of young people both in the United States and around the world we have found that the psychological capacities that are thought to be influenced by this brain development are also maturing during this time too . . ..[14]

Specifically, scientists have learned that different areas of the brain mature at different rates, resulting in what Dr. Steinburg describes as a "maturational imbalance."[15] This imbalance, and in particular the imbalance between the structures of the brain related to rewards, and those related to self-control,

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[11] Tr. 5.
[12] Tr. 9.
[13] Tr. 4.
[14] *Id.*
[15] TR V, 699, ¶ 21.

"inclines adolescents toward sensation seeking and impulsivity."[16] This effect is particularly pronounced in situations of emotional arousal.[17]

There are several distinct ways in which older adolescents are more like juveniles than adults. First, adolescents are more likely to "underestimate the number, seriousness and likelihood of risks involved in a given situation."[18] Second, older adolescents are "more likely than older individuals to engage in what psychologists call 'sensation seeking,' the pursuit of arousing, rewarding, exciting or novel experiences."[19] Third, older adolescents are "less able than older individuals to control their impulses and consider the future consequences of their actions and decisions."[20] Fourth, while older adolescents are intellectually mature, they tend to be emotionally immature.[21] This results in individuals being "more focused on rewards, more impulsive, and more myopic" when they are acting under circumstances of emotional arousal.[22] All of "these inclinations are exacerbated by the presence of peers."[23]

As a result of these characteristics, at this stage there is "greater risk taking than at any other stage of development", with studies showing that the peak age of risk taking is between ages 19 and 21.[24] This finding "has been demonstrated both

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[16] *Id.*
[17] TR V, 699, ¶ 22.
[18] TR V, 695, ¶ 13.
[19] *Id.*, at 696, ¶ 14.
[20] *Id.*, ¶ 15.
[21] *Id.*, at 697, ¶ 16.
[22] *Id.*, ¶ 17.
[23] *Id.*, ¶ 18.
[24] *Id.*, at 698, ¶¶ 19-20.

in studies of risk taking in psychological experiments . . . and in the analysis of risk behavior in the real world."[25]

The fifth and final similarity between older adolescents and juveniles is that both have a high degree of neuroplasticity during this period, meaning that they have substantial capacity for behavioral change. As Dr. Steinburg candidly pointed out, this can be a "dual edge sword. . . . It means the brain is more susceptible to positive influence but it means the brain is more susceptible to toxic influence as well. And the brain can't tell the difference between good influences and bad influences and if it's plastic it's influenced by both."[26] However, given the right environment an older adolescent would be more amenable to rehabilitation than a 25 year old.[27]

Based on the foregoing, Dr. Steinburg testified that the characteristics which the *Roper* court relied upon in finding that youth were categorically less culpable than their adult counterparts, i.e., impetuosity and impulsivity, susceptibility to coercive influences, especially from peers, and amenability to rehabilitation, apply to the same extent to adolescents under 21. As a result, "if a different version of *Roper* was heard today, knowing what we know now, one could've made the very same arguments about eighteen, nineteen and twenty year olds that were made about sixteen and seventeen year old's in *Roper*."[28]

Travis also presented the report of Dr. Kenneth Benedict, a clinical psychologist and neuropsychologist. Dr. Benedict examined Travis and

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[25] *Id.*, ¶ 19.
[26] Tr., 14.
[27] *Id.*
[28] Tr., 12.

investigated his mental status.[29] After reviewing his status Dr. Benedict diagnosed Travis with a number of mental disorders, including Post-Traumatic Stress Disorder, Attention Deficit Hyperactivity Disorder, and learning disabilities.[30] Based on this diagnosis, Dr. Benedict found that Travis was functioning about four years behind his peer group (i.e., at the level of a 14 year old) in multiple areas, including the capacity to control his emotions and behaviors, the ability to respond to natural consequences, and the capacity to develop healthy relationships.[31]

The Commonwealth presented no proof on the issue.

After the close of the evidence, the trial court issued a ruling finding that it violated the Eighth Amendment to apply the death penalty to older adolescents, such as Travis. In support of this conclusion, the trial court first reviewed the evidence of national consensus that the death sentence was inappropriate for offenders in this age group. The trial court found that "it appears that 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."[32] The court based its conclusion primarily on the following factors:

- "[T]here 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."[33]

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[29] TR V, 664
[30] *Id.*
[31] *Id.*
[32] *Id.*, 667.
[33] *Id.*, 665.

- "[O]nly nine (9) [states] have executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016."
- Outside of Texas, "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) in the years 2006 to 2011, and twenty-seven (27) in the years 2001 to 2006."[34]

In short, the trial court found that the nation was moving in a uniform direction against the death penalty for this population, including both a reduction in the number of states where such a sentence is possible, and a reduction in the number of sentences imposed.[35]

Further, the Court found that "[i]f the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling."[36] The Court began by describing how fMRI technology enabled scientists of the late 1990's and early 2000's to learn about the development of the juvenile brain, "[f]urther 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)", a conclusion that "is now widely accepted among neuroscientists."[37]

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[34] *Id.* 666.
[35] *Id.*
[36] *Id.* 667.
[37] *Id.*, citing N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using MRI*, 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

The Court then made detailed and specific findings about the psychological and neurobiological deficiencies of older adolescents: [38]

> 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.[39] First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.[40] 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).[41] 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).[42] Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the ability to exercise self-control, to properly consider the risks and rewards of alternative courses of

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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 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).

[38] TR V, 668-672 (the footnotes have been renumbered, but otherwise are as they appear in the trial court's order).

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

[40] 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).

[41] E. Cauffman, et al., *Age Differences in Affective Decision Making as 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).

[42] L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 2844 (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).

action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.[43] 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.[44] 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.[45] In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).[46]

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, 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).[47] Thus, during

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43 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).

44 A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non Emotional* 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).

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

46 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).

47 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:*

middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive 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.[48]

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).[49] 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).[50] This supports the psychological findings spelled out above which conclude that even intellectual young adults 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.[51] Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control

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Neurocognitive Development of Reward and Control Regions, 51 NEUROIMAGE 345-355 (2010).

48 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 1841-1191 (2012).

49 S-J, Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397406 (2012); R. Engle, The Teen Brain, 22(2) CURRENT DIRECTIONS PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).

50 L. Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NAT. REV. NEUROSCIENCE 513-518 (2013).

51 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).

> 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.[52] 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.
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> 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.[53] 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.[54] In fact, many 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.[55]

Finally, having found that both the scientific evidence and information concerning national consensus warranted prohibiting the death penalty on this population, the trial court concluded that:

> [i]t is important to note that, even though this Court is adhering to the bright-line rule as promoted by *Roper* and not an 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

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52 *Id.*

53 Laurence Stenberg, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

54 T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, DEV. & PSYCHOPATHOLOGY (2016).

55 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).

> findings are that Mr. Bredhold operates at a level at least four years before that of his peers. These findings further support the exclusion of the death penalty for this Defendant.[56]

The Commonwealth filed an interlocutory appeal from this decision, and this Court granted transfer. This appeal follows.

[56] TR V, 673.

Argument

I. Imposition of a Death Sentence for a Crime Committed by an Adolescent Under Age 21 is Cruel and Unusual Punishment Prohibited by the Eighth Amendment to the United States Constitution.

Proportionality of the punishment, both to the gravity of the offense and the culpability of the offender, lies at the core of the Eighth Amendment. Based on this principle, the United States Supreme Court has clearly stated that "[c]apital 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 (quoting *Atkins*, 536 U.S. at 319) (emphasis added) As the trial court's findings clearly demonstrate, the scientific consensus is that older adolescents like Travis function as poorly as juveniles do, especially under stressful conditions or in the presence of peers. They simply do not possess the level of forethought, self-control or maturity to be considered the "worst of the worst." As older adolescents would not be eligible for the death penalty in a majority of jurisdictions, and are increasingly unlikely to receive that penalty in those remaining jurisdictions that would permit it, the trial court was correct to declare the penalty unconstitutional for this class of individuals.

A. Preservation and Standard of Review

In the trial court, the Commonwealth filed a four-page response to Travis' extensively researched and developed motion, primarily arguing that the trial court was without authority to adjudicate the constitutionality of the death penalty because no other state had made such a ruling, and the decision was reserved for the United States Supreme Court. TR IV, 486-490. The closest the Commonwealth came to arguing a position that it has taken in this appeal was

saying that "this Court is in no position to find a national consensus based upon the authority cited by the Defendant." *Id.* 488. At the subsequent hearing, the Commonwealth largely restated its argument that the trial court was without authority to decide whether a national consensus exists. VR 6/9/17, 11:14:00-11:14:55. The Commonwealth never addressed the merits of Dr. Steinburg's testimony or the conclusions that should be drawn from that testimony, nor did it ask questions of Dr. Steinburg that would have supported the scientific assertions it has made in the Brief for Appellant.

This Court has traditionally held that it is "not at liberty to review alleged errors when the issue was not presented to the trial court for decision." *Henson v. Commonwealth*, 20 S.W.3d 466, 470 (Ky. 1999). Or, as the Court has more colorfully put it, "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky.1976), *overruled on other grounds by, Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky.2010). As such, all of Sections I. C. and E. of the Brief for Appellant should be treated as unpreserved. The Commonwealth has not requested palpable error review, so this Court should limit its review to the arguments in Section I.D. ("The trial court erred in finding a national consensus against imposing the death penalty on persons under the age of twenty-one.")

Finally, while the Commonwealth states correctly that the trial court's legal conclusions are reviewed *de novo*, "the trial court's findings of fact are reviewed for clear error and are deemed conclusive if supported by substantial evidence." *Barrett v. Commonwealth*, 470 S.W.3d 337, 341 (Ky. 2015). If any of the

Commonwealth's claims are reviewed as palpable error, they should only be reversed if a "manifest injustice" occurred. It did not.

B. Standard for Evaluating Claims under the Eighth Amendment

In determining whether a punishment violates the Eighth Amendment prohibition against "cruel and unusual punishments," courts have referred to "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons,* 543 U.S. 551, 561 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1985). Prior to *Moore v. Texas*, ___ U.S. ___, 137 S.Ct. 1039 (2017) cases finding an Eighth Amendment violation have relied on both "objective indicia of consensus" that the practice is excessive, ***and*** a finding in the Court's "independent judgment" that the punishment practice at issue does not serve a legitimate penological purpose. *Roper*, 543 U.S. at 564.[57] In *Moore,* the Court

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[57] The significant Eighth Amendment opinions rendered from the U.S. Supreme Court state that these considerations are to be taking into account regarding claims that a punishment against a certain class of offenders violates the Eighth Amendment. E.g., *Miller v. Alabama*, 567 U.S. 460, 469-470, 482-485 (2012) (mandatory life without parole sentences for homicide offenders under 18 violates the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48, 61 (2010) (Eighth Amendment prohibits imposition of life without parole sentences on juvenile offenders who did not commit homicide); *Kennedy v. Louisiana*, 554 U.S. 407, 420-422 (2008) (the death penalty is not a proportional punishment for the rape of a child); *Atkins v. Virginia*, 536 U.S. 304, 312-313 (2002) (execution of intellectually disabled offenders is prohibited by the Eighth Amendment).

While *Miller* and *Graham* dealt with life without parole sentences regarding juvenile offenders, they utilized the exact same aforementioned considerations under the Eighth Amendment and thus their logic is applicable to death penalty cases. This is because the death penalty and life without parole "share some characteristics ... that are shared by no other sentences." *Miller*, 567 U.S. at 474 (quoting *Graham*, 560 U.S. at 69). "In part because we viewed [life without parole] as akin to the death penalty, we treated it similarly to that most severe punishment" and "the bar we adopted ***mirrored*** a proscription first established in the death penalty context." *Miller*, 567 U.S. at 475 (citing *Graham*, 560 U.S. at

found that Texas' method of determining intellectual disability violated the Eighth Amendment, without reference to whether any consensus existed as to its use. Whether was a function of the facts of that case, or a determination by the majority that the consensus analysis has outlived its usefulness,[58] remains to be seen. As the evidence of a consensus in this case is at least as strong as in prior cases where an Eighth Amendment violation has been found, however, this Court need not reach that question.

C. The Death Penalty Serves No Legitimate Penological Purpose for Youthful Offenders who were Under 21 Years Old at the Time of an Offense.

"'[T]he Constitution contemplates that in the end [a Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment'" *Roper*, 543 U.S. at 563 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977). The Supreme Court has found that "there are two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes by prospective offenders." *Roper*, *supra*, 543 U.S. at 571 (quoting *Atkins*, *supra*, 536 U.S. at 319 and *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)) (internal quotation marks omitted). "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Likewise, the *Roper* Court found that deterrence was also not an

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60, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and *Coker v. Georgia*, 433 U.S. 584 (1977)) (emphasis added).

[58] In principal, the consensus analysis would require that a punishment practice which lacks any legitimate penological purpose be saved from the historical dust heap merely because a substantial majority of states still approve of its use. It is difficult to see the value of that approach, which may explain the United States Supreme Court's quiet abandonment of it.

effective justification because "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Roper* 543 U.S. at 571-72, (quoting *Thompson*, 487 U.S., at 837)

A review of the recent psychological and neuroscientific research reveals that offenders under 21 years old have the exact same vulnerabilities as those under 18 years old, and they cannot be condemned as the "worst of the worst."

1. *Roper* and its progeny's findings regarding person's under 18 years old.

In *Roper*, the Court found that there are "[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S. at 569. These differences have to do with immaturity and reckless behavior, susceptibility to negative influences and peer pressure, and underdeveloped character and transitory personality traits.

The first difference identified by the *Roper* Court is that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993) and citing *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982)).

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, [445 U.S. at 115] ("[Y]outh is more than a chronological fact. It is a time

and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstances that juveniles have less control, or less experience with control, over their own environment. *Roper*, 543 U.S. at 569 (citing Steinberg and Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. *Roper*, 543 U.S. at 569-570 (citing E. Erikson, *Identity: Youth and Crisis* (1968).

Roper concluded that "[t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835). The Court further concluded:

> [t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably deprived character. From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, [t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that ma dominate in younger years can subside. ... see also Steinberg and Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal

> activities develop entrenched patterns of problem behavior that persist into adulthood."). *Roper*, 543 U.S. at 570 (certain internal quotation marks and citations omitted).

While the Supreme Court has made clear that "[r]ehabilitation . . . is not an applicable rationale for the death penalty," *see Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986 (2014) (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)), the fact that a class of individuals will naturally cease their antisocial behavior is a strong indication that their behavior is not a function of irrevocably bad character, but if immaturity and impetuosity.

2. *Roper* and its Progeny Made Clear that Legitimate Penological Interests are Not Served by Executing Individuals who were under 18 Years Old at the Time of an Offense.

The *Roper* court began its analysis by finding that the goal of deterrence is not served by executing juveniles. This is because "the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 72 and *Roper* 543 U.S. at 571) (internal quotation marks omitted). The absence of evidence of deterrent effect to the contrary is of special concern. *Roper*, 543 U.S. at 571. *Roper* also stated that "the same characteristics that render juveniles less culpable than adults suggest... that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571; see also *Graham*, 560 U.S. at 72 (quoting the same). "Because juveniles' lack of maturity and underdeveloped sense of responsibility... often result in impetuous and ill-considered actions and decisions... they are less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72 (quoting *Johnson*, 509 U.S. at 467) (internal quotation marks omitted). Regarding

the possibility that a punishment could have a deterrent effect, the Court in *Graham* noted that such an "argument does not overcome other objectives" and even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered." 560 U.S. at 72 (quoting *Kennedy*, 554 U.S. at 441) (internal quotation marks omitted).

Finally, the goal of retribution is not served by executing juveniles either. As the *Roper* Court found, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." 543 U.S. at 571. As similarly stated in *Graham*, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." 560 U.S. at 71. Clearly, juvenile offenders are less culpable than adult offenders.

Thus, *Roper* and its progeny held that legitimate penological interests are not served by executing individuals who were under 18 years old at the time of an offense.

3. Executing Those who were under 21 at the Time of an Offense Also Serves No Legitimate Penological Purpose.

After hearing the evidence, the trial court made substantial and detailed findings concerning brain function in older adolescents. The trial court described the physical changes the brain undergoes through this period, which results in a "maturational imbalance" where the systems which process rewards are very well

developed, while the systems for cognitive control lag behind.[59] As a result of these physiological changes, older adolescents do not grow out of the mental deficiencies that typify youth until much later than previously thought. Consequently, as a class, older adolescents function similarly to juveniles in that they are:

- "[M]ore likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation."[60]
- "[M]ore likely to engage in 'sensation seeking,' the pursuit of arousing, rewarding, exciting, or novel experiences, [especially] among individuals between the ages of eighteen (18) and twenty-one (21)."[61]
- "[L]ess 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)."[62]

As with juveniles, "these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including

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[59] TR V, 669-671.

[60] TR V, 668, citing 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).

[61] *Id.*, citing E. Cauffman, et al., *Age Differences in Affective Decision Making as 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).

[62] *Id.*, citing L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 2844 (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).

those that generate negative emotions, such as fear, threat, anger, or anxiety," or in the presence of peers.[63] Also similar to juveniles, older adolescents also possess a substantial capacity for reform, including the tendency to cease antisocial behavior even without state intervention. As such, "the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21)."[64]

In light of the foregoing, executing those who were under 21 at the time of an offense serves no legitimate penological purpose. As with juveniles, executions do not serve a retributive purpose. When it comes to the domains of self-control, risk analysis, resistance to peer pressure, and other areas, older adolescents are as impaired – or in some cases more impaired – than their juvenile counterparts. As such, they are also "categorically less culpable" and therefore the exercise of the state's harshest sanction is inappropriate when applied to them.

For the same reasons, there is no reason to believe that the death penalty deters crimes within this population. As with juveniles, especially in periods of arousal, the science overwhelmingly shows that older adolescents act in haste, without forethought or significant analysis. The presence or absence of the death penalty in their cases will make no substantial difference on their criminal conduct.

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[63] *Id.*, 668-669, citing A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non Emotional* 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).

[64] *Id.*, 669, citing 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).

Finally, studies now establish that older adolescents behavior is clearly more a function of neurological and psychological deficiencies consistent with their stage of life, than it is a function of hardened antisocial attitudes. As with juveniles, most older adolescents will cease antisocial behavior within a matter of a few years, and possess the same amenability to rehabilitation that juveniles do.

In short, the trial court correctly found that the science in 2017 mandated the same finding today that the *Roper* court made about juveniles in 2005: the death penalty served no penological purpose for the class of offenders who are 18 and older, but not yet 21.

D. The Trial Court Correctly Found that There is a Sufficient National Consensus that Individuals under Twenty-One Years Old at the Time of the Offense Should Not be Executed.

The Supreme Court has not identified a single formula for establishing a consensus that a punishment is excessive. The Court has recognized that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham v. Florida*, 560 U.S. 48, 62 (2010)(quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) and *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). However, it has gone on to say that "[t]here are measures of consensus other than legislation." *Graham*, 560 U.S. at 62 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008). Accordingly, the Supreme Court also looks to actual state practices, including past usage and jury verdicts, a punishment's frequency, as well as trends and the consistency of the direction of the change. *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("Central to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment. Such as, indicia

of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations.") (citations omitted); *Thompson v. Oklahoma*, 487 U.S. 815, 822 (1988) ("[W]e first review relevant legislative enactments, then refer to jury determinations."); *Atkins*, 536 U.S. at 316 ("[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades."). In addition, the Supreme Court has also looked to "views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community" when considering indicia of consensus.[65] *Thompson*, 487 U.S. at 830); see also *Roper*, 543 U.S. at 561, 575-579 (evaluating international opinion). Evaluating all of these areas, it is clear that a sufficient consensus exists to support the trial court's finding.

1. The Evidence of Consensus in this Case is Similar to Other Cases Where a Consensus was Found.

The Commonwealth suggests that a majority of jurisdictions must preclude the practice at issue in order to trigger an Eighth Amendment claim. CW Brief, pp. 18-19. However, this reasoning is contradicted by the United States Supreme Court's rulings in *Graham* and *Miller*. Using the correct standard, it is clear that the trial court's conclusion was right.

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[65] This is undoubtedly due to the fact that the Eighth Amendment has its roots and language directly taken from the English Declaration of Rights of 1688 and that the principle it represents can be traced back to the Magna Carta. *Trop*, 356 U.S. at 100.

First, merely comparing the number of states involved in *Roper*, *Graham* and *Miller* to the current case makes clear that a sufficient consensus against this practice already exists:

	Roper v. Simmons	*Graham v. Florida*	*Miller v. Alabama*	Current Case
Number of States Prohibiting Sentence?	30	13	22	31[66]
Number of States Actually Imposing Sentence w/in Last 5 Years?	3	11	Unk.	9
Has One State Carried Out the Majority of Sentences?	Yes-Tex.	Yes-Fla.	Unk.	Yes-Tex.
Is the Use of the Sentence Declining Significantly?	Yes.	Unk.	Unk.	Yes

This conclusion is consistent with the holdings of the cases themselves. In *Graham*, the Supreme Court used the same Eighth Amendment analysis at issue in the case at bar to determine whether the Eighth Amendment prohibits imposition of a life without parole sentence on juvenile offenders who did not commit homicide. 560 U.S. at 61. The Court noted that only six jurisdictions excluded life without parole sentence for any juvenile offenders while seven permitted it for juveniles convicted of homicide and that thirty-seven states as well as the District of Columbia and Federal law permitted it for some juvenile non-homicide offenders. *Id.* at 62. The State argued that, given this metric, there was no consensus against the sentencing practice at issue. *Id.* The Court found that argument "incomplete and unavailing" and stated that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Id.* The Court, acknowledging the statistics may be flawed, found that only 123 juvenile

[66] Though the trial court found that 30 states prohibited the death sentence, that finding is clearly erroneous, as the trial court neglected to include the state of Delaware, whose state supreme court found the death sentence unconstitutional in 2016. *See Powell v. Delaware*, 153 A.3d 69 (Del. 2016).

non-homicide offenders were serving sentences of life without parole. *Id.* at 64-65. Thus, the Court concluded that because the sentencing practice at issue was exceedingly rare, "it is fair to say that a national consensus has developed against it." *Id.* at 67 (quoting *Atkins*, 536 at 316).[67]

After the opinion in *Graham* was rendered, the Supreme Court, in *Miller*, held that a mandatory life without parole sentence imposed on juvenile homicide offenders violates the Eighth Amendment. *Miller*, 567 U.S. at 479. The Court acknowledged that 28 states and the Federal law make a life without parole sentence mandatory for some juvenile homicide offenders. *Id.* at 482. However, the Court stated that this holding followed directly from the principles of *Roper* and *Graham* and stated that "in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which less than half of the States that permitted capital punishment for whom the issue existed had previously chosen to do so." *Id.* at 484 (internal quotations and citations omitted).[68]

Moreover, since the opinion in *Roper* was rendered, the trend against the death penalty has continued. To break it down by jurisdiction: seven[69] more states have abolished the death penalty, making a total of nineteen states and the District of Columbia without a death penalty statute.[70] These states, along with the dates of abolition, are Delaware (2016)[71], Maryland (2013), Connecticut (2012), Illinois

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[67] In *Atkins*, the Court held that the execution of intellectually disabled offenders is prohibited by the Eighth Amendment.
[68]The considerations taken into account under *Miller* and *Graham* mirror those taken into account in death penalty cases.
[69] The trial court incorrectly stated six instead of seven states.
[70] TR V, 665.
[71] The trial court failed to mention Delaware in its order.

(2011), New Mexico (2009), New York (2007), and New Jersey (2007).[72] The states that had abolished the death penalty prior to *Roper*, along with the dates of abolition, are Rhode Island (1984), Massachusetts (1984), North Dakota (1973), Iowa (1965), West Virginia (1965), Vermont (1964), Alaska (1957), Hawaii (1957), Minnesota (1911), Maine (1887), Wisconsin (1853), and Michigan (1846) and the District of Columbia abolished the death penalty in 1981.[73]Regarding the nineteen states that have abolished the death penalty, this has been done either by the state's highest court or by the state's legislature.

Also, the death penalty is prohibited in four of the five inhabited U.S. territories. Under the constitutions of Puerto Rico and the Commonwealth for the Northern Mariana Islands, the death penalty is prohibited. P.R. Const. Art. II § 7 ("The death penalty shall not exist."); C.N.M.I. Const. Art. I § 4(i) ("Capital punishment is prohibited."). In Guam and the U.S. Virgin Islands, the death penalty is not a possible sentence. G.C.A. § 16.39(b) (punishment for aggravated murder is life); 14 V.I.C. § 923(a) (providing for life in prison as punishment for murder). It should be also be noted that the death penalty has not been carried out or imposed in the remaining inhabited U.S. territory since the 1930s. While the death penalty is still a possible sentence in theory in America Samoa, the last execution there was in 1939 and no death sentence has been imposed since the 1930s.

In *Hall*, the Supreme Court also characterized the moratorium states as being on the defendant's "side of the leger" in the indicia of consensus

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[72] TR V, 665.
[73] *Id.*

consideration. 134 S.Ct. at 1997. Currently, the governors of four states have imposed moratoriums on executions in the last five years.[74] The Governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively.[75] The governor of Oregon extended a previously imposed moratorium in 2015, while the governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013. All of these have been imposed in the last five years.

Also, as the trial court found, seven states have de facto prohibitions on the death penalty as they have not executed offenders under the age of twenty-one years old in the last fifteen years and have not imposed any new death sentences on offenders in that age group in the last twenty years.[76] These states are Kansas, New Hampshire, Montana, Wyoming, Utah, Idaho, and Kentucky.[77]

Furthermore, as the trial court found, "since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to twenty-one" and "the infrequency of [the death penalty's] use even where it remains on the books" are to be considered in regard to indicia of consensus as are "actual sentencing practices."[78] Again, the trial court's conclusion was right.

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[74] TR V, 665. The Commonwealth argues that these four states should not be considered because the moratoriums do not preclude new death sentences from being imposed. CW Brief, pg. 20. However, this ignores *Hall* and the fact that, regarding indicia of consensus, actual practices and the frequency of death sentences being carried out is to be considered. *Atkins*, 536 U.S. at 316

[75] *Id.*

[76] *Id.*,note 9.

[77] *Id.*

[78] TR V, 666-667 (citing *Roper*, 543 U.S. at 567 and *Graham*, 560 U.S. at 62.)

2. Evidence of Other Social Practices Also Support a Finding that there is Now a Consensus Against the Execution of Older Adolescents.

In *Roper*, the Supreme Court considered state statutes imposing minimum age requirements in concluding that the death penalty was a prohibited punishment for juvenile offenders: "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." 543 U.S. at 569.

Likewise, in the context of offenders under 21 years old, state and federal laws impose a minimum age of 21 years old for various activities and extend the age of "minority" to 21 years old for other activities. For example, all 50 states, as well as the District of Columbia, impose a minimum age restriction of 21 years old for the consumption, purchase, or possession of alcohol or recreational marijuana.[79]

Most states also impose minimum ages related to handguns: 41 states, including Kentucky, impose a minimum age of 21 years old to obtain concealed carry permits.[80] Table C. Also, federal law outright prohibits licensed gun dealers from selling handguns and handgun ammunition to people under 21 years old. 18 U.S.C. § 922(b)(1), (c)(1); 27 C.R.R. § 478.99(b).

In addition, federal immigration law permits a parent who is a United States citizen to petition for an immigration visa for any "unmarried children the under

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[79] Memorandum in Support of Renewed Motion to Exclude the Death Penalty, ("Memorandum"), TR III 422 – TR IV 483, at TR IV 473. This document is included in the Appendix at Apx. Tab 5.

[80] *Id.*, at Table C, pp. 470-472

the age of 21." 8 U.S.C. § 1151(b)(2)(A)(i). A child can likewise petition for an immigrant visa for his parents, but only if he is at least 21 years old. *Matter of Hassan*, 16 I&N Dec. 16(1976). Although a United States citizen of any age may petition for immigration benefits for "alien" children, prospective adoptive parents must be married, or at least 25 years old if unmarried to obtain immigration benefits under the Hague Convention of Protection of Children and Co-operation in Respect of Inter-country Adoptions. Indeed, some states impose heightened age requirements on prospective adoptive parents. See, e.g., Colo. Rev. Stat. §§ 19-8-3 (25 years old or married); Okla. Stat. Tit. 10 § 7503-1.1 (21 years old). And some states allow for the adoption of children up to the age of 21 years old. See, e.g., Colo. Rev. Stat. § 19-5-201, 14-1-101. Most states allow for the adoption of any person regardless of age. See, e.g., Alaska Stat. § 25.23.010; Ark. Code § 9-9-203.

That youths under 21 years old should not be treated the same as those 21 and older finds support in the various laws that protect those under 21 years old the same way that children under 18 are protected. For example, the Credit Card Act of 2009 bans credit cards for people under the age of 21 unless they have a co-signer age 21 or older, or show proof that they have the means to repay the debt. See, e.g., 15 U.S.C. § 1637(c)(8); 15 U.S.C. § 1637(p). Consistent with this rule, 42 states and the District of Columbia impose a minimum age of 21 to transfer gifts.[81] That is, by law in a majority of states, people under 21 years old cannot dispose of, or use, their property outright; transfers of "gifts" to "minors" must be subject to approval by a custodian until the "minor" reaches the required age: most often, 21

[81] Id., Table E at 475-478

years old. *Id.*. Also, 31 states provide free public education up to age 21 years old; two states have higher age maximums; and 10 states provide free education up to age 20. Motion, Table F.

Furthermore, 40 States and the District of Columbia impose a minimum age of 21 years old to become a foster parent (Motion, Table G), and several states extend foster-care benefits to children ages 18, 19, or 20 years old. See, e.g., Cal. Fostering Connections to Success Act, Assembly Bill 12 (2010) (extending foster care benefits up to 21 years old); Ind. Collaborative Care Program (extending foster care benefits up to 20 years old and extending voluntary services until 21 years old); Minn. Stat. § 260C.451, subdivision 1 (extending foster care benefits to 21 years old); Va. Code § 63.2-905.1 (extending independent living services to former foster kids). Kentucky law allows a child to extend her commitment to the Commonwealth's Cabinet for health and Family Services in order to purse educational goals or acquire independent living skills to age 21. KRS 625.025. In 2008, the federal Social Security Act was amended to extend eligibility for certain foster care, adoption assistance and kinship guardianship payments for foster kids and adoptees up the age of 21. Pub. Law 110-351 §§ 201, 202.

There are also categorical age-based limits affecting professional activities, further corroborating scientific observations about the immaturity and impulsivity of those under 21 years old. For example, federal law requires a person to be at least 21 years old to drive a commercial vehicle interstate, transport passengers intrastate, or transport hazardous materials intrastate. See 49 C.F.R §§ 391.11(b)(1), 390.3(f), 391.2. The age of 23 is the minimum to become a Federal

Bureau of Investigation agent and 21 years old is the minimum age to become a special agent with the Drug Enforcement Agency.

Finally, the federal and various state constitutions impose age-of candidacy requirements for public office. For example, the minimum age to run for the U.S. House of Representatives is 25 years old. U.S. Const. Art. I § 2 cl. 2. Also, 27 states have even higher age restrictions.[82] Individuals are categorically barred from holding such an office in 33 states if he or she is under 21 years old.

In sum, it appears that where activities clearly require a certain level of responsibility, American jurisdictions are comfortable setting the minimum age at 21 or higher, rather than at 18. Likewise, state and federal laws extend protections to persons under 21 that might otherwise only apply to juveniles because of the vulnerability of these individuals and the need for society to protect this class. Tables A through G of the Memorandum[83] set forth the various age minimums and maximums for each state for selected activities.

3. In 2018, the American Bar Association published a Resolution urging every jurisdiction to prohibit the death penalty for offenders who were 21 years old or younger at the time of an offense.

The opinions of respected professional organizations are to also be considered by the Courts in evaluating whether a consensus is emerging. *Thompson*, 487 U.S. at 830. Along those lines, in February of 2018, the American Bar Association (ABA) published a Resolution and stated the following:

> RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to prohibit the

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[82] *Id.*, Table B, 468-469.
[83] *Id.*, 465-483

> imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense.

ABA Resolution, preface. (ABA Resolution attached in appendix). This resolution was based on legal, scientific and societal developments, including new understandings of brain science, since the opinion in *Roper* was rendered. Some of these were discussed in Section I.C. above. This Resolution consisted of a 17 page report and concluded as follows:

> In the decades since the ABA adopted it policy opposing capital punishment for individuals under the age of 18, legal, scientific and societal developments strip the continued application of the death penalty against individuals in late adolescence of its moral or constitutional justification. The rationale supporting the bans on executing either juveniles, as advanced in *Roper v. Simmons*, or individuals with intellectual disabilities, as set forth in *Atkins v. Virginia*, also apply to offenders who are 21 years old or younger when they commit their crimes. Thus, this policy proposes a practical limitation based on age that is supported by science, tracks many other areas of our civil and criminal law, and will succeed in making the administration of the death penalty fairer and more proportional to both the crimes and the offenders.
>
> In adopting this revised position, the ABA still acknowledges the need to impose serious and severe punishment on these individuals when the take the life of another person. Yet at the same time, this policy makes clear our recognition that individuals in late adolescence, in light of their ongoing neurological development, are not among the worst of the worst offenders, for whom the death penalty must be reserved. *Id.* at 12-14.

The opinion of numerous respected professional organizations, as expressed through the ABA and numerous *amici* briefs filed in this case that there is an indicia of consensus that the older adolescents herein should not be subject to execution.

The Commonwealth is incorrect in its representation of the indicia of consensus at issue regarding this case. As outlined above, a national consensus have been developing against executing offenders who were under 21 years old at

the time of an offense. Nineteen states and the District of Columbia and four of the five U.S. territories ban the death penalty (seven of these states have abolished the Death penalty since *Roper*). Four states have imposed moratoriums on executions during the past five years and during approximately the past 15 years, seven states have demonstrated an actual practice of neither executing nor sentencing to death offenders who were under 21 years old when they committed an offense. Furthermore, executions of individuals in this age range are rare in the states that continue to execute the death penalty. Moreover, respected national organizations, including the ABA, have voiced their opposition to executions of individuals who were under the age of 21 at the time of an offense and backed such opposition with reliable scientific and sociological studies. As such, the trial court was correct when it found that "the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).[84]

E. The Commonwealth's Unpreserved Objections to this Ruling Should Be Rejected.

As noted above, in the trial court the Commonwealth's objections were considerably less robust then they are here. In particular, the Commonwealth now argues that (a) other jurisdictions have already considered and rejected this claim, and (b) the scientific facts underlying this claim were known and considered at the time *Roper* was initially decided. Neither argument has merit, but this Court should reject both of them as unpreserved. First, if this Court wants to ensure that important issues of this nature are fully and completely litigated in the future, it

[84] TR V, 667.

should act today to reaffirm the principle that the Commonwealth, like the defense, is obligated to make its case in the first instance to the trial court. Especially given how the trial court poured over thousands of pages of scientific information, all the while inviting the Commonwealth to participate much more than it did, it deserved the benefit of understanding the Commonwealth's position before it ruled. There will be no manifest injustice if the maximum penalty Mr. Bredhold faces is life without parole.

Second, to the extent that the Commonwealth is now attacking the testimony of Dr. Steinburg, it is not only asking this court to completely ignore the trial court's factual findings and the substantial evidence supporting them, it is asking this Court engage in rank speculation on what Dr. Steinburg might have said if he had been confronted with these issues when he was on the stand. Dr. Steinburg presented his testimony under oath, and supported it with dozens of studies published *after Roper*. The Commonwealth had plenty of opportunity to cross examine Dr. Steinburg on that point, or to present their own testimony which could have been cross examined by the defense. This Court has previously found that a factual finding is conclusive if it is supported by "evidence that a reasonable mind would accept as adequate to support a conclusion, or evidence that has sufficient probative value to induce conviction in the minds of reasonable men." *Johnson v. Commonwealth*, 412 S.W.3d 157, 166 (Ky. 2013). The same ruling should apply here.

That said, even if the Court considers the merits of the Commonwealth's arguments, they should be rejected.

1. This Claim Has Not Been Decided in Other Jurisdictions

While the Commonwealth claims that other courts have already rejected this claim, that greatly overstates its case. What is unprecedented about this case is that after hearing extensive evidence, the trial court made a clear factual finding that the scientific consensus today is that older adolescents suffer the same cognitive and decision-making limitations as juvenile offenders. None of the Commonwealth's cases contains such a factual finding. Indeed, most of the cases the Commonwealth relies upon do not even address this argument at all.

Among the cases the Commonwealth cites, *Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006), hits closest to home. There, this Court was asked to apply *Roper* to an individual based on his "mental age," as opposed to his chronological age. While this Court did not believe that the "mental age" evidence was sufficient to warrant relief, it was at pains not to reject the argument Mr. Bredhold is making today, stating that "[w]e do not necessarily disagree that, in theory, the broad concepts espoused by the Supreme Court could pertain to those who function at the mental level of a juvenile." *Id.* at 582. As this case was decided in the immediate aftermath of *Roper*, at that time there were no new scientific considerations to take into account that might have triggered an expansive view of *Roper*.

Out-of-state cases that followed *Bowling* also do not stand for the proposition that the *Roper* findings could never be extended to older individuals based on updated science. To the contrary, they seem to be little more than boilerplate efforts to raise some variation of Bowling's "mental age" claim. For example, *Mitchell v. State*, 235 P.3d 640, 658-660 (Okla. Crim. App. 2010) followed *Bowling* without any real independent analysis after an Appellant, in his

11th proposition of error, argued that *Roper* should apply to him even though he was over 18 at the time of the offense. All indications are that this issue was one of a plethora raised in a capital case and that no new arguments were made regarding indicia of consensus or new scientific research. Similarly, in *Thompson v. State*, 153 So.3d 84 (Ala.Ct.Crim.App. 2012), the issue appeared to also have been raised apparently as a boilerplate issue because it was summarily rejected without any real analysis on the 94th page of a 108 page opinion in a capital case. *Id.* at 178. Certainly neither of these cases involved direct evidence of categorical neurological similarities between 18-20 years olds and juveniles.

The Commonwealth also points to decisions in other jurisdictions that were decided after the order in the instant case, implying that these cases reject the conclusion that there has been a change in the scientific consensus. However, the Commonwealth's arguments regarding these cases are incredibly misleading. First, both cases were dismissed for procedural reasons, without a ruling on the merits of the claim. *See Otte v. State*, 96 N.E.3d 1288, 1293 (Ohio Ct.App.8th 2017) (dismissing the case "because Otte has no right to file a declaratory judgment action to challenge his death sentence"); *Branch v. State*, 236 So. 3d 981, 986 (Fla. 2018) (Rejecting the claim because "this claim is waived as it could have been raised previously.") Second, the Commonwealth implies that these courts rejected the factual findings made by the lower courts, but that is not accurate. In *Otte*, the majority opinion mentioned the order in this case, but only for the purpose of pointing out that as a Kentucky Circuit Court order, it did not meet the legal standards to reopen a post-conviction claim. That said, one of the judges in the case clearly was moved by the order, stating that "*I would suspend implementation*

of capital punishment for those who committed capital crimes before 21 years old." Id. at 1294 (McCormack, J., concurring) (emphasis added).

By contrast, *Branch* did not mention the order in this case, but did include a discussion of whether a brain study would qualify as "newly discovered evidence" for post-conviction purposes. Relying on *Morton v. State*, 995 So.2d 233 (Fla. 2008), the Court opined that it would not. However, what constitutes "newly discovered evidence" for post-conviction purposes is completely different than asking whether the science has progressed enough to demonstrate a new consensus regarding brain development in older adolescents at the trial level.

The remaining cases are also inapplicable to this issue. *See Hill v. State*, 921 So.2d 579 (Fla. 2006) (Summarily rejecting argument without analysis because Hill was 23 – a claim that would have been rejected by the trial court in this case as well); *Romero v. State*, 105 So.3d 550 (2012)(not a death penalty case); *United States v. Marshall*, 736 F.3d 492 (6th Cir. 2013)(same); *United States v. Lopez-Cabrera*, 2015 WL 3880503 (S.D.N.Y. June 23, 2015)(same).

2. The Scientific Evidence was Not Available at the Time of Roper

The Commonwealth's only argument regarding the scientific evidence in this case is that it was already available at the time of *Roper* and therefore *Roper* should be construed to have rejected this claim. CW Brief, pg. 24-27. That argument fails for a number of reasons. First, the statement is contradicted by the trial court's factual findings. As noted above, factual findings are conclusive when they are supported by substantial evidence. *Johnson,* 412 S.W.3d at 166.

Here, the trial court repeatedly found that the scientific consensus had changed in the years following *Roper*, such that "if the science in 2005 mandated

the ruling in *Roper,* the science in 2017 mandates this ruling". TR 5, pg. 667. "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 (20's); this notion is now widely accepted among neuroscientists." *Id.* pg. 668 (emphasis added). The trial court based its findings on "[r]ecent psychological research" and "[r]ecent neurobiological research." *Id.*, pp. 668 and 669. The evidence presented to the Court supports this finding. Not only did Dr. Steinburg testify directly to the scientific understanding had changed, but of the thirty (30) studies cited by the trial court in its findings related to the current science, all but one was published after *Roper* was decided. This completely contradicts the Commonwealth's assertion that "the research laid out in the *amicus* brief in *Roper* is the same as what Dr. Steinburg presented to the trial court in this matter." CW Brief, pg. 25. Quite the contrary – none of the research presented was available at the time.

Second, the Commonwealth's underlying legal contention – that *Roper* considered and rejected a bright line above 18 – is simply false. The Rules of the United States Supreme Court are clear that "[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court." Rules of the United States Supreme Court, Rule 14.1(a). As a corollary principle, the Supreme Court "does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Relevant to this case, the question raised by the case was "Is the imposition of the death penalty on a person who commits a murder at age seventeen 'cruel and unusual,' and thus barred by the Eighth and Fourteenth Amendments?." *Roper v. Simmons*, petition for

certiorari, 2003 WL 26089783 (U.S.), pg. i. That question did not permit the Supreme Court to venture into unexplored territory and consider any line above age 18. Not only was the science

F. Conclusion: The Trial Court's Ruling is Right and Should Be Affirmed

In an unbroken line of cases starting with *Atkins*, continuing through *Roper* and its progeny, and culminating in *Hall v. Florida* and *Moore v. Texas*, the United States Supreme Court has regularly rejected the arguments like those made by the Commonwealth in this case, which ask the Court to reject current science in favor of maintaining a bright line rule. *Roper* and *Atkins* both overturned recent precedents which had approved of execution of juveniles or the intellectually disabled, because changes in our scientific understanding of how juveniles or the intellectually disabled functioned, demanded it. Similarly, *Graham* and *Miller* adopted Eighth Amendment restrictions in an area that had never had them before, again because the science required it.

Very recent precedents continue to adopt this approach. In *Hall*, the Supreme Court rejected Florida's attempt to limit application of *Atkins* to those whose IQ score on standard tests were below 70. In rejecting that bright line rule, the Court noted that "[i]t is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Hall*, 5134 S. Ct. at 2000. That philosophy was reaffirmed in *Moore*, when the Court found that courts did not have "leave to diminish the force of the medical community's consensus." *Moore*, 137 S.Ct. at 1044. In both cases, what mattered to the Court was not preserving a bright line rule, it was

ensuring that the punishment at issue is justifiable in light of the best available scientific thinking.

Applying the best available scientific thinking to this case, this Court has no other choice but to affirm the lower courts' ruling. The scientific evidence is simply overwhelming that older adolescents perform no better than juveniles perform, and often perform worse. Older adolescents may function like kids, but they are often treated as adults, and so the risk that an older adolescent will be sentenced to death in error is even greater than what motivated the Court to act in *Roper*. Finally, the practice of executing older adolescents has been substantially abandoned throughout most of the nation, with only a handful of jurisdictions continuing to do it. In light of all of this, the trial court was completely correct to declare that older adolescents are categorically barred from the death penalty. The judgment should be affirmed.

II. Imposition of a Death Sentence for a Crime Committed by an Adolescent Aged 18-20 is Cruel Punishment Prohibited by § 17 of the Kentucky Constitution.

A. Preservation

This issue is not preserved for appellate review, in that no specific state constitutional argument was made within Mr. Bredhold's motion. However, it should be reviewed for palpable error under RCr 10.26. Having an unconstitutionally severe sentence imposed is clearly a "manifest injustice", and given the similarities between the Eighth Amendment analysis and the analysis under §17 of the Kentucky Constitution, there is no prejudice to the Commonwealth by deciding this claim for the first time on appeal.

B. Argument

"Section 17 of the Kentucky Constitution accords protections parallel to those accorded by the Eighth Amendment to the U.S. Constitution." *Turpin v. Commonwealth*, 350 S.W.3d 444, 448 (Ky. 2011). As with the United States Constitution, a punishment offends state constitutional provisions if it is "contrary to evolving standards of decency that mark the progress of a maturing society." *Baze v. Rees*, 217 S.W.3d 207, 211 (Ky. 2006), *aff'd*, 553 U.S. 35 (2008), citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *See also Harrison v. Commonwealth*, 858 S.W.2d 172, 177 (Ky. 1993)(employing same analysis to claims brought under § 17 of the Kentucky Constitution and claims brought under the Eighth Amendment to the U.S. Constitution); *Hampton v. Commonwealth*, 666 S.W.2d 737, 740-41 (Ky. 1984)(same); *Workman v. Commonwealth*, 429 S.W.2d 374, 377 (Ky. 1968)("[w]hat constitutes cruel and unusual punishment .... changes with the continual development of society and with sociological views concerning the punishment for crime.").

One test for whether a punishment practice comports with the Constitution is when there is objective indicia of a societal consensus rejecting the practice. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002). In determining whether there is a consensus rejecting a particular punishment, "actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62. As with claims under the Eighth Amendment, after the Court reviews the societal consensus in favor of or against a punishment, it applies its own judgment and independently "ask[s] whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313. Importantly,

this analysis can come to a different conclusion with reference to the state community standard than what was contemplated when reviewing a national community standard. *See State v. Santiago*, 318 Conn. 1, 20-29 (2015)(examining the societal consensus against the death penalty within Connecticut in holding the death penalty violates the state constitution); *State v. Lyle*, 854 N.W. 378, 389 (Iowa 2014)(relying, in part, on the consensus "building in Iowa in the direction of eliminating mandatory minimum sentencing" in holding the application of mandatory minimums to juvenile offenders violates the Iowa Constitution); *Van Tran v. State*, 66 S.W.3d 790, 804 (Tenn. 2001)(examining consensus within Tennessee to determine the execution of intellectually disabled persons violates the Tennessee State Constitution), *State v. Campbell*, 691 P.2d 929, 947-48 (Wash. 1984) (looking to "current community standards" within Washington in analyzing a state constitutional challenge to Washington's death penalty). This is due to the fact that the Court is looking only at the practices within the state when making its decision.

To that end, this Court has struck down punishments for violating the Kentucky Constitution, even when those practices were considered proper under the Eighth Amendment. *See, e.g., Workman, supra* (striking down life without parole for a juvenile non-homicide offense approximately 40 years before it was struck down under the Eighth Amendment.) If this Court concludes that the Eighth Amendment does not prohibit capital punishment for older adolescents, then it should make a decision similar to the holding in *Workman*, and find that the capital punishment violates the Kentucky Constitution.

Proceeding to declare the death sentence unconstitutional with relation to this population on state law grounds alone would have the salutary effect of avoiding having to unwind this penalty at a later time. The testimony in this case makes clear that it is supported by a strong scientific consensus, based on conclusions that are now regarded as established scientific fact. Eventually this fact will lead society away from this penalty for this population. Making the change today will spare the Commonwealth much needless expense for litigating crimes that should not be tried as capital cases.

The cost of not making this change is evident in this individual case. Travis is clearly not the "worst of the worst". His offense does not appear to have elements of premeditation or cold-bloodedness, but appears to be more in the nature of a "robbery gone wrong." The trial court found that Travis was functioning at the level of a 14 year old at the time of the offense, making him neither a hardened criminal nor a criminal mastermind. Nevertheless, the Commonwealth has sought the death penalty against him. The taxpayers will pay the extra cost of a capital prosecution in this case even though Travis is not an appropriate person to receive that penalty. Even if the jury reaches that conclusion, the expense will have already been borne by society.

Rather than continue this practice, this Court should declare that the death sentence violates § 17 of the Kentucky Constitution when imposed upon individuals under the age of twenty-one (21) at the time of the offense.

Conclusion

For the foregoing reasons, the judgment of the Fayette Circuit Court should be affirmed.

Respectfully Submitted,
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APPENDIX

Tab	Item	Location in the Record
1	Order Declaring Kentucky's Death Penalty Statute as Unconstitutional	TR, Vol 5, pgs. 712-724
2	Defense Expert Witness Testimony of Laurence Steinberg	
3	Laurence Steinberg Report (July 17, 2017)	TR, Vol 5, pgs. 691-706
4	American Bar Association Resolution 111	
5	Defendant's *Renewed* Memorandum of Law in Support of Motion to Exclude the Death Penalty Based Upon Holding and Reasoning Reasoning of *Roper v. Simmons*	TR, Vols 3 & 4, pgs. 422-483

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.

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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]

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[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.

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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]

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[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]

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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

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[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.

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

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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

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[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).

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,

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[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

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[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

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[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 fits into 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

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[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.

(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:

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COMMONWEALTH OF KENTUCKY VS. EFRAIN DIAZ, JR.
15-CR-0584-001

BUFKIN

DEFENSE EXPERT WITNESS TESTIMONY

JUDGE (J): HON. ERNESTO SCORSONE
PROSECUTION (P): HON. LOU ANN RED CORN
PROSECUTION 2 (P2): HON. ANDREA MATTINGLY WILLIAMS
DEFENSE (D): HON. MICHAEL BUFKIN
DEFENSE 2 (D2): HON. KIM GREEN
WITNESS (W): LAURENCE STEINBERG

J: Well alright. Defendants present with counsel. Commonwealth present. Is the Commonwealth ready?

P: Uh it's the defendant's motion.

J: Yeah I know but I mean are you ready?

P: Oh yes oh we're...

J: Okay.

P: ready.

J: Defense ready?

D: Yes your Honor.

J: Alright...

D2: Yes...

J: You all had uh asked uh to allow the introduction of some testimony...

D: Yes your Honor.

J: I'm in support of your motion on the constitutionality of the statute. So ready to begin?

D: If it may please the Court...

J: Yes.

D: uh I would call Professor Laurence Steinberg to the stand...

J: Alright.

D: please. (PAUSE)

J: Alright if you'll stand right here sir and raise your right hand. (WITNESS BEING SWORN) Thank you please come around to this chair right here. (PAUSE) Alright. If you would for the record give us your full name.

W: Laurence Steinberg.

J: Thank you counsel your witness.

D: Thank you very much your Honor. Professor can you please tell Judge Scorsone your education please?

W: Yes. I received my Bachelor's Degree in Psychology from Vassar College in nineteen seventy-four (1974). I have a PhD in Developmental Psychology from Cornell University in nineteen seventy-seven (1977).

D: And can you tell us a little bit about your qualifications please?

W: Yes. My training is in Developmental Psychology which is the study of how people grow and change as they age. My specialty is in adolescent development and I have been engaged in research on adolescent development for the past forty years or so. After I finished my doctoral work at Cornell I took a position at the University of California in Irvine uh following that I was on the faculty at University of Wisconsin in Madison and in nineteen eighty-eight (1988) I moved to Temple University in Philadelphia where I have been on the faculty since then.

D: Very good. And um, what is your primary field of study?

W: My primary field of study is Adolescent Development and most recently specifically Adolescent Decision Making and Risk Taking and in the Application of the Science of Adolescent Psychological and Brain Development to Legal and Policy Issues.

D: Okay. Well we want to I want to start right off by defining one of the terms that we're using already and that is the term adolescent. Can you please define that for us?

W: Sure. Um, people define adolescence in many different ways. For my purposes and for the purposes of my testimony today I am thinking of adolescence as the period from ten until um twenty in other words from ten to up to twenty-one.

D: Okay thank you. Um, and have you been qualified as an expert before by courts?

W: Yes I have.

D: And could you tell us uh a little bit about which courts that have done that?

W: I've been qualified by experts in state courts in New York and Wisconsin and Colorado and Pennsylvania. And I've been qualified by federal courts um in the districts in New York and uh the state of Washington.

D: Thank you very much. Um, let's get right to the heart of the matter. Uh could you please tell us when does the brain mature?

W: The brain matures over an extended period of time. And certainly beginning from birth the brain is, maturing. If by your question you're asking when does the brain finish maturing...

D: Yes...

W: um the answer would be to the best of our understanding sometime during the mid-twenties. I say that sometime during the mid-twenties because different parts of the brain mature along different timetables. Some aspects of brain development are more or less complete by the time individuals are in their mid-teens but other aspects of brain development are not complete until individuals are let's twenty-three or twenty-four years old.

D: Okay. And how is it that we know this where where does this information come from?

W: Well uh up until the late nineteen nineties (1990's) we didn't really know very much about adolescent brain development and when I was in graduate school in the nineteen seventies (1970's) it was commonly believed that the brain stopped

developing at around the age of ten or so. And that was because the brain reaches its adult size at that age. It wasn't until the advent of imaging technology during the nineteen nineties (1990's) primarily that scientists became able to look inside the living brain. We could always do autopsies of course but it wasn't until then that scientists could look inside the living brain and see how the anatomy of the brain and the functioning of the brain changed with age. The first, published studies of adolescen adolescent brain development appeared in nineteen ninety-nine (1999) two thousand (2000) around then so it wasn't until as recently as that that we understood that there still was tremendous change going on inside the brain during adolescence. But at that time point scientists had not eh expressed any interest in asking this question for people who are older than eighteen. Um and and at the time when *Roper* was heard *Roper* was decided in two thousand and five (2005) there really wasn't much research on brain development that went beyond the age of eighteen. Uh that after all of that was the question in *Roper* anyway so it didn't matter. But during the period from about two thousand and five (2005) until today, the age range that scientists have focused in their studies of brain development has expanded. And in the last ten years or so we have seen that a lot of the maturation uh takes places between ages ten and eighteen is actually ongoing into their early twenties up until we think the the mid-twenties. So it hadn't been known at the time of *Roper* that there was this brain maturation that extended past eighteen but that is now well established in the scientific literature.

D: Okay. Um and if you would tell us the difference, or difference as uh between an immature adolescent brain and a mature adult brain and by that I'm talking in two terms one is structurally and one is functionally uh as the literature talks about. If you could address that issue?

W: Sure. Um the kind of maturity that we have been talking about in the legal cases that have been discussed um has to do primarily with um the ability of the individual to control his impulses, as to regulate his behavior. Um the ability of the individual to have a more accurate perception of risk. Um and the uh the extent to which the person's emotions are easily aroused. So what we see happening as people mature through adolescence and from adolescence into adulthood is that, they get better at perceiving risk where it is there. They get better at controlling their impulses. And they get better uh at at controlling themselves in emotionally arousing situations. Another aspect of brain development that I do want to explain here has to do with the capacity of the brain to change. So as many of you probably know, the brain is a malleable organ it changes in response to experience that's how we learn things. Um neuroscientist talk about a characteristic of the brain called plasticity. Which is

the extent to which the brain can be changed by experience. The brain is more plastic during adolescence than it is during adulthood. Which means that people are more capable of changing during adolescence when the brain is more plastic than they are during adulthood. That was an important part of the reasoning um it has been courts' decisions in *Graham* and *Miller* in which they talked about the heightened capacity of younger people to change in response to rehabilitation.

D: Okay. Um, and I just want to uh ask you this for clarification before we get too far into this. Um, this is all information that has been gathered by scientists through study through tests through observation and through scientific means is that correct?

W: That's correct. Gathered by scientists and, um published in peer reviewed scientific journals so gathered by scientists and also evaluated by scientists. And the research for the most part has been funded by the federal government by the National Institutes of Health.

D: Um, I have sort of a two-part question here. Um, how does the immaturity of the adolescent brain manifest itself and isn't that simple a function of intelligence? Isn't that what a lot of people would kind of jump to?

W: Well compared to adults, adolescents are more impetuous. Um the eh because they have more difficulty regulating their emotions they're more susceptible to peer pressure and the influence of of peers. Um, they are less able and less likely to think about the future consequences of their actions. They're less likely to be able to make longer term plans. They're more focused on the immediate consequences of a decision rather than the longer-term consequences of the decision and they tend to be more focused on, the potential rewards of a risky choice rather than the potential costs of a risky choice. Um so if they're thinking about let's say speeding down the highway what's on their mind is how fun it's gonna feel to be driving the car that fast and what typically would not be on their mind is the chance that they might hurt somebody or get a speeding ticket. Um this is different from intelligence in that when when we think about intelligence we tend to think about the purely cognitive aspects of functioning. Things like memory, um and attention and perception. And we also might think about facts that we have um uh held in in memory so that might be referred to as general intelligence. The factors that I'm talking about are usually described by psychologists as having to do with judgment. And not with intelligence per say. And I think one of the things that perplexes a lot of parents for example is that even though they see their teenage children as smart and even though their children can do things in school that seem like things you would have to be

intelligent to be able to do they nevertheless do a lot of reckless and dumb things. And that's because adolescence is a time when people can be very intelligent but have very poor judgement.

D: Okay. Let's ask about a comparison that I'd like you to kind of uh take a stab at it. Um, does a twenty-year-old brain more closely resemble a seventeen-year-old brain than a mature say twenty-five-year-old brain?

W: Well that's hard to answer. Um because brain development is gradual and linear. Um it's not a switch that gets flipped when it changes from a immature brain to a mature brain. Um it is like a a seventeen-year-old brain was that the age you asked me to compare it...

D: Yes...

W: to? It's like a seventeen-year-old brain in the sense that it is still growing and changing um and it is still malleable and plastic. Um it is uh it it it is a little bit more mature than a seventeen-year-old brain but it is maturing and in that sense it is different from an adult brain.

D: Okay if you would, speaking you know kind of eh in the the physical world and in terms of biologically etcetera, um are there significant differences between the brain of a twenty-year-old and a mature brain?

W: Well...

D: And in what ways?

W: sure. Um, so there there is a process inside the brain that's called the myelination. Myelination is the process through which the circuits of the brain that is the wiring of the brain if you will um becomes insheathed in a white fatty substance called myelin. Myelin, serves a purpose in the brain that's very much like the insulin uh the insulation around the speaker wires you might have in a stereo system. And in the same way that that plastic insulation allows the electricity to flow through the speaker wire without breaks in it without um interruption um without leakage. The myelin in the brain um allows electrical impulses to travel down those neurocircuits without breakage and without interruption and more um, smoothly and con more quickly. M myelin therefore allows for better connections between different regions of the brain because it allows those electrical impulses to travel longer distances throughout the brain um without leakage and without interruption. So one of the things that scientists

have been interested has to do with the connections between the the rational part of the brain which is in the prefrontal cortex. The front of the brain. And the more emotional part of the brain which is in the limbic system which is deeper inside toward the center of the brain. And because connections between those two regions are becoming more myelinated, they're becoming better connected during the adolescent years and their early twenties. Communication between those regions those rational regions and the emotional regions becomes improved. And that's what we think leads to the heightened capacity of of individuals as they get older to control their impulses and and regulate their emotions.

D: Okay very good. Um, you were involved in the preparation of uh, uh amicus curiae briefs in uh *Miller v. Alabama*, *Graham v. Florida* and *Roper v. Simmons* is that correct?

W: Yes.

D: Can you tell us a little bit about what your involvement was...

W: Yes...

D: in those cases?

W: Um in before *Roper* I was a member of a joint committee of the American Psychological Association and the American Bar Association. And as it appeared that the Supreme Court was going to take *Roper*, the American Psychological Association decided to file an amicus brief um in that case. And the general counsel of the association came to me and asked if I would lead the team of scientists who would help make sure that the amicus brief draft was scientifically accurate. So I had nothing to do with the crafting of the legal arguments...

D: Right.

W: in the brief but my role was to assemble the science on adolescent psychological development and adolescent brain development. Give it to the attorneys who were writing the brief. Make sure that they described the science accurately and then read and go back and forth uh eh you know over the drafts to make sure that what was being said in that brief was scientifically true. And I played the same role in *Roper* and *Graham* and *Miller*. So also the case that some of the work that I had written independent of that was cited by the Supreme Court in those three cases. When the court reached its conclusion that the juvenile death

penalty was unconstitutional that um imposing life without parole on juveniles for non-homicide crimes was unconstitutional and that mandating life without parole for juveniles for any crime was unconstitutional.

D: Okay. Um and when you say you lead a team, there were uh a number of other scientists working with you on this project?

W: About a half a dozen.

D: About a half a dozen okay. Um, and um, in *Roper* uh Justice Kennedy opined that there were three things that applied to twenty-year old's can you tell us what those are were?

W: Well he opined that they applied they apply to people who were um younger than eighteen in...

D: Okay...

W: in *Roper*. Um, because the case there was not about twenty-year old's.

D: Okay.

W: He he um noted three characteristics that distinguish adolescence from adults. They are impetuosity. That is the extent to which they make impulsive decisions. Their susceptibility to um to coercive influence especially of peers. Um, and the fact that their character is not yet fully formed. And those were the three defining characteristics of young people that Kennedy said should make them not eligible for the punishments that we reserve for the the harshest of of of crimes committed by people who are fully responsible for their behavior.

D: And based upon your studies uh do those characteristics apply to a twenty-year-old?

W: Ye yes they do.

D: Okay. Okay um, so time has passed since then uh uh *Roper* was decided in two thousand and five (2005) uh, has the study of the adolescent brain an advan advance since then and if so in what ways?

W: Well it's advanced tremendously since then remember as I said before that it didn't really begin until about two thousand (2000). Um so, eh as two thousand

five (2005) today let's see we're talking about a little more than ten years but there are literally thousands more studies of adolescent brain development that have in in the public published literature. There are multiple journals scientific journals that are devoted exclusively to the study of adolescent brain development. Books on the topic as well so the science has really expanded. We know much much more about eh about what's going on inside the adolescent brain both anatomically and functionally. We know much much more about the timetable of different aspects of brain maturation and as I said before one of the important lessons that we've learned in the last ten years is that the maturation that is taking place during the teen years continues to take place as people move into their early and towards their mid-twenties. Um and uh at the same time that that research has been done uh eh it's also important I think to note that there's been a lot of psychological research on development during this time period as well. Uh my own research has focused on the development of things like impulse control and sense and risk perception. And uh response to reward and susceptibility to peer influence. And in our studies of young people both in the United States and around the world we have found that the psychological capacities that are thought to be influenced by this brain development are also maturing during this time too so it's not just the fact that the brain is developing it's that people are getting better at this age at controlling their impulses at resisting peer pressure, at thinking ahead. And understanding wh where risk is and what the consequences of risky decision might be.

D: Okay. Um, how has the advent of functional magnetic residence imaging advanced the study of the adolescent brain and you might want to just explain what the FMRI is?

W: Well the MRI is a brain imaging um well technique um which allows scientists to see what parts of the brain are active and how active they are um when individuals are doing different things. And so, um before the advent of functional magnetic imaging um wh we eh eh wh what we knew about the brain was by eh was through observation of of the brain e either from the outside or in an autopsy from the inside. Um or in animal studies from the inside as well. With the advent of brain imaging techniques we can take you, and put you inside a a machine which we call a scanner um and in that machine we would have um a computer screen that you could see and we could ask you to do different things to read something to listen to a passage of music, to make a decision by using your fingers to press the spacebar on the computer keyboard. And we would be able to tell by looking at a monitor that was that was tracking your brain activity how your brain activity changed as a function of what you were doing in there. We can do that because when the brain is active there is a flow of blood to that

region of the brain and the MRI technique is um is designed to be able to see where there are changes in blood flow to the brain depending upon what somebody is doing. So we might compare what your brain looks like when you're reading something versus when you're listening to something. And that might get us eh to better understand well what parts of the brain are intri are are important for visual processing of words as opposed to auditory processing of words. And what parts are common because in both of those tasks you're processing words in one way or another.

D: And has that informed the uh information regarding the maturity of the brain over time?

W: Yes because a lot of the maturation of the brain particularly during adolescence um and during the early adult years, a lot of that maturation is only visible by looking at the brain activity. In other words su se for for in many instances if you just looked at the structure of the brain of the anatomy of the brain you wouldn't see differences between adolescents and adults. But if you put those individuals into um a scanner and you give them the same tasks you might see a different pattern of activity in a younger person than you would in an older person. So FMRI has enabled us identify differences between the adolescent brain and the adult brain that we could never have seen had it not for that imaging technique.

D: Okay. Excellent. Um, I'm gonna ask for you to make a a comparison and compare the um how do young adults age twenty do in controlling impulses when they are aroused by something negative?

W: Um, they don't do as well as they do when they're not aroused and they don't do as well as adults do um when they are aroused. So let me let me describe a study that our group did which...

D: Okay...

W: illustrates this point. Um we had a a task it was a standard psychological task um in which you are looking at a screen and you're asked to press a button every time you see a certain letter. Let's say it's the letter X. And you're asked to not press the screen if you see a different letter. And now we show you a series of letters that are going along pretty quickly in front of you and we mix in, X's and non-X's but we have a lot of X's so you get very accustomed to pressing the button because you're seeing a lot of X's and then all of a sudden they'll be a D in there and you're supposed to withhold that press. It's hard to do. Because

we get you accustomed to pressing and then we throw in something that you're not supposed to press to. We did a study in which we looked at teenagers let's say around the age of fifteen or so um people between eighteen and twenty-one and people who were uh twenty-four and and a little bit older. And we gave them that task while they were in a scanner. Um but we altered the emotional context of the experiments so that sometimes you were asked to do this task under emotionally neutral conditions and sometimes you were asked to this task under emotionally arousing conditions. One of the arousing conditions was that you were told that at any moment a very loud and averse aversive sound would come out very unpleasant sound. What we found was that if you compared the teenagers the eighteen to twenty-one-year old's and the adults under emotionally neutral conditions when people were not aroused, the eighteen to twenty-one-year old's' performed and their brains looked like adults. But if you you did the same experiment but you emotionally aroused people, the eighteen to twenty-year old looked like the teenagers and not like the adults. So to answer the question, um under conditions of emotional arousal eighteen to twenty-year old's eh twenty-one year old's brains look more like the brains of teenagers than they do like the brains of adults.

D: And this is the result of some kind of negative emotional arousal?

W: It in this particular study this was negative emotional arousal.

D: Um, and let me ask you to to say how can your studies inform the decisions as to inform decisions as to punishment and rehabilitation?

W: Well, I don't want to venture into a a legal...

D: Okay.

W: that's not my area of of...

D: Okay.

W: expertise. I think that to the extent that um courts want to take eh the this kind of science into account, it it, should eh it should ask the court or encourage the court to consider ways in which people um uh at at this age may be less mature and therefore less responsible or less culpable. Uh eh a different way of putting it is I think that the the way in which the court referred to science in the *Roper* and *Graham* and *Miller* decisions is correct. And in the sense that they use that science to form an opinion that younger people were not as mature as older ones

and therefore less culpable and less responsible and less deserving of the the the punishments we reserve for the worst of the worst.

D: And when you talk about those individuals you're talking about people who are twenty years old correct?

W: I would say that they're in the group of people who are characterized by the same uh three phenomena that Kennedy wrote about in *Roper*. Impulsivity susceptibility to coercive influence of others and still having characters that are not yet heartened. So that it is my opinion that if if a if a different version of *Roper* was heard today, knowing what we know now, one could've made the very same arguments about eighteen nineteen and twenty year old's that were made about sixteen and seventeen year old's in *Roper.*

D: And these findings have been peer reviewed by other scientists?

W: Oh yes extensively.

D: Okay. So it's not just your opinion it's also what has been found by other scientists who have been studying the same thing?

W: Oh it is it is not disputed by scientists that the brain continues to mature beyond uh eighteen and into the mid-twenties that is an established fact.

D: Okay. Uh thank you Professor that's all the questions for you now but uh a couple of the other lawyers may have questions and the Judge may have questions. Thank you your Honor.

D2: Your Honor if I can ask...

J: Mm-hmm...

D2: just a few.

J: Sure.

D2: Um, you've spoken a little bit about culpability but how does a lack of brain maturity in these individuals in their late teens and early twenties impact their ability to, understand or process the concept of deterrence?

W: Well deterrence requires the ability to think eh systematically in a deliberative way about the future consequences of one's action. Alright if if I'm contemplating committing a crime, um and I'm thinking what could happen to me in the future uh oh there's gonna be a bad outcome if I get caught that might stop me from committing that crime but if I don't have the capacity or the inclination to think about what's going to happen in the future then something isn't going to deter me and as I said before, one of the hallmark features of adolescent thinking is that they are very focused on the immediate and not focused on the longer term. So, in my opinion to be deterred in a criminal situation you can't just focus on the immediate you have to be focusing on the longer term. Especially if what's deterring you eh is the knowledge that something happened to somebody else no not not even you in a in a previous time.

D2: And um, you mentioned one of the factors that the court focused on in *Roper* was being more vulnerable to negative influences or outside pressures...

W: Yes...

D2: or their peer influences. Um how do those in their late teens early twenties react differently to peer pressure than adults?

W: One of the things that we study in our lab at Temple University is the impact of the presence of peers on decision making. And we've done studies in which we've compared teenagers college age students uh those who are between eighteen and twenty-two and people who are twenty-four and older. And we have looked at how they behave in situations when they're alone and compared them to their behavior in situations when other people their same age were around. And one of the things we've shown in several experiments is that, in the presence of peers adolescents and young adults make significantly more risky decisions than they do when they're by themselves but that people who are twenty-four and older don't change as a function of whether they're with their peers or by themselves. And in some brain imaging studies that we've done, we've shown why this is and what seems to happen is that when kids and by kids I mean adolescents um are with their peers this activates reward centers of the brain and it makes eh people pay more attention to the immediate rewards of a choice rather than the potential cost of a choice. So, peers activate their reward centers the activation of the reward centers makes people take more risks. Eh it helped us answer a question that I think people have wondered about for a long time which is why do young people do such stupid things when they're with their friends that they wouldn't do if they were by themselves. And we think we have an answer both in terms of the

psychology of it but also in terms of the brain underpinnings of it. So in just to finish all the things that I was saying before about the deficiencies in adolescent judgment, the short term um the lack of planning the impulsivity and so forth all of those things are exacerbated they're made worse when kids are in groups than with their when when they're by themselves.

D2: Okay. Um, you also mentioned that the adolescent brain is more plastic and has the ability to change. Um is that in a positive way or in more um open to rehabilitation in that sense?

W: Um it is in a both a positive way and a negative way. Um eh so that uh eh your brain when when we talk about the brain being plastic it's it's a dual edged sword. Um it means that the brain is more susceptible to positive influence but it means that the brain is more susceptible to toxic influence as well. And the brain can't tell the difference between good influences and bad influences and if it's plastic it's influenced by both.

D2: But as compared to an adult age twenty-five or over the brain of an adolescent might be more malleable to rehabilitation?

W: Probably yes. (PAUSE)

D2: And we've been talking on a very general level here about the adolescent brain. Um is there a way to look at an individual specifically and establish where on a scale they may be in terms of brain development and, and how does one do that?

W: No it would not because of my you could look at an individual's brain and you could identify whether there was some malformation or an injury or a lesion or a tumor but we do not have the the technology available as of now to look at individual brains and put them along some kind of maturity scale it's not possible.

D2: Is there a way for them to do some sort of neuropsychological testing though to establish how an individual is reacting um under certain situations?

W: Yes.

D2: Okay.

W: Uh eh it is possible for a neuropsychologist and clinical psychologist to test individuals and make some statements about how they react under given situations

whereabout what strengths and weaknesses they have psychologically and cognitively.

D2: I have nothing further at this time your Honor.

J: Alright. Commonwealth?

P: Thank you. Good morning Doctor.

W: Good morning.

P: Um I wanna follow up on the que last question and that is that it would be possible to test individuals through psychological testing to determine where they are in this maturing process?

W: Yes although uh eh I it uh and we think that there yet is consensus among um among clinical psychologist about what the best instruments are to do that but I do believe that there are clinical psychologist who feel confident that they can test individuals and make statements about the relative degree of maturity of this person or that person. That's not me...

P: Right.

W: but there are those who can.

P: But that would seem to um suggest that people do matu their brain does mature at different rates...

W: Yes.

P: So when you say that um, and you you've we've defined adolescence as ten to twenty-five is that kind of...

W: Um I well today I said I was gonna talk about it as as ten to twenty-one...

P: Okay.

W: um...

P: But some of the literature talks about twenty-five...

W: Yes. Right...

P: I mean does the literature distinguish between twenty-one-year old's and twenty-five-year old's?

W: Um, not, not between twenty-one and twenty-five at a on a brain level. I think there are some people like myself who've written about the fact that some behaviors that we still see in people who are twenty-four still look somewhat immature and some of our research that we've done in the United States and in other countries shows that twenty fi four-year-old twenty-five-year old's they're still a little bit more impulsive than people who are twenty-seven or twenty-eight. But that brain science isn't there yet at that at that end of the continuum.

P: But you feel like the brain science is there for those that are under twenty-one?

W: Yes I do.

P: And um, what about I mean you've talked we talk about and you mentioned and I've read several of your articles about um risk taking or reckless behavior. And I I think I have some concept of that but is there a difference between risk taking and reckless behavior in the in the non-criminal sense and risk taking and reckless behavior in the criminal sense?

W: Only in the sense that the behavior is against the law in in the latter but not in the former. But I eh if I take your question correctly, um I think it is it is possible to account for non-criminal risky behavior during adolescence using a lot of the same language that we use to describe criminal risky behavior during adolescence.

P: But it but, you know in general I mean just generally speaking there are plenty of youth between the ages of ten and twenty-one that don't engage in that might engage in risky activity like tying a mattress on the back of a car driving around versus pulling a gun on someone and trying to take something from them...

W: Absolutely. So so even though um adolescence is a time of, relatively more risky behavior that manifest itself in different ways in different people.

P: Now in terms of cognitive development uh is the is the uh twenty-year-old brain cognitively developed?

W: Yes.

P: And in terms of um, there's something else that goes along with with cognitive development um reasoning.

W: Yes.

P: It's so at the age of eighteen a person can reason, and think like an adult?

W: Ye yes although, it is easier to disrupt the reasoning abilities of a of an eighteen-year-old by making that person emotionally aroused but in but in situations where emotions are kind of tamped down and in which there's not a lot of stress or time pressure under ideal situations, if I was giving you a reasoning test in a nice quiet room...

P: Mm-hmm...

W: um and you were sixteen you would perform just as well as an adult would on that test...

P: Okay so so that would mean that at the age of eighteen a person knows the difference between right and wrong...

W: Absolutely.

P: um a person understands that what they're doing is wrong?

W: Absolutely.

P: And this this concept of then that it's it has to do with um, peer pressure and impulsivity do you in in your opinion about those things do you think that translates into other a significant decisions um that have long term consequences for eighteen-year old's like for example um, getting married? We know the legal age of getting married is eighteen some places sixteen perhaps.

W: Um, I I do think it's uh hard for me to answer that kind of with a sweeping statement um, eh yes and that's why for for some of these decisions um we try to, we try to structure them so that eighteen-year old's have the the wisdom of adults to to guide their decision making...

P: Mm-hmm.

W: um but, well I'm sorry to to eh maybe you can re you can restate the question for me?

P: Well using your your the understanding of the science as you've represented it to us should we change the age of of maturity to make decisions about getting married to twenty-one? Should it be that you have to be twenty-one years of age or older to get married?

W: Um, I wouldn't change it for getting married um, mm...

P: What about driving a car?

W: I I think the driving age should be raised to to to...

P: Twenty?

W: um well uh I think it should be raised at least to eighteen.

P: Because those take...

W: And I and I have written that. I eh that that I think this that because of what we know about sixteen-year old's um the impulsivity and uh um, deficiencies in miscalculation make me nervous about sixteen-year old's driving.

P: But eight you're okay with eighteen-year old's?

W: I think for any, legal decision about drawing a boundary...

P: Mm-hmm.

W: we have to consider science along with other things...

P: Right.

W: Now in because there are eighteen-year old's who need to drive to get to work, we might factor that into a decision about uh the driving age. So so I might say if there were no other considerations than scientific considerations maybe we should have the driving age be twenty-one but I know that there are considerations other than scientific considerations and therefore we have to do our best job of weighing all these different factors.

P: Okay and do you feel the same way about um marriage?

W: Um, marriage seems different to me I can't exactly tell you why but it seems different to me.

P: But it has long term consequences obviously...

W: Of course it, of of...

P: what about decisions about one's body? Medical decisions?

W: Yes and I've and I've...

? (INAUDIBLE)...

W: written about that um and I believe that when young people are have an opportunity to make decisions about their bodies um that we should try to structure those decisions so that they have available to them the counsel and guidance of adults.

P: And would you would you um, propose that those kind of decisions be weighted until a person was over the age of twenty?

W: No.

P: So eighteen for that ag for...

W: For...

P: those kinds of...

W: yes...

P: decisions...

W: because I think I I think that making good decisions at that age and there's some research on that making good decisions about those kinds of things whether to have a medical procedure or not um we we know that the competence to make those decisions develops by the time people are sixteen or so.

P: Are there other things besides uh the immature brain that would cause a person that is twenty years of age to engage in criminal activity?

W: Of course.

P: Like what?

W: Um pressure from antisocial peers...

P: Mm-hmm.

W: um, eh perhaps some im immediate uh, experience like an altercation that might let led somebody to behave in an aggressive...

P: Mm-hmm.

W: way um, having had parents who were abusive or treated the person harshly so there are other factors in people's lives other than their brain that lead to antisocial behavior.

P: And in fact those kinds of things happen to people that are over the age of twe or twenty-one or older or even twenty-five and older...

W: That's...

P: right?

W: correct.

P: What is your personal opinion about the death penalty?

W: Um I'm opposed to it.

P: And is have you always been opposed to the death penalty?

W: (SIGHS) Uh I'm no I've changed my mind a a you know o o over um recent years ha for reasons that don't have anything to with this...

P: I understand...

W: for reasons that have to do with the um, some of the DNA evidence and exoneration and then then questions in my mind about the, um, uh a uh about mistakes that can be made in in reaching decisions and about the irreversibility obviously of the penalty.

P: And have you written on that subject...

W: I have not.

P: specifically about the abolition of the death penalty?

W: Well I've written about the juvenile death penalty...

P: Okay...

W: but not about the death penalty in general...

P: For adults?

W: Right.

P: Have you testified in other courts on this specific topic...

W: I...

P: I mean the...

W: I have not I did I'm not sure your Honor whether it counts as testimony I did make a presentation before the Arkansas State Parole board...

P: Mm-hmm.

W: in the recent series of cases um in which those eight men were being considered for execution so I did present to the state parole board but that's as close as I've I've done in terms of testifying on this issue.

P: Okay. Are there others uh that you're aware of that hold the same uh beliefs that you do who have testified in st cour state courts uh on the issue of um eliminating the death penalty for those less than tw uh twenty-one years of age?

W: Not that I'm aware of.

P: Okay as in you're aware that no state has a law that says if you're under twenty-one you're not eligible for the death penalty?

W: Um I don't know one way or the other.

P: Okay. (PAUSE) I I just I need to ask this question are you being paid today to testify?

W: Yes.

P: Okay and who's paying you?

W: Um well I I guess it's the well I'm I'm being paid by the (UNINTELLIGIBLE) by the defender's office...

P: Mm-hmm.

W: I think that that's being paid by the Court.

P: By the Court?

W: I thi...

P: And how much are you being paid?

W: Five hundred dollars an hour.

P: Okay. And so at uh when you've finished your testimony today what will your entire fee have been?

W: Um, I have to sit down and calculate it but there's the preparation and travel and testimony and so forth. Um I think the Court said that it was a maximum of ten thousand dollars.

P: Okay. (PAUSE)

W: May I amend one of my answers to one of your questions...

P: Certainly.

W: Uh well because when you were asking me about eh the the parallels between the logic on this and on marriage and on medical...

P: Mm-hmm...

W: procedures and so forth uh what I didn't say and should've said is that my understanding is that there is a long history of jurisprudence that says that death is different and that the logic that we use to talk about death is not necessarily the same as the logic that we use to talk about other kinds of punishments and other kinds of situations so, eh I just wanted to add to that that I, I I would be hesitant about making one to one correspondences between things like capital punishment and things like the age of marriage or the age of driving or something like that.

P: Right I I understand that but we're still talking about judgements right I mean when you get to when you strip away everything else we're talking about eh how at what age is a person able to control their behavior make judgments and think about future consequences.

W: Yes but we in the United States at least have been comfortable having different ages for different legal decisions. Alright you can drive at sixteen but you can't see an X-rated movie at that age um and you can't vote but you can vote at eighteen but you can't buy alcohol at that age and you can buy alcohol you know at twenty-one but you can't rent a a car from some car agencies until you're older than that so that it doesn't bother me to have different ages for different legal questions. And it's not inconsistent with American law. (PAUSE)

P: I know in *Roper* the decision the issue was really about people that were less than eighteen um years of age, would if the iss question had been less than twenty-one years of age in *Roper* with the information that you had at that time would you have felt the same way?

W: No because there hadn't there wasn't adequate science and I it I have been trying today and and you know in the in the past to ground my um opinions about these matters in in science and the science just did not exist then.

P: But you feel like it does today?

W: I do.

P: Okay. And um, and I I've already asked you this but I just wanna make sure you're you haven't or people with other op the same si situ opinion that you have about the science have not testified in any other state court regarding this is that correct?

W: Regarding the death penalty?

P: Mm-hmm.

W: Correct.

P: Okay. (PAUSE) And one last um, is there anyway uh are there brains that are twenty years of age or twenty-one years of age that are adequately developed um in those areas that you have talked about and that would be peer pressure and um susceptibility to peer pressure risk taking and thinking about future consequences that would be just the same as a twenty-two year old brain or a twenty-three year old brain?

W: Um, I eh there there may be I don't know because we don't have, as yet in in the science of brain development we don't as yet have norms established to say what's adequate and what's not adequate. Um maybe someday we will but we don't have it now.

P: It so is twenty-one in your mind a bright-line like eighteen was in *Roper*?

W: Um, that's a legal question I uh I mean I was asked to opine here today about people who are under the age of twenty-one. Um I don't whether twenty-one should be a bright-line like eighteen as in *Roper* it's a question for for courts to decide.

P: Yes but in *Roper* you all uh the amicus brief took the position that eighteen should be the age.

W: No I think we took...

P: Is that right?

W: I think we took the position in responding to eh those particular cases that sixteen and seventeen-year olds were not as mature as adults so I would also take the stance here that nineteen and twenty years old's or eighteen nineteen and twenty-year olds are not as mature as adults. I think where we draw the bright-line seems to me to be a decision for the courts and for legislatures.

P: Do you think there should be a bright-line? (PAUSE)

W: (SIGHS) Well, it you you've asked me before so so I've already admitted that I'm not in favor of the death penalty for anybody...

P: Right.

W: so eh it's a it's a purely hypothetical question as far as I'm concerned.

P: Well give me a hypothetical response.

W: (LAUGHS) Um, given the brain science if I had to draw a bright-line um I think I'd be more inclined to draw it at an older age than twenty-one. Um by I think at this point twenty-four is probably a more clo closely to the science if we're saying when is the brain when are we absolutely confident that the brain is fully mature, it's more around there.

P: Okay. That's all the questions I have...

J: Alright.

P: thank you.

J: Any redirect?

D: Uh yes just briefly. (PAUSE) Um, you were asked by one of uh eh by uh Ms. Red Corn about um, reasoning by adolescents uh, and I believe you made the statement that it's easier to disrupt reasoning of adolescents would that be under situations of emotional stress?

W: Yes. On or under situations when they're in groups.

D: Okay. Um, so if you're not dealing with the ideal situation, you're talking about a young person of the age of twenty-one being more easily disrupted having his reasoning disrupted by an emotional disturbance?

W: Yes that was the point of our experiments that I described.

D: Okay. Um, and this is really just a simple question but mainly just to highlight uh the court in *Roper* didn't have the benefit of the additional science that has developed since two thousand and five (2005)?

W: Correct.

D: Okay. Uh, and the science, and you were cited by the court in *Roper*?

W: Yes.

D: And now that science is different?

W: Yes.

D: I have no further questions your Honor.

J: Alright.

D: Thank you.

J: Ms. Green?

D2: Nothing your Honor.

J: Alright any re-cross?

P: No your Honor.

J: Okay. Doctor just uh just a couple of questions I just for the eh I wanna be sure when you were talking about those imaging techniques when did they start being used as as a methodology for the research?

W: Um I believe they started being used eh eh in in the nineteen eighties (1980's) but they weren't used in the study of adolescents until the late nineteen nineties (1990's) and the first paper um on that was was I think either in nineteen ninety-nine (1999) or two thousand (2000). They they had they had been um your Honor as you me as you might surmise those techniques had been developed mainly to deal with disease um and diagnosis and not to deal with research questions about the the sort that we've talking.

J: Okay now you said that there are a lot of peer review journals uh that support your theory...

W: Yes.

J: uh give me some of those, sources if you will...

W: Well there's the Journal of Neuroscience, um there's the Journal Nature there's the journal...

J: Well yeah but I need some cites.

W: Oh some cites...

J: Yeah of studies...

W: okay...

J: that support this other than your writings...

W: off the top of my head it's...

J: okay well that's that's why we're here...

W: yeah...

J: and uh eh counsel for defense is there's all this science...

W: yeah...

J: and I understand your testimony...

W: sure...

J: I understand you've written. I'd be interested in what other peer review journals support your theory.

W: Well well there are papers by a sc um pa the first author is BJ Casey. C-A-S-E-Y. Um there's a very important paper by a scientist whose last name is Dosenbach D-O-S-E-N-B-A-C-H. There is um an important paper by a scientist by the name of Gogtay G-O-G-T-A-Y. Uh um if there's some way to get information to you after this I'd be happy to um to provide the full citations.

J: Well you you can certainly supplement your testimony...

W: Okay.

J: Yes. And these are now eh I'm I'm interested in the science uh for the issue that the defense is bringing up the eighteen to twenty-one-year-old...

W: Yes.

J: And is this science that has come out since *Roper*?

W: Yes.

J: Okay. How long would it take you to get these citations to supplement your testimony?

W: I mean well I could get em' as soon as I'm home and at my computer. And how how would you like me to get that information to the...

J: You'd just get em' to counsel and then...

W: okay...

J: they could file it and give a copy to the Commonwealth.

D: Yes.

J: Okay. Any subsequent questions from my after my questions any?

P: No your Honor.

J: Okay. May this witness be excused then?

P: Yes your Honor...

D: Pardon me?

J: May this witness be excused?

D: Yes your Honor.

J: Okay. Very well Doctor thank you very much for your testimony.

W: Thank you.

J: Alright. Any other witnesses?

D: No other witnesses your Honor.

J: Okay. Does the Commonwealth have any witnesses?

D: No your Honor.

J: Okay. Very well. Alrighty we're adjourned uh we've got a didn't we have a subsequent status date or?

P2: I don't I don't think so Judge but we haven't seen the order for the KCPC evaluation for the def three defendants yet.

J: Um we've su I've signed every order that's been submitted oh is this an agreed order or is...

P2: No sir. When we were in court two weeks ago, you...

J: Yeah...

P2: um, um...

J: I ordered...

P2: ordered that each of the...

J: Yeah...

P2: three defendants would be sent to KCPC...

J: Okay.

P2: And we have not...

J: So that hasn't been...

P2: seen that yet...

J: entered?

P2: No.

J: Okay.

P2: Yes no sir.

J: Okay we've got the file upstairs I'll double check I don't know why that hasn't been entered.

P2: Okay.

J: But we'll get that done...

P2: Thank you.

J: anything else?

D2: Your Honor I just wanted to make sure the Court received um Friday we supplemented our motion for uh the *Roper* extension with an affidavit from Doctor Benedict?

J: Uh we I did receive that the Commonwealth received that as well.

P2: Yes.

J: Yeah I did get that.

D2: Okay. Would you like to set another status date? Okay...

J: I'd I don't think so. I think it's under advisement. Uh they're we got some rulings under advisement I don't see any reason for another status date unless you all do do ya?

P2: No your Honor. I think this is the only issue before the...

J: Yeah.

P2: Court.

J: That's what I thought so too.

D2: The only reason I thought we might want a status is um since, if we wanted to su set some dates to do to do jury, selection...

J: Yeah.

D2: issues.

J: Yeah on those uh let me get with the court administrator and then we maybe we can do a conference call to pick a date to do that...

D2: That's fine.

J: jury that'll work with your all's schedules as well.

D2: Because Mr. Gonzales' attorney is not here right now.

J: Right.

D2: So would be...

J: Okay.

D2: hard to pick a date...

J: Alright. Very well. Alright thank you all very much...

D2: Thank you.

J: We're adjourned.

TRACK CUTS OFF/END OF TRACK

REPORT PREPARED WITH REFERENCE TO THE DIAZ ROPER EXTENSION HEARING IN LEXINGTON, KENTUCKY ON JULY 17, 2017

I, Laurence Steinberg, declare as follows:

1. My name is Laurence Steinberg. My address is 1924 Pine Street, Philadelphia, Pennsylvania, 19103, USA.

2. I hold the degrees of A.B. in Psychology from Vassar College (Poughkeepsie, New York) and Ph.D. in Human Development and Family Studies from Cornell University (Ithaca, New York).

3. I am a developmental psychologist specializing in adolescence, broadly defined as the second decade of life.[1] I am on the faculty at Temple University, in Philadelphia, Pennsylvania, USA, where I am a Distinguished University Professor and the Laura H. Carnell Professor of Psychology. I am a Fellow of the American Psychological Association, the Association for Psychological Science, and the American Academy of Arts and Sciences, and a member of the Society for Research in Child Development and the Society for Research on Adolescence. I was a member of the National Academies' Board on Children, Youth, and Families and chaired the Academies' Committee on the Science of Adolescence. I was President of the Division of Developmental Psychology of the American Psychological Association and President of the Society for Research on Adolescence.

4. I received my Ph.D. in 1977 and have been continuously engaged in research on adolescent development since that time. I am the author or co-author of approximately 400 scientific articles and 17 books on young people. Prior to my appointment at Temple University, where I have been since 1988, I was on the faculty at the University of Wisconsin—Madison (1983-1988) and the University of

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[1] Throughout this document, "adolescence" refers to the period of development from age 10 to age 20. "Young adulthood" refers to the period from age 21 to age 24.

Attachment #1

California, Irvine (1977-1983). From 1997-2007, I directed the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, a national multidisciplinary initiative on the implications of research on adolescent development for policy and practice concerning the treatment of juveniles in the legal system. I also have been a member of the MacArthur Foundation Research Network on Law and Neuroscience, a national initiative examining the ways in which neuroscientific research may inform and improve legal policy and practice.

5. Since 1997, I have been engaged in research on the implications of research on adolescent development for legal decisions about the behavior of young people. More specifically, my colleagues and I have been studying whether, to what extent, and in what respects adolescents and adults differ in ways that may inform decisions about the treatment of juveniles under the law.

6. I have qualified as an expert in state courts in California, New York, Pennsylvania, and Wisconsin, as well as the United States District Court for the Eastern District of New York. I have also been deposed as an expert in cases in California, Colorado, Pennsylvania, and Rhode Island, as well as in U.S. District Court. In addition, I was the lead scientific consultant for the American Psychological Association when the Association filed Amicus Curiae briefs in *Miller v. Alabama*, ___ U.S. ___ , 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2011); and *Roper v. Simmons*, 543 U.S. 551 (2005). One of my articles, "Less Guilty by Reason of Adolescence," (co-authored with Elizabeth Scott),[2] was cited in the Court's majority opinion in *Roper* and in *Miller*.

7. I have been asked by the Court to outline the current understanding of neurobiological and psychological development in adolescent and young adult populations, the ways in which neurobiological immaturity impacts behavior and psychological development during this period, and the basis for and evolution of the understanding of ongoing behavioral development during these years, along with the

[2] Steinberg, L., & Scott, E. (2003). Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist, 58*, 1009-1018.

departure of this newer understanding from assumptions held for decades about human emotional, social, neurobiological, and cognitive development. I have been specifically asked to summarize the state of the scientific literature on brain development between 18 and 21.

BRAIN DEVELOPMENT CONTINUES BEYOND THE TEEN YEARS

8. For most of the 20th century, scientists believed that brain maturation ended sometime during late childhood, a conclusion based on the observation that the brain reached its adult size and volume by age 10. This conclusion began to be challenged in the late 1990s, as a result of research that examined the brain's internal anatomy as well patterns of brain activity, rather than focusing solely on the brain's external appearance.[3]

9. The advent of functional Magnetic Resonance Imaging (fMRI) permitted scientists and researchers to actually observe the brains of living individuals and examine their responses to various stimuli and activities. The results of this examination demonstrated that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature throughout adolescence.[4]

10. In response to these revelations about ongoing brain maturation, researchers began to focus on the ways in which adolescent behavior is more

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[3] Gogtay, N., et al. (2004). Dynamic mapping of human cortical development during childhood through early adulthood. *Proceedings of the National Academies of Sciences, 101*, 8174–8179; Giedd, J. N., Blumenthal, J., Jeffries, N. O., Castellanos, F. X., Liu, H., Zijdenbos, A., Paus, T., Evans, A. C., and Rapoport, J. L. (1999). Brain development during childhood and adolescence: a longitudinal MRI study. *Nature Neuroscience.* 2, 861–863; Sowell, E., et al. (2004). Longitudinal mapping of cortical thickness and brain growth in normal children. *Journal of Neuroscience, 24*, 8223–8231.

[4] Casey, B. J., Tottenham, N., Liston, C., & Durston, S. (2005). Imaging the developing brain: What have we learned about cognitive development? *Trends in Cognitive Science, 9,* 104–110.

accurately characterized as reflecting psychological and neurobiological immaturity.[5] The results of many of these studies and descriptions of adolescent behavior were used by the United States Supreme Court, first in *Roper v. Simmons*, and later in *Graham v. Florida* and *Miller v. Alabama*, as the foundation for the high court's conclusions that adolescents prior to the age of majority should not be treated as adults by the criminal justice system, because their brains and resulting behavior cannot be characterized as fully mature and, as a consequence, their culpability is not comparable to and should not be equated with that of fully mature adults.[6] In addition, the Court noted that because psychological and neurobiological development were still ongoing in adolescence, individuals were still amenable to change and able to profit from rehabilitation.

11. **Further study of brain maturation conducted during the past decade has revealed that several aspects of brain development affecting judgment and decision-making are not only ongoing during adolescence, but continue well beyond age 20.** As more research confirming this conclusion has accumulated, the notion that brain maturation continues into young adulthood has become widely accepted among neuroscientists.[7] This contemporary view of brain development as

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[5] Steinberg, L., & Scott, E. (2003). Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist*, *58*, 1009-1018.

[6] The American Psychological Association filed briefs as amicus curiae in each of these cases, outlining the state of neuropsychological and behavioral research on adolescent brain development and behavior for the Court. *See* Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012) (No. 10-9646); Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412), *Sullivan v. Florida*, 560 U.S. 181 (2010) (No. 08-7621); Brief for the American Psychological Association, and the Missouri Psychological Association as *Amici Curiae* Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

[7] Dosenbach, N., et al. (2011). Prediction of individual brain maturity using fMRI. *Science*, *329*, 1358–1361; Fair, D., et al. (2009). Functional brain networks develop from a "local to distributed" organization. *PLoS Computational*

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ongoing at least until the mid-20s stands in marked contrast to the view held by scientists as recently as 15 years ago. In many respects, individuals in their late teens and early 20s are more similar to younger teenagers than had previously been thought.

PSYCHOLOGICAL IMMATURITY IN ADOLESCENCE

12. Research on psychological development during adolescence and young adulthood conducted during the past 15 years has also led scientists to revise longstanding views of these age periods. **Conclusions drawn from this psychological research parallel those drawn from recent studies of brain development and indicate that individuals in their late teens and early 20s are less mature than their older counterparts in several important and legally-relevant ways.**[8]

13. First, adolescents are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation. When asked to make a decision about a course of action, compared to adults, adolescents have more difficulty identifying the possible costs and benefits of each alternative, underestimate the chances of various negative consequences occurring, and

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Biology, 5, 1–14; Hedman A., van Haren N., Schnack H., Kahn R., & Hulshoff Pol, H. (2012). Human brain changes across the life span: A review of 56 longtitudinal magnetic resonance imaging studies. *Human Brain Mapping, 33*, 1987-2002; Pfefferbaum, A., Rohlfing, T., Rosenbloom, M., Chu, W., & Colrain, I. (2013). Variation in longitudinal trajectories of regional brain volumes of healthy men and women (ages 10 to 85 years) measured with atlas-based parcellation of MRI. *NeuroImage, 65*, 176-193; Simmonds, D., Hallquist, M., Asato, M., & Luna, B. (2014). Developmental stages and sex differences of white matter and behavioral development through adolescence: A longitudinal diffusion tensor imaging (DTI) study. *NeuroImage, 92*, 356-368. Somerville, L., Jones, R., & Casey, B.J. (2010). A time of change: behavioral and neural correlates of adolescent sensitivity to appetitive and aversive environmental cues. *Brain & Cognition, 72*, 124-133.

[8] For a recent review of this research, see Steinberg, L. (2014). *Age of opportunity: Lessons from the new science of adolescence*. New York: Houghton Mifflin, Harcourt.

underestimate the degree to which they could be harmed if the negative consequences occurred.[9]

14. Second, adolescents and people in their early 20s are more likely than older individuals to engage in what psychologists call "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. As a consequence of this, young people are more apt to focus on the potential rewards of a given decision than on the potential costs.[10] Other studies have indicated that heightened risk taking among adolescents is due to the greater attention they pay to the potential rewards of a risky choice relative to the potential costs. **This tendency is especially pronounced among individuals between the ages of 18 and 21.**[11]

15. Third, adolescents and people in their early 20s are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions. In general, adolescents and young adults are more short-sighted and less planful, and they have more difficulty than adults in foreseeing the possible outcomes of their actions and regulating their behavior accordingly. **Importantly, gains in impulse control continue to occur during the early 20s.**[12]

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[9] Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N., & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior*, *27*, 333-363.

[10] Steinberg, L., Albert, D., Cauffman, E., Banich, M., Graham, S., & Woolard, J. (2008). Age differences in sensation seeking and impulsivity as indexed by behavior and self-report: Evidence for a dual systems model. *Developmental Psychology*, *44*, 1764-1778.

[11] Cauffman, E., Shulman, E., Steinberg, L., Claus, E., Banich, M., Graham, S., & Woolard, J. (2010). Age differences in affective decision making as indexed by performance on the Iowa Gambling Task. *Developmental Psychology*, *46*, 193-207; Steinberg, L., Icenogle, G., Shulman, E., Breiner, K., Chein, J., Bacchini, D., . . . Takash, H. (2017). Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation. *Developmental Science*. Advance online publication. doi: 10.1111/desc.12532.

[12] Steinberg, L., Graham, S., O'Brien, L., Woolard, J., Cauffman, E., & Banich, M. (2009). Age differences in future orientation and delay discounting. *Child Development*, *80*, 28-44); Steinberg, L., Albert, D., Cauffman, E., Banich, M., Graham, S., & Woolard, J. (2008) Age differences in sensation seeking and

cont'd...

16. Fourth, the development of basic cognitive abilities, including memory and logical reasoning, matures before the development of emotional maturity, including the 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, a young person who appears to be intellectually mature may also be socially and emotionally immature.[13]

17. As a consequence of this gap between intellectual and emotional maturity, **the tendencies of adolescents and people in their early 20s, relative to individuals in their mid- or late 20s, to be more focused on rewards, more impulsive, and more myopic are exacerbated when adolescents are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety. Accordingly, adolescents' deficiencies in judgment and self-control, relative to adults,** are greater under circumstances in which emotions are aroused.[14]

18. Fifth, these inclinations are exacerbated by the presence of peers. It is well established that a disproportionate amount of adolescent and young adult risk taking occurs in the presence of peers.[15] Scientists believe that this is because, when they are with their peers, young people pay relatively more attention to the potential

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impulsivity as indexed by behavior and self-report: Evidence for a dual systems model. *Developmental Psychology*, *44*, 1764-1778; Steinberg et al. (2017).

[13] Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. (2009). Are adolescents less mature than adults? Minors' access to abortion, the juvenile death penalty, and the alleged APA "flip-flop". *American Psychologist*, *64*, 583-594.

[14] Cohen, A., Breiner, K., Steinberg, L., Bonnie, R., Scott, E., Taylor-Thompson, K., . . . Casey, B.J. (2016). When is an adolescent an adult? Assessing cognitive control in emotional and non-emotional contexts. *Psychological Science*, *4*, 549-562; Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. (2009). Are adolescents less mature than adults? Minors' access to abortion, the juvenile death penalty, and the alleged APA "flip-flop". *American Psychologist*, *64*, 583-594.

[15] Albert, D., & Steinberg, L. (2011). Peer influences on adolescent risk behavior. In M. Bardo, D. Fishbein, & R. Milich (Eds.), *Inhibitory control and drug abuse prevention: From research to translation*. (Part 3, pp. 211-226). New York: Springer.

rewards of a risky decision than they do when they are alone, and that they are especially drawn to immediate rewards, including both material rewards (e.g., money, drugs) as well as social rewards (e.g., praise, the admiration of others). In our lab, **we have shown that the presence of peers activates the brain's "reward center" among adolescents and people in their early 20s, but has no such effect on adults.**[16] It is thus not surprising that a much greater proportion number of juvenile crimes, compared to adult crimes, occur when individuals are in groups.[17]

19. The combination of heightened attentiveness to rewards and still-maturing impulse control makes middle and late adolescence a period of greater risk-taking than any other stage of development. This has been demonstrated both in studies of risk-taking in psychological experiments (when other factors, such as outside influences, can be controlled) and in the analysis of data on risky behavior in the real world.

20. **In recent experimental studies of risk-taking, the peak age for risky decision-making was determined to be between 19 and 21.**[18] This age trend is consistent with epidemiological data on age trends in risky behavior, which show **peaks in the adverse outcomes of risk-taking in the late teens and early 20s in a wide range of behaviors, including driver deaths, unintended pregnancy, arrests for violent and non-violent crime, and binge drinking.**[19]

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[16] Albert, D., Chein, J., & Steinberg, L. (2013). The teenage brain: Peer influences on adolescent decision-making. *Current Directions in Psychological Science*, *22*, 114-120.

[17] Zimring, F., & Laquear, H. (2014). Kids, groups, and crime. *Journal of Research in Crime and Delinquency*, *52,* 403-415.

[18] Braams, B., van Duijvenvoorde, A., Peper, J., & Crone, E. (2015). Longitudinal changes in adolescent risk-taking: A comprehensive study of neural responses to rewards, pubertal development and risk taking behavior. *Journal of Neuroscience, 35*, 7226-7238; Shulman, E., & Cauffman, E. (2014). Deciding in the dark: Age differences in intuitive risk judgment. *Developmental Psychology*, *50,* 167-177.

[19] Willoughby, T., Good, M., Adachi, P., Hamza, C., & Tavernier, R. (2013). Examining the link between adolescent brain development and risk taking from a social-developmental perspective. *Brain and Cognition*, *83*, 315-323.

NEUROBIOLOGICAL ACCOUNTS OF ADOLESCENT IMMATURITY

21. Many scientists, including myself, believe that the main underlying cause of psychological immaturity during adolescence and the early 20s is the different timetables along which two important brain systems change during this period, sometimes referred to as a "maturational imbalance." The system that is responsible for the increase in sensation-seeking and reward-seeking that takes place in adolescence undergoes dramatic changes very early in adolescence, around the time of puberty. **Attentiveness to rewards remains high through the late teen years and into the early 20s. But the system 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 significant maturation well into the mid-20s.**[20] Thus, during middle and late adolescence there is an imbalance between the reward system and the self-control system that inclines adolescents toward sensation-seeking and impulsivity. As this "maturational imbalance" diminishes, during the mid-20s, there are improvements in such capacities as impulse control, resistance to peer pressure, planning, and thinking ahead.[21]

22. Studies of structural and functional development of the brain are consistent with this view. Specifically, **research on neurobiological development shows continued maturation into the early or even mid-20s of brain regions and systems that govern various aspects of self-regulation and executive function.** These developments involve structural (i.e., in the brain's anatomy) and functional

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[20] Casey, B. J., et al. (2010). The storm and stress of adolescence: Insights from human imaging and mouse genetics. *Developmental Psychobiology*, *52*, 225-235; Steinberg, L. (2008). A social neuroscience perspective on adolescent risk-taking. D*evelopmental Review*, *28*, 78-106; Van Leijenhorst, L., Moor, B. G., Op de Macks, Z. A., Rombouts, S. A. R. B., Westenberg, P. M., & Crone, E. A. (2010). Adolescent risky decisionmaking: Neurocognitive development of reward and control regions. *NeuroImage, 51*, 345–355.

[21] Albert, D., & Steinberg, L. (2011). Judgment and decision making in adolescence. *Journal of Research on Adolescence*, *21*, 211-224; Blakemore, S-J., & T. Robbins, T. (2012). Decision-making in the adolescent brain. *Nature Neuroscience*, *15*, 1184-1191.

(i.e., in the brain's activity) changes in the prefrontal and parietal cortices, as well as improved structural and functional connectivity between cortical and subcortical regions. The structural changes are primarily the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, which allows the brain to transmit information more efficiently) and myelination (the growth of sheaths of myelin around neuronal connections, which functions as a form of insulation that allows the brain to transmit information more quickly). **Although the process of synaptic pruning is largely finished by age 16, myelination continues into the late teens and throughout the 20s.[22] Thus, although the development of the prefrontal cortex is largely complete by the late teens, the maturation of connections between this region and regions that govern self-regulation and the brain's emotional centers, facilitated by the continued myelination of these connections, continues beyond the early 20s and may not be complete until the mid-20s.[23] As a consequence, even in young adulthood individuals may have difficulty controlling impulses, especially in emotionally arousing situations.**

23. A recent study that my colleagues and I conducted, of teenagers, young adults, and individuals in their mid-20s, illustrates this point. We assessed individuals' impulse control while experimentally manipulating their emotional state. **Under conditions during which individuals were not emotionally aroused, individuals between 18 and 21 were able to control their impulses as well as those in their mid-20s. But under emotionally arousing conditions, 18- to 21-year-olds demonstrated levels of impulsive behavior and patterns of brain activity**

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[22] For reviews of changes in brain structure and function during adolescence and young adulthood, see Blakemore, S-J. (2012). Imaging brain development: The adolescent brain. *Neuroimage*, *61*, 397-406; Engle, R. (2013). The teen brain. *Current Directions in Psychological Science*, *22 (2)* (whole issue); and Luciana, M. (Ed.) (2010). Adolescent brain development: Current themes and future directions. *Brain and Cognition, 72* (2), whole issue.

[23] Steinberg, L. (2013). The influence of neuroscience on U.S. Supreme Court decisions involving adolescents' criminal culpability. *Nature Reviews Neuroscience*, *14,* 513-518.

comparable to those in their mid-teens.[24] In other words, under some circumstances, the brain of a 20-year-old functions in ways that are similar to that of a 16- or 17-year old.

24. In addition to this "maturational imbalance," one of the hallmarks of neurobiological development during adolescence is the heightened malleability, or "plasticity," of the brain. Plasticity refers to the capacity of the brain to change in response to experience. **Humans experience varied levels of neuroplasticity throughout their lifetimes, with marked neuroplasticity continuing through the late teen years and into the early 20s.[25]** Like teenagers prior to the age of majority, individuals in their late teens and early 20s demonstrate continued capacity for behavioral change.[26] Given adolescents' ongoing neurobiological and character development, 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.[27] My colleagues and I, along with other researchers, have conducted studies finding that approximately ninety percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.[28]

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[24] Cohen, et al. (2016). When is an adolescent an adult? Assessing cognitive control in emotional and non-emotional contexts. *Psychological Science*, *4*, 549-562.

[25] Steinberg, 2014.

[26] Kays, J., Hurley, R., Taber, K. (2012). The dynamic brain: Neuroplasticity and mental health. *Journal of Clinical Neuropsychiatry and Clinical Neuroscience*, *24*, 118-124; Thomas, M., & Johnson, M. (2008). New advances in understanding sensitive periods in brain development. *Current Directions in Psychological Science, 17*, 1-5.

[27] Moffitt, T. (2006). Life-course persistent versus adolescent-limited antisocial behavior. In D. Cicchettti and D. Cohen (Eds.) *Developmental Psychopathology* (2nd ed., Vol. 3).

[28] Monahan, K., Steinberg, L., Cauffman, E., & Mulvey, E. (2013). Psychosocial (im)maturity from adolescence to early adulthood: Distinguishing between adolescence-limited and persistent antisocial behavior. *Development and Psychopathology*, 25, 1093–1105.; Mulvey, E., Steinberg, L., Piquero, A., Besana, M., Fagan, J., Schubert, C., & Cauffman, E. (2010). Trajectories of desistance and continuity in antisocial behavior following court adjudication among serious adolescent offenders. *Development and Psychopathology*, *22*, 453-475.

CONCLUSION

25. **Extensive studies demonstrate that important neurobiological development is ongoing throughout the teenage years and continuing into the early 20s.** As a result of neurobiological immaturity, young people, even those past the age of majority, continue to demonstrate difficulties in exercising self-restraint, controlling impulses, considering future consequences, making decisions independently from their peers, and resisting the coercive influence of others. Heightened susceptibility to emotionally laden and socially charged situations renders adolescents and young adults more vulnerable to the influence of others, and in such situations young people are even less able to consider and weigh the risks and consequences of a chosen course of action. **Many of the same immaturities that characterize the brains of individuals younger than 18, and that have been found to mitigate their criminal culpability, are characteristic of the brains of individuals in their late teens and early 20s.**

26. The research in developmental psychology and developmental neuroscience outlined above explains the ways in which psychological and neurobiological maturation contributes to the gradual decrease in crime that takes place during young adulthood. Improvements in self-control, resistance to the influence of others, and future orientation, which naturally occur during late adolescence and continue into young adulthood, help account for the decrease in criminal activity occurring during these developmental periods. In other words, as the brain undergoes normal maturation during adolescence and young adulthood, antisocial behavior becomes increasingly unlikely.[29]

27. Criminal acts committed by adolescents, even those past the age of majority, are best understood in light of their neurobiological and psychological

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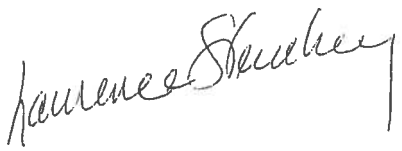
[29] Monahan, K., Steinberg, L., & Cauffman, E. (2009). Affiliation with antisocial peers, susceptibility to peer influence, and desistance from antisocial behavior during the transition to adulthood. *Developmental Psychology*, *45*, 1520-1530; Monahan, K., Steinberg, L., Cauffman, E., & Mulvey, E. (2009). Trajectories of antisocial behavior and psychosocial maturity from adolescence to young adulthood. *Developmental Psychology*, *45*, 1654-1668.

immaturity. For this reason, it is inappropriate to assign the same degree of culpability to criminal acts committed at this age to that which would be assigned to the behavior of a fully mature and responsible adult. The vast majority of criminal activity during the teen years is transitory and not indicative of intractably bad character.

28. **Neurobiological and psychological immaturity of the sort that the U.S. Supreme Court referenced in its opinions on the diminished culpability of minors is also characteristic of individuals in their late teens and early 20s.**

29. My testimony provided on July 17, 2017, and this report supplementing my testimony, provide opinions which are within a reasonable degree of scientific certainty.



Laurence Steinberg, Ph.D.

July 18, 2017

LIST OF SCIENTIFIC ARTICLES CITED IN ROPER EXTENSION MEMO

Albert, D., & Steinberg, L. (2011). Judgment and decision making in adolescence. *Journal of Research on Adolescence, 21*, 211-224

Blakemore, S-J., & T. Robbins, T. (2012). Decision-making in the adolescent brain. *Nature Neuroscience, 15*, 1184-1191.

Albert, D., & Steinberg, L. (2011). Peer influences on adolescent risk behavior. In M. Bardo, D. Fishbein, & R. Milich (Eds.), *Inhibitory control and drug abuse prevention: From research to translation.* (Part 3, pp. 211-226). New York: Springer.

Albert, D., Chein, J., & Steinberg, L. (2013). The teenage brain: Peer influences on adolescent decision-making. *Current Directions in Psychological Science, 22*, 114-120.

Blakemore, S-J. (2012). Imaging brain development: The adolescent brain. *Neuroimage, 61*, 397-406

Braams, B., van Duijvenvoorde, A., Peper, J., & Crone, E. (2015). Longitudinal changes in adolescent risk-taking: A comprehensive study of neural responses to rewards, pubertal development and risk taking behavior. *Journal of Neuroscience, 35*, 7226-7238

Casey, B. J., et al. (2010). The storm and stress of adolescence: Insights from human imaging and mouse genetics. *Developmental Psychobiology, 52*, 225-235.

Casey, B. J., Tottenham, N., Liston, C., & Durston, S. (2005). Imaging the developing brain: What have we learned about cognitive development? *Trends in Cognitive Science, 9,* 104–110.

Cauffman, E., Shulman, E., Steinberg, L., Claus, E., Banich, M., Graham, S., & Woolard, J. (2010). Age differences in affective decision making as indexed by performance on the Iowa Gambling Task. *Developmental Psychology, 46*, 193-207.

Cohen, A., Breiner, K., Steinberg, L., Bonnie, R., Scott, E., Taylor-Thompson, K., . . . Casey, B.J. (2016). When is an adolescent an adult? Assessing cognitive control in emotional and non-emotional contexts. *Psychological Science, 4*, 549-562

Dosenbach, N., et al. (2011). Prediction of individual brain maturity using fMRI. *Science, 329*, 1358–1361.

Fair, D., et al. (2009). Functional brain networks develop from a "local to distributed" organization. *PLoS Computational Biology, 5*, 1–14.

Giedd, J. N., Blumenthal, J., Jeffries, N. O., Castellanos, F. X., Liu, H., Zijdenbos, A., Paus, T., Evans, A. C., and Rapoport, J. L. (1999). Brain development during childhood and adolescence: a longitudinal MRI study. *Nature Neuroscience.* 2, 861–863.

Gogtay, N., et al. (2004). Dynamic mapping of human cortical development during childhood through early adulthood. *Proceedings of the National Academies of Sciences, 101*, 8174–8179.

Attachment #2

Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N., & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior, 27*, 333-363.

Hedman A., van Haren N., Schnack H., Kahn R., & Hulshoff Pol, H. (2012). Human brain changes across the life span: A review of 56 longtitudinal magnetic resonance imaging studies. *Human Brain Mapping, 33*, 1987-2002;.

Kays, J., Hurley, R., Taber, K. (2012). The dynamic brain: Neuroplasticity and mental health. *Journal of Clinical Neuropsychiatry and Clinical Neuroscience, 24*, 118-124.

Monahan, K., Steinberg, L., & Cauffman, E. (2009). Affiliation with antisocial peers, susceptibility to peer influence, and desistance from antisocial behavior during the transition to adulthood. *Developmental Psychology, 45*, 1520-1530.

Monahan, K., Steinberg, L., Cauffman, E., & Mulvey, E. (2009). Trajectories of antisocial behavior and psychosocial maturity from adolescence to young adulthood. *Developmental Psychology, 45*, 1654-1668.

Monahan, K., Steinberg, L., Cauffman, E., & Mulvey, E. (2013). Psychosocial (im)maturity from adolescence to early adulthood: Distinguishing between adolescence-limited and persistent antisocial behavior. *Development and Psychopathology*, 25, 1093–1105.

Mulvey, E., Steinberg, L., Piquero, A., Besana, M., Fagan, J., Schubert, C., & Cauffman, E. (2010). Trajectories of desistance and continuity in antisocial behavior following court adjudication among serious adolescent offenders. *Development and Psychopathology, 22*, 453-475.

Pfefferbaum, A., Rohlfing, T., Rosenbloom, M., Chu, W., & Colrain, I. (2013). Variation in longitudinal trajectories of regional brain volumes of healthy men and women (ages 10 to 85 years) measured with atlas-based parcellation of MRI. *NeuroImage, 65*, 176-193.

Shulman, E., & Cauffman, E. (2014). Deciding in the dark: Age differences in intuitive risk judgment. *Developmental Psychology, 50,* 167-177.

Simmonds, D., Hallquist, M., Asato, M., & Luna, B. (2014). Developmental stages and sex differences of white matter and behavioral development through adolescence: A longitudinal diffusion tensor imaging (DTI) study. *NeuroImage, 92*, 356-368.

Somerville, L., Jones, R., & Casey, B.J. (2010). A time of change: behavioral and neural correlates of adolescent sensitivity to appetitive and aversive environmental cues. *Brain & Cognition, 72*, 124-133.

Sowell, E., et al. (2004). Longitudinal mapping of cortical thickness and brain growth in normal children. *Journal of Neuroscience, 24*, 8223–8231.

Steinberg, L. (2008). A social neuroscience perspective on adolescent risk-taking. *Developmental Review, 28*, 78-106.

Steinberg, L. (2013). The influence of neuroscience on U.S. Supreme Court decisions involving adolescents' criminal culpability. *Nature Reviews Neuroscience, 14,* 513-518.

Steinberg, L., & Scott, E. (2003). Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist, 58*, 1009-1018.

Steinberg, L., Albert, D., Cauffman, E., Banich, M., Graham, S., & Woolard, J. (2008) Age differences in sensation seeking and impulsivity as indexed by behavior and self-report: Evidence for a dual systems model. *Developmental Psychology, 44*, 1764-1778

Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. (2009). Are adolescents less mature than adults? Minors' access to abortion, the juvenile death penalty, and the alleged APA "flip-flop". *American Psychologist, 64*, 583-594.

Steinberg, L., Graham, S., O'Brien, L., Woolard, J., Cauffman, E., & Banich, M. (2009). Age differences in future orientation and delay discounting. *Child Development, 80*, 28-44).

Steinberg, L., Icenogle, G., Shulman, E., Breiner, K., Chein, J., Bacchini, D., . . . Takash, H. (2017). Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation. *Developmental Science*. Advance online publication. doi: 10.1111/desc.12532.

Thomas, M., & Johnson, M. (2008). New advances in understanding sensitive periods in brain development. *Current Directions in Psychological Science, 17*, 1-5.

Van Leijenhorst, L., Moor, B. G., Op de Macks, Z. A., Rombouts, S. A. R. B., Westenberg, P. M., & Crone, E. A. (2010). Adolescent risky decisionmaking: Neurocognitive development of reward and control regions. *NeuroImage, 51*, 345–355.

Willoughby, T., Good, M., Adachi, P., Hamza, C., & Tavernier, R. (2013). Examining the link between adolescent brain development and risk taking from a social-developmental perspective. *Brain and Cognition, 83*, 315-323.

Zimring, F., & Laquear, H. (2014). Kids, groups, and crime. *Journal of Research in Crime and Delinquency, 52,* 403-415.

ADOPTED

AMERICAN BAR ASSOCIATION

DEATH PENALTY DUE PROCESS REVIEW PROJECT
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense.

REPORT

Introduction

The American Bar Association (ABA) has long examined the important issue of the death penalty and has sought to ensure that capital punishment is applied fairly, accurately, with meaningful due process, and only on the most deserving individuals. To that end, the ABA has taken positions on a variety of aspects of the administration of capital punishment, including how the law treats particularly vulnerable defendants or those with disabilities. In 1983, the ABA became one of the first organizations to call for an end of using the death penalty for individuals under the age of 18.[1] In 1997, the ABA called for a suspension of executions until states and the federal government improved several aspects of their administration of capital punishment, including removing juveniles from eligibility.[2]

Now, more than 35 years since the ABA first opposed the execution of juvenile offenders, there is a growing medical consensus that key areas of the brain relevant to decision-making and judgment continue to develop into the early twenties. With this has come a corresponding public understanding that our criminal justice system should also evolve in how it treats late adolescents (individuals age 18 to 21 years old), ranging from their access to juvenile court alternatives to eligibility for the death penalty. In light of this evolution of both the scientific and legal understanding surrounding young criminal defendants and broader changes to the death penalty landscape, it is now time for the ABA to revise its dated position and support the exclusion of individuals who were 21 years old or younger at the time of their crime.

The ABA has been – and should continue to be – a leader in supporting developmentally appropriate and evidence-based solutions for the treatment of young people in our criminal justice system, including with respect to the imposition of the death penalty. In 2004, the ABA filed an amicus brief in *Roper v. Simmons,* in which the U.S. Supreme Court held that the Eighth Amendment prohibited the imposition of the death penalty on individuals below the age of 18 at the time of their crime.[3] It also filed an amicus brief in 2012 in *Miller v. Alabama,* concerning the constitutionality of mandatory life without parole sentences for juveniles convicted of homicides.[4] The ABA's brief in *Roper*

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[1] ABA House of Delegates Recommendation 117A, (adopted Aug. 1983), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/juvenile_offenders_death_penalty0883.authcheckdam.pdf.

[2] ABA House of Delegates Recommendation 107 (adopted Feb. 1997), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/aba_policy_consistency97.authcheckdam.pdf.

[3] Brief for the ABA as Amicus Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005).

[4] Brief for the ABA as Amicus Curiae Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012).

emphasized our long-standing position that juvenile offenders do not possess the heightened moral culpability that justifies the death penalty.[5] It also demonstrated that under the "evolving standards of decency" test that governs the Eighth Amendment, over 50 percent of death penalty states had already rejected death as an appropriate punishment for individuals who committed their crimes under the age of 18.[6] In *Miller*, the ABA stressed that mandatory life without parole sentences for juveniles, even in homicide cases, were categorically unconstitutional because "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation."[7]

Not only has the U.S. Supreme Court held that there is a difference in levels of criminal culpability between juveniles and adults generally,[8] but the landscape of the American death penalty has changed since 1983. Fifty-two out of 53 U.S. jurisdictions now have a life without parole (LWOP) option, either by statute or practice;[9] and the overall national decline in new death sentences corresponds with an increase in LWOP sentences in the last two decades.[10] In 2016, 31 individuals received death sentences,[11] and only two of those individuals were under the age of 21 at the time of their crimes.[12] As of the date of this writing, 23 individuals had been executed in 2017, further reflecting a national decline in the imposition of capital punishment.[13] The U.S. Supreme Court has also recognized that the Eighth Amendment's evolving standards of decency has made other groups categorically ineligible for the death penalty – most notably individuals with intellectual disability.[14]

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[5] Brief for the ABA as Amicus Curiae Supporting Respondent at 5-11, *Roper v. Simmons*, 543 U.S. 551 (2005).

[6] Brief for the ABA as Amicus Curiae Supporting Respondent at 18, *Roper v. Simmons*, 543 U.S. 551 (2005).

[7] Brief for the ABA as Amicus Curiae Supporting Petitioners at 12, *Miller v. Alabama*, 567 U.S. 460 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 79 (2010)).

[8] *See, e.g., Miller v. Alabama,* 567 U.S. 460, 474 (2012); *Graham v. Florida* , 560 U.S. 48, 50, 76 (2010); *Roper v. Simmons*, 543 U.S. 551, 553 (2005).

[9] *See Life Without Parole,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/life-without-parole (last visited Sept. 28, 2017).

[10] Notes, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1845- 47 (2006).

[11] *Facts about the Death Penalty,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Nov. 7, 2017).

[12] Damantae Graham was under the age of 19 at the time of his crime. *See* Jen Steer, *Man Sentenced to Death in Murder of Kent State Student,* FOX 8 (Nov. 15, 2016), http://fox8.com/2016/11/15/man-sentenced-to-death-in-murder-of-kent-state-student. Justice Jerrell Knight was under the age of 21 at the time of his crime. *See* Natalie Wade, *Dothan Police Arrest Teenager in Murder of Dothan Man; Another Suspect Still at Large,* AL.COM (Feb. 8, 2012), http://blog.al.com/montgomery/2012/02/dothan_police_arrest_teenager.html.

[13] *See Searchable Execution Database,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2017&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply (last visited Nov. 13, 2017).

[14] *See Atkins v. Virginia*, 536 U.S. 306 (2002). The ABA was at the forefront of this movement as well, passing a resolution against executing persons with intellectual disability in 1989. *See* ABA House of Delegates Recommendation 110 (adopted Feb. 1989),

Furthermore, the scientific advances that have shaped our society's improved understanding of the human brain would have been unfathomable to those considering these issues in 1983. In 1990, President George H.W. Bush launched the "Decade of the Brain" initiative to "enhance public awareness of benefits to be derived from brain research."[15] Advances in neuroimaging techniques now allow researchers to evaluate a living human brain.[16] Indeed, neuroscience "had not played any part in [U.S. Supreme Court] decisions about developmental differences between adolescents and adults," likely due to "how little published research there was on adolescent brain development before 2000."[17] These and other large-scale advances in the understanding of the human brain, have led to the current medical recognition that brain systems and structures are still developing into an individual's mid-twenties.

It is now both appropriate and necessary to address the issue of late adolescence and the death penalty because of the overwhelming legal, scientific, and societal changes of the last three decades. The newly-understood similarities between juvenile and late adolescent brains, as well as the evolution of death penalty law and relevant standards under the Eighth Amendment lead to the clear conclusion that individuals in late adolescence should be exempted from capital punishment.[18] Capital defense attorneys are increasingly making this constitutional claim in death penalty litigation and this topic has become part of ongoing juvenile and criminal justice policy reform conversations around the country. As the ABA is a leader in protecting the rights of the vulnerable and ensuring that our justice system is fair, it is therefore incumbent upon this organization to recognize the need for heightened protections for an additional group of individuals: offenders whose crimes occurred while they were 21 years old or younger.

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http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_retardation_exemption0289.authcheckdam.pdf; *see also Kennedy v. Louisiana,* 554 U.S. 407, 413 (2008) (holding that the Eighth Amendment prohibits execution for crime of child rape, when victim does not die and death was not intended).

[15] *Project on the Decade of the Brain*, LIBR. OF CONGRESS, http://www.loc.gov/loc/brain/ (last visited Oct. 6, 2017).

[16] B.J. Casey, *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104,104-10 (2005).

[17] Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions about Adolescents' criminal Culpability*, 14 NATURE REVIEWS NEUROSCIENCE 513, 513-14 (2013).

[18] Earlier this year, a Kentucky Circuit Court held pre-trial evidentiary hearings in three cases and found that it is unconstitutional to sentence to death individuals "under twenty-one (21) years of age at the time of their offense."*See Commonwealth v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 14-CR-161, *1, 12 (Fayette Circuit Court, Aug. 1, 2017); *Commonwealth v. Smith*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 15-CR-584-002, *1, 12 (Fayette Circuit Court, Sept. 6, 2017); *Commonwealth v. Diaz*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 15-CR-584-001, *1, 11 (Fayette Circuit Court, Sept. 6, 2017).).

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Major Constitutional Developments in the Punishment of Juveniles for Serious Crimes

The rule that constitutional standards must calibrate for youth status is well established. The U.S. Supreme Court has long recognized that legal standards developed for adults cannot be uncritically applied to children and youth.[19] Although "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[20] the Court has held that "the Constitution does not mandate elimination of all differences in the treatment of juveniles."[21]

As noted above, between 2005 and 2016, the U.S. Supreme Court issued several landmark decisions that profoundly alter the status and treatment of youth in the justice system.[22] Construing the Eighth Amendment, the Court held in *Roper v. Simmons* that juveniles are sufficiently less blameworthy than adults, such that the application of different sentencing principles is required under the Eighth Amendment, even in cases of capital murder.[23] In *Graham v. Florida*, the Court, seeing no meaningful distinction between a sentence of death or LWOP, found that the Eighth Amendment categorically prohibited LWOP sentences for non-homicide crimes for juveniles.[24]

Then, in *Miller v. Alabama,* the U.S. Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."[25] Justice Kagan, writing for the majority, was explicit in articulating the Court's rationale: the mandatory imposition of LWOP sentences "prevents those meting out punishment from considering a juvenile's 'lessened culpability 'and greater 'capacity for change,'[26] and runs afoul of our cases 'requirement of individualized sentencing for defendants facing the most serious penalties.'"[27] The Court grounded its holding "not only on common sense…but on science and social science as

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[19] *See, e.g.*, *May v. Anderson*, 345 U.S. 528, 536 (1953) ("Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State 's duty towards children."); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) ("[A child] cannot be judged by the more exacting standards of maturity.").

[20] *In re Gault*, 387 U.S. 1, 13 (1967).

[21] *Schall v. Martin*, 467 U.S. 253, 263 (1984) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)) (holding that juveniles have no right to jury trial).

[22] Apart from the sentencing decisions discussed herein, the Court, interpreting the Fifth and Fourteenth Amendments, held in *J.D.B. v. North Carolina,* that a juvenile's age is relevant to the *Miranda* custody analysis. 564 U.S. 261, 264 (2011). In all of these cases, the Court adopted settled research regarding adolescent development and required the consideration of the attributes of youth when applying constitutional protections to juvenile offenders.

[23] 543 U.S. 551, 570-71 (2005).

[24] 560 U.S. 48, 74 (2010).

[25] 567 U.S. 460, 479 (2012).

[26] *Miller v. Alabama,* 567 U.S. 460, 465 (2012) (citing *Graham* v. *Florida*, 560 U.S. 48, 68, 74 (2010)).

[27] *Miller,* 567 U.S. at 480.

well,"[28] all of which demonstrate fundamental differences between juveniles and adults.

The Court in *Miller* noted the scientific "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.'"[29] Importantly, the Court specifically found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific."[30] Relying on *Graham*, *Roper*, and other previous decisions on individualized sentencing, the Court held "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."[31] The Court also emphasized that a young offender's moral failings could not be comparable to an adult's because there is a stronger possibility of rehabilitation.[32]

In 2016, the U.S. Supreme Court in *Montgomery v. Louisiana* expanded its analysis of the predicate factors that the sentencing court must find before imposing a life without parole sentence on a juvenile.[33] *Montgomery* explained that the Court's decision in *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.[34] The Court held "that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption," noting that a life without parole sentence "could [only] be a proportionate sentence for the latter kind of juvenile offender."[35]

Collectively, these decisions demonstrate a distinct Eighth Amendment analysis for youth, premised on the simple fact that young people are different for the purposes of criminal law and sentencing practices. Relying on prevailing developmental research and common human experience concerning the transitions that define adolescence, the Court has recognized that the age and special characteristics of young offenders play a critical role in assessing whether sentences imposed on them are disproportionate under the Eighth Amendment.[36] More specifically, the cases recognize three key characteristics that distinguish adolescents from adults: "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more

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[28] *Id.* at 471.
[29] *Id.* at 472 (quoting *Graham,* 560 U.S. at 68; *Roper,* 543 U.S. at 570).
[30] *Id.* at 473.
[31] *Id.* at 477.
[32] *Miller 567* U.S. at 471 (citing *Roper,* 543 U.S. at 570).
[33] *Montgomery v. Louisiana,* 577 U.S. __, 136 S. Ct. 718 (2016).
[34] *Id.* at 734 (emphasis added).
[35] *Id.* (emphasis added).
[36] *See Graham*, 560 U.S. at 68; *see also Miller*, 567 U.S. at 471-72.

vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'"[37]

As both the majority and the dissent agreed in *Roper* and *Graham*, the U.S. Supreme Court has supplanted its "death is different" analysis in adult Eighth Amendment cases for an offender-focused "kids are different" frame in serious criminal cases involving young defendants.[38] Indeed, in *Graham v. Florida*, the Court wrote "criminal procedure laws that fail to take defendants' 'youthfulness into account at all would be flawed."[39]

Increased Understanding of Adolescent Brain Development

American courts, including the U.S. Supreme Court, have increasingly relied on and cited to a comprehensive body of research on adolescent development in its opinions examining youth sentencing, capability, and custody.[40] The empirical research shows that most delinquent conduct during adolescence involves risk-taking behavior that is part of normative developmental processes.[41] The U.S. Supreme Court in *Roper v. Simmons* recognized that these normative developmental behaviors generally lessen as youth mature and become less likely to reoffend as a direct result of the maturational process.[42] In *Miller and Graham,* the Court also recognized that this maturational process is a direct function of brain growth, citing research showing that the frontal lobe, home to key components of circuitry underlying "executive functions" such as planning, working memory, and impulse control, is among the last areas of the brain to mature.[43]

In the years since *Roper*, research has consistently shown that such development actually continues beyond the age of 18. Indeed, the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development. While there were findings that pointed to this conclusion prior to 2005,[44] a wide body of research has since provided us with an

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[37] *Miller,* 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569-70).
[38] *See Graham v. Florida*, 560 U.S. 48, 102-103 (2010) (Thomas, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 588-89 (2005) (O'Connor, J., dissenting).
[39] 560 U.S. at 76.
[40] *See, e.g., Roper v. Simmons,* 543 U.S. 551, 569-70 (2005); *Graham v. Florida*, 560 U.S 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012).
[41] NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 66-74 (Joan McCord et al. eds., National Academy Press 2001).
[42] *See Roper*, 543 U.S. at 570-71; *see also* NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 91 (Richard J. Bonnie et al. eds., Nat'l Acad. Press, 2013).
[43] *See Miller v. Alabama*, 567 U.S. 460, 472 (2012); *Graham* v. *Florida,* 560 U.S. 48, 68 (2010).
[44] *See, e.g.,* Graham Bradley & Karen Wildman, *Psychosocial Predictors of Emerging Adults' Risk and Reckless Behaviors*, 31 J. YOUTH & ADOLESCENCE 253, 253–54, 263 (2002) (explaining that, among emerging adults in the 18-to-25-year-old age group, reckless behaviors—defined as those actions that are not socially approved–were found to be reliably predicted by antisocial peer pressure and stating that "antisocial peer pressure appears to be a continuing, and perhaps critical, influence upon [reckless] behaviors well into the emerging adult years"); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 AM.

expanded understanding of behavioral and psychological tendencies of 18 to 21 year olds.[45]

Findings demonstrate that 18 to 21 year olds have a diminished capacity to understand the consequences of their actions and control their behavior in ways similar to youth under 18.[46] Additionally, research suggests that late adolescents, like juveniles, are more prone to risk-taking and that they act more impulsively than older adults in ways that likely influence their criminal conduct.[47] According to one of the studies conducted by Dr. Laurence Steinberg, a leading adolescent development expert, 18 to 21 year olds are not fully mature enough to anticipate future consequences.[48]

More recent research shows that profound neurodevelopmental growth continues even into a person's mid to late twenties.[49] A widely-cited longitudinal

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PSYCHOLOGIST 1009, 1013, 1016 (2003) ("[T]he results of studies using paper-and-pencil measures of future orientation, impulsivity, and susceptibility to peer pressure point in the same direction as the neurobiological evidence, namely, that brain systems implicated in planning, judgment, impulse control, and decision making continue to mature into late adolescence. . . . Some of the relevant abilities (e.g., logical reasoning) may reach adult-like levels in middle adolescence, whereas others (e.g., the ability to resist peer influence or think through the future consequences of one's actions) may not become fully mature until young adulthood.").

[45] *See* Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731 (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)); Damien A. Fair et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization,* 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); 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, 626, 632, 634 (2005) (examining a sample of 306 individuals in 3 age groups—adolescents (13-16), youths (18-22), and adults (24 and older) and explaining 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"); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91 (2008) (noting that "the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults").

[46] *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 343 (1992); Kathryn L. Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 L. & HUM. BEHAV. 78, 79 (2008) ("In general, the age curve shows crime rates escalating rapidly between ages 14 and 15, topping out between ages 16 and 20, and promptly deescalating.").

[47] *See* Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy,* 85 FORDHAM L. REV. 641, 644 (2016).

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

[49] *See* Christian Beaulieu & Catherine Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood,* 27 J. OF NEUROSCIENCE 31 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women*

study sponsored by the National Institute of Mental Health tracked the brain development of 5,000 children, discovering that their brains were not fully mature until at least 25 years of age.[50] This period of development significantly impacts an adolescent's ability to delay gratification and understand the long-term consequences of their actions.[51]

Additionally, research has shown that youth are more likely than adult offenders to be wrongfully convicted of a crime.[52] Specifically, an analysis of known wrongful conviction cases found that individuals under the age of 25 are responsible for 63 percent of false confessions.[53] Late adolescents' propensity for false confessions, combined with the existing brain development research, supports the conclusion that late adolescents are a vulnerable group in need of additional protection in the criminal justice system.[54]

Legislative Developments in the Legal Treatment of Individuals in Late Adolescence

The trend of treating individuals in late adolescence differently from adults goes well beyond the appropriate punishment in homicide cases. As noted, scientists, researchers, practitioners and corrections professionals are all now recognizing that individuals in late adolescence are developmentally closer to their peers under 18 than to those adults who are fully neurologically developed. In response to that understanding, both state and federal legislators have created greater restrictions and protections for late adolescents in a range of areas of law.

For example, in 1984, the U.S. Congress passed the National Minimum Drinking Age Act, which incentivized states to set their legal age for alcohol purchases at age 21.[55] Since then, five states (California, Hawaii, New Jersey, Maine, and Oregon) have also raised the legal age to purchase cigarettes to age 21.[56] In addition to restrictions on purchases, many car rental companies have

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(Ages 0 to 85 Years) Measures with Atlas-Based Parcellation of MRI, 65 NEUROIMAGE 176. 176-193 (2013).

[50] Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1358–59 (2010).

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

[52] *Understand the Problem*, BLUHM LEGAL CLINIC WRONGFUL CONVICTIONS OF YOUTH, http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem/ (last visited Nov. 10, 2017).

[53] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004).

[54] *See Atkins v. Virgina*, 536 U.S. 304, 320-21 (2002) (possibility of false confessions enhances the imposition of the death penalty, despite factors calling for less severe penalty).

[55] 23 U.S.C. § 158 (1984).

[56] Jenni Bergal, *Oregon Raises Cigarette-buying age to 21*, WASH. POST, (Aug. 18, 2017), https://www.washingtonpost.com/national/health-science/oregon-raises-cigarette-buying-age-to-21/2017/08/18/83366b7a-811e-11e7-902a-2a9f2d808496_story.html?utm_term=.132d118c0d10.

set minimum rental ages at 20 or 21, with higher rental fees for individuals under age 25.[57] Under the Free Application for Federal Student Aid (FASFA), the Federal Government considers individuals under age 23 legal dependents of their parents.[58] Similarly, the Internal Revenue Service allows students under the age of 24 to be dependents for tax purposes.[59] The Affordable Care Act also allows individuals under the age of 26 to remain on their parents' health insurance.[60]

In the context of child-serving agencies, both the child welfare and education systems in states across the country now extend their services to individuals through age 21, recognizing that youth do not reach levels of adult independence and responsibility at age 18. In fact, 25 states have extended foster care or state-funded transitional services to late adolescents through the Fostering Connections to Success and Increasing Adoptions Act of 2008.[61] Under the Individuals with Disabilities Education Act (IDEA), youth and late adolescents (all of whom IDEA refers to as "children") with disabilities who have not earned their traditional diplomas are eligible for services through age 21.[62] Going even further, 31 states allow access to free secondary education for students 21-years-old or older.[63]

Similar policies protect late adolescents in both the juvenile and adult criminal justice systems. Forty-five states allow youth up to age 21 to remain under the jurisdiction of the juvenile justice system.[64] Nine of those states also allow individuals 21 years old and older to remain under the juvenile court's jurisdiction, including four states that have set the maximum jurisdictional age at 24.[65] A number of states have created special statuses, often called "Youthful

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[57] *See, e.g., What are Your Age Requirements for Renting in the US and Canada*, ENTERPRISE.COM, https://www.enterprise.com/en/help/faqs/car-rental-under-25.html (last visited Oct. 16, 2017); *Restrictions and Surcharges for Renters Under 25 Years of Age*, BUDGET.COM, https://www.budget.com/budgetWeb/html/en/common/agePopUp.html (last visited Oct. 16, 2017); *Under 25 Car Rental,* HERTZ.COM, https://www.hertz.com/rentacar/misc/index.jsp?targetPage=Hertz_Renting_to_Drivers_Under_25.jsp (last visited Oct. 16, 2017).

[58] *See Dependancy Status,* FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/fafsa/filling-out/dependency (last visited Sept. 21, 2017).

[59] *See Dependants and Exemptions 7,* I.R.S, https://www.irs.gov/faqs/filing-requirements-status-dependents-exemptions/dependents-exemptions/dependents-exemptions-7 (last visited Sept. 21, 2017); 26 U.S.C. § 152 (2008).

[60] 42 U.S.C. § 300gg-14 (2017).

[61] *See Extending Foster Care to 18*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx.

[62] 20 U.S.C. § 1412 (a)(1)(A) (2017).

[63] *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2015*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp.

[64] Jurisdictional Boundaries, *Juvenile Justice Geography, Policy, Practice & Statistics*, NAT'L CTR. FOR JUV. JUST.,http://www.jjgps.org/jurisdictional-boundaries#delinquency-age-boundaries?year=2016&ageGroup=3 (last visited Nov. 8, 2017).

[65] *Id.*

Offender" or "Serious Offender" status that allows individuals in late adolescence to benefit from similar protections to the juvenile justice system, specifically related to the confidentiality of their proceedings and record sealing.[66]

For example, in 2017, the Vermont legislature changed the definition of a child for purposes of juvenile delinquency proceedings in the state to an individual who "has committed an act of delinquency after becoming 10 years of age and prior to becoming 22 years of age."[67] This change affords late adolescents access to the treatment and other service options generally associated with juvenile proceedings.[68] In 2017, Connecticut, Illinois, and Massachusetts legislators were considering similar efforts to provide greater protections to young adults beyond the age of 18.[69] Notably, even when late adolescents enter the adult criminal justice system, some states have created separate correctional housing and programming for individuals under 25.[70]

Furthermore, several European countries maintain similarly broad approaches to treatment of late adolescents who commit crimes. In countries like England, Finland, France, Germany, Italy, Sweden, and Switzerland, late adolescence is a mitigating factor either in statute or in practice that allows many 18 to 21 year olds to receive similar sentences and correctional housing to their peers under 18.[71]

There has thus been a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18. These various laws and policies, designed to both restrict and protect individuals in this late adolescent age group, reflect our society's evolving view of the maturity and culpability of 18 to 21 year olds, and beyond. Virtually all of these important reforms have come after 1983, when the ABA first passed its policy concerning the age at which individuals should be exempt from the death penalty.

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[66] *See* FLA. STAT. § 958.04 (2017) (under 21); D.C. CODE § 24-901 *et seq.* (2017) (under 22); S.C. CODE ANN. § 24-19-10 *et seq.* (2017) (under 25); *see also* 33 V.S.A § 5102, 5103 (2017) (under 22).

[67] The legislature made this change in 2017 in order to make Vermont law consistent, as it had also expanded its Youthful Offender Status in 2016 so that 18-to-21-year-olds would be able to have their cases heard in the juvenile court versus the adult court. *See* H. 95, 2016 Leg., Reg. Sess. (Vt. 2016); S. 23, 2017 Leg., Reg. Sess. (Vt. 2017).

[68] *Id.*

[69] *See* H.B. 7045, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017); H.B. 6308, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); H. 3037, 190th Gen. Ct., Reg. Sess. (Mass. 2017).

[70] *See* S.C. CODE Ann. § 24-19-10; H. 95, 2016 Leg., Reg. Sess. (Vt. 2016); *Division of Juvenile Justice,* CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Juvenile_Justice/ (last visited on Oct. 16, 2017); *Oregon Youth Authority Facility Services*, OR. YOUTH AUTH., http://www.oregon.gov/oya/pages/facility_services.aspx#About_OYA_Facilities (last visited on Oct. 18, 2017), Christopher Keating, *Connecticut to Open Prison for 18-to-25 Year Olds*, HARTFORD COURANT (Dec. 17, 2015), http://www.courant.com/news/connecticut/hc-connecticut-prison-young-inmates-1218-20151217-story.html.

[71] Ineke Pruin & Frieder Dunkel, TRANSITION TO ADULTHOOD & UNIV. OF GREIFSWALD, BETTER IN EUROPE? EUROPEAN RESPONSES TO YOUNG ADULT OFFENDING: EXECUTIVE SUMMARY 8-10 (2015).

Purposes Served by Executing Individuals in Late Adolescence

Regardless of whether one considers the death penalty an appropriate punishment for the worst murders committed by the worst offenders, it has become clear that the death penalty is indefensible as a response to crimes committed by those in late adolescence. As discussed in this report, a growing body of scientific understanding and a corresponding evolution in our standards of decency undermine the traditional penological purposes of executing defendants who committed a capital murder between the ages of 18 and 21. Just as the ABA has done when adopting earlier policies, we must consider the propriety of the most common penological justifications for the death penalty: "retribution and deterrence of capital crimes by prospective offenders."[72]

Capital punishment does not effectively or fairly advance the goal of retribution within the context of offenders in late adolescence. Indeed, the Eighth Amendment demands that punishments be proportional and personalized to both the offense and the offender.[73] Thus, to be in furtherance of the goal of retribution, those sentenced to death – the most severe and irrevocable sanction available to the state – should be the most blameworthy defendants who have also committed the worst crimes in our society. As has been extensively discussed above, contemporary neuroscientific research demonstrates that several relevant characteristics typify late adolescents' developmental stage, including: 1) a lack of maturity and an underdeveloped sense of responsibility, 2) increased susceptibility to negative influences, emotional states, and social pressures, and 3) underdeveloped and highly fluid character.[74]

The U.S. Supreme Court's holdings in *Roper* and *Atkins* were based on the findings that society had redrawn the lines for who is the most culpable or "worst of the worst." Similarly, the scientific advancements and legal reforms discussed above support the ABA's determination that there is an evolving moral consensus that late adolescents share a lesser moral culpability with their teenage counterparts. If "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state", then the lesser culpability of those in late adolescence surely cannot justify such a form of retribution.[75]

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[72] *Roper,* 543 U.S. at 553.
[73] *Graham v. Florida,* 560 U.S. 48, 59 (2010) (citing *Weems v. United States,* 217 U.S. 349, 367 (1910)).
[74] *See Commonwealth v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 14-CR-161, *1, 7-8 (Fayette Circuit Court, Aug. 1, 2017) (After expert testimony and briefing based on contemporary science, the court made specific factual findings that individuals in late adolescence are more likely to underestimate risks; more likely to engage in "sensation seeking;" less able to control their impulses; less emotionally developed than intellectually developed; and more influenced by their peers than adults. It then held that, based on those traits and other reasons, those individuals should be exempt from capital puninshment.)
[75] *See Atkins v. Virginia,* 536 U.S. 304, 319 (2002).

Second, there is insufficient evidence to support the proposition that the death penalty is an effective deterrent to capital murder for individuals in late adolescence. In fact, there is no consensus in either the social science or legal communities about whether there is any general deterrent effect of the death penalty.[76] Even with the most generous assumption that the death penalty may have some deterrent effect for adults without any cognitive or mental health disability, it does not necessarily follow that it would similarly deter a juvenile or late adolescent. Scientific findings suggest that late adolescents are, in this respect, more similar to juveniles.[77] As noted earlier, late adolescence is a developmental period marked by risk-taking and sensation-seeking behavior, as well as a diminished capacity to perform rational, long-term cost-benefit analyses. The same cognitive and behavioral capacities that make those in late adolescence less morally culpable for their acts also "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[78]

Finally, both the death penalty and LWOP effectively serve the additional penological goal of incapacitation, as either sentence will prevent that individual from release into general society to commit any future crimes. However, only the death penalty completely rejects the goal of providing some opportunity for redemption or rehabilitation for a young offender. Ninety percent of violent juvenile and late adolescent offenders do not go on to reoffend later in life.[79] Thus, many of these individuals can and will serve their sentences without additional violence, even inside prison, and will surely mature and change as they reach full adulthood. Imposing a death sentence and otherwise giving up on adolescents, precluding their possible rehabilitation or any future positive contributions (even if only made during their years of incarceration), is antithetical to the fundamental principles of our justice system.

Conclusion

In the decades since the ABA adopted its policy opposing capital punishment for individuals under the age of 18, legal, scientific and societial developments strip the continued application of the death penalty against

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[76] John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate,* 58 STAN. L. REV. 791, 843 (2005).

[77] James C. Howell et al., *Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What Happens, What Should Happen, and What We Need to Know,* NAT'L INST. OF JUST. STUDY GROUP ON THE TRANSITIONS BETWEEN JUV. DELINQ. AND ADULT CRIME, at Bulletin 5, 24 (2013).

[78] *Atkins,* 536 U.S. at 320.

[79] Kathryn Monahan et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior,* 25 DEV. & PSYCHOPATHOLOGY 1093, 1093-1105 (2013); Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders,* 22 DEV. & PSYCHOPATHOLOGY 453,453-75 (2010).

individuals in late adolescence of its moral or constitutional justification. The rationale supporting the bans on executing either juveniles, as advanced in *Roper v. Simmons,* or individuals with intellectual disabilities, as set forth in *Atkins v. Virginia,* also apply to offenders who are 21 years old or younger when they commit their crimes. Thus, this policy proposes a practical limitation based on age that is supported by science, tracks many other areas of our civil and criminal law, and will succeed in making the administration of the death penalty fairer and more proportional to both the crimes and the offenders.

In adopting this revised position, the ABA still acknowledges the need to impose serious and severe punishment on these individuals when they take the life of another person. Yet at the same time, this policy makes clear our recognition that individuals in late adolescence, in light of their ongoing neurological development, are not among the worst of the worst offenders, for whom the death penalty must be reserved.

Respectfully submitted,

Seth Miller
Chair, Death Penalty Due
Process Review Project

Robert Weiner
Chair, Section of Civil Rights and
Social Justice

February, 2018

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GENERAL INFORMATION FORM

Submitting Entities: Death Penalty Due Process Review Project, with Co-sponsor: Section of Civil Rights and Social Justice

Submitted By: Seth Miller, Chair, Steering Committee, Death Penalty Due Process Review Project; Robert N. Weiner, Chair, Section of Civil Rights and Social Justice.

1. Summary of Resolution.

This resolution urges each death penalty jurisdiction to not execute or sentence to death anyone who was 21 years old or younger at the time of the offense. Without taking a position supporting or opposing the death penalty, this recommendation fully comports with the ABA's longstanding position that states should administer the death penalty only when performed in accordance with constitutional principles of fairness and proportionality. Because the Eighth Amendment demands that states impose death only as a response to the most serious crimes committed by the most heinous offenders, this resolution calls on jurisdictions to extend existing constitutional protections for capital defendants under the age of 18 to offenders up to and including the age of 21.

2. Approval by Submitting Entity.

Yes. The Steering Committee of the Death Penalty Due Process Review Project approved the Resolution on October 26, 2017 via written vote. The Council of the Section of Civil Rights and Social Justice approved the Recommendation at the Section's Fall Meeting in Washington, D.C on October 27, 2017, and agreed to be a co-sponsor.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has existing policy that pertains to the imposition of capital punishment on young offenders under the age of 18; this new policy, if adopted, would effectively supercede that policy and extend our position to individuals age 21 and under. Specifically, at the 1983 Annual Meeting, the House of Delegates adopted the position "that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committee while under the age of 18."[80]

[80] ABA House of Delegates Recommendation 117A, (adopted Aug. 1983), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/juvenile_offenders_death_penalty0883.authcheckdam.pdf.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation.

N/A. There is no known relevant legislation pending in Congress or in state legislatures. However, several states have passed laws in recent years extending juvenile protections to persons older than 18 years of age, including, for example, allowing youth under 21 to remain under the jurisdiction of the juvenile justice system. Additionally, this is an issue being raised more frequently in capital case litigation.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use this policy to enable the leadership, members and staff of the ABA to engage in active and ongoing policy discussions on this issue, to respond to possible state legislation introduced in 2018 and beyond, and to participate as *amicus curiae*, if a case reaches the U.S. Supreme Court with relevant claims. The sponsors will also use the policy to consult on issues related to the imposition of the death penalty on vulnerable defendants generally, and youthful offenders specifically, when called upon to do so by judges, lawyers, government entities, and bar associations.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

This Resolution has been referred to the following ABA entities that may have an interest in the subject matter:

Center for Human Rights
Center on Children and the Law
Coalition on Racial and Ethnic Justice
Commission on Youth at Risk
Criminal Justice Section
Death Penalty Representation Project
Judicial Division
Law Student Division

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Litigation
Section of International Law
Section of State and Local Government Law
Solo, Small Firm and General Practice Division
Standing Committee on Legal Aid and Indigent Defense
Young Lawyers Division

11. Contact Name and Address Information (prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges each death penalty jurisdiction to not execute or sentence to death anyone who was 21 years old or younger at the time of the offense.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the practice of sentencing to death and executing young persons ages 21 and under. The resolution clarifies that the ABA's long-standing position on capital punishment further necessitates that jurisdictions categorically exempt offenders ages 21 and under from capital punishment due to the lessened moral culpability, immaturity, and capacity for rehabilitation exemplified in late adolescence.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution aims to accomplish this goal by consulting on issues related to young offenders and the death penalty when called upon to do so by judges, lawyers, government entities, and bar associations, by supporting the filing of amicus briefs in cases that present issues of youthfulness and capital punishment, and by conducting and publicizing reports of jurisdictional practices vis-à-vis the imposition of death on late adolescent offenders for public information and use in the media and advocacy communities.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.

FILED ELECTRONICALLY THROUGH KENTUCKY eCOURTS
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COMMONWEALTH OF KENTUCKY
COUNTY OF FAYETTE

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH, DIVISION SEVEN (7)

INDICTMENT NO. 14-CR-00161

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS.

TRAVIS BREDHOLD — DEFENDANT

* * * * *

DEFENDANT'S *RENEWED* MEMORADUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE THE DEATH PENALTY BASED UPON HOLDING AND REASONING OF *ROPER VS. SIMMONS*

* * * * *

Comes now Travis Bredhold, by counsel, and tenders to this Court the following memorandum of law in support of his motion to exclude the death penalty as a possible punishment in the above-styled indictment. Mr. Bredhold, by counsel, incorporates his motion by reference into this memorandum.

TABLE OF POINTS AND AUTHORITIES

B. Overview of the United States Supreme Court's Eighth Amendment Jurisprudence

C. Analysis of this Issue Requires Courts to Determine National Consensus by Looking at Legislation, Actual Sentencing Practices, Execution Statistics, and Other Objective Indicia.

1. *Atkins*, *Roper* and Progeny

2. National Consensus Reflects that Individuals Under Twenty-One Years Old at the Time of Commission of Offense Should Not Be Executed.

a. An Offender Under 21 Years Would Not Be Executed for Any Offense in Twenty-Three (23) States, the District of Columbia, and the Five U.S. Territories.

b. Among States that Authorize the Death Penalty for Offenders Under 21 Years, Seven (7) Reveal a De Facto Prohibition On the Execution of Offenders Under 21 Years: There Have Been No Executions of Such Offenders in the Last 15 Years, and Offenders Under 21 Years Have Not Been Sent to Death Row – Or Remained There – in the Last 20 Years.

(1) Kansas and New Hampshire: No Executions Since 1977, and No One Under 21 Years Currently Under Sentence of Death.

(2) Montana and Wyoming: No Executions of Offenders Under 21 Years Since 1977, and No One Under 21 Years On Death Row.

(3) Utah: No Executions of Offenders Under 21 Years Within the Last 15 Years, and No One Under 21 Years Currently On Death Row

(4) Idaho and Kentucky: No Executions of Offenders Under 21 Years in the Last 15 Years, and No New Death Sentences of Those Under 21 Years In Nearly 20 Years.

c. Of the Remaining States that Authorize Executions of Those Under 21 Years at the Time of their Offenses, It Is Only Implemented in a Minority of States.

3. Analysis of This Issue Requires Courts To Examine Whether the Death Penalty Has a Legitimate Penological Purpose for Offenders Who Have Committed Offenses When Under 21 Years of Age.

a. **Scientific and Social Science Research Suggests that People Under 21 Years of Age Do Not Have Fully Developed Brains, Are Immature, and Are Vulnerable to Peer Pressure and Risk-Taking Behavior.**

b. **That People Ages 18, 19, and 20 Are Categorically Less Mature and Less Responsible than Adults 21 Years and Over Is Corroborated by State and Federal Laws that Set Minimum Age Requirements At 21 Years and Those Laws that Include 18, 19 and 20 Year Olds in the Protections Granted to "Children," "Minors," or Young People in General.**

c. **Capital Punishment Directed at Offenders Under 21 Years Has Little or No Penological Purpose and Is Unconstitutionally Excessive.**

D. **International Opinion on the Death Penalty and the Treatment of Criminal Offenders Under the Age of 21 Years Further Supports the Notion that the Death Penalty Should be Categorically Prohibited.**

1. **The Death Penalty Is Only Implemented in a Minority of Countries.**

2. **Members of the International Community Have Also Recognized the Need to Treat Youthful Offenders as Juveniles Rather than As Adults in the Criminal Context.**

IV. CONCLUSION

APPENDICES

APPENDIX A: Age Restrictions under Selected Federal Laws

APPENDIX B: State Age Restrictions Related to Candidacy for Elected Office (Lower House)

APPENDIX C: State Age Restrictions Related to Handguns

APPENDIX D: State Age Restrictions Related to the Possession/ Consumption/ Purchase of Alcohol and Marijuana

APPENDIX E: State Age Restrictions Related Uniform Transfers or Gifts to Minors Act

APPENDIX F: State Age Maximums for Free Public Education

APPENDIX G: State Age Restrictions Related to Foster Parenting and Maximum Age for Foster Care/Adoption

TABLE OF EXHIBITS[1]

Death Row and Execution Data

Exhibit A: Summary of States' Death Row Populations and Execution Data

Exhibit B: Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from https://deathpenaltyinfo.org/documents/FactSheet.pdf

Exhibit C: 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]

Exhibit D: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, Capital Punishment, 2013 – Statistical Tables (Rev. Dec. 19, 2014) downloaded from http://www.bjs.gov/content/pub/pdf/cp13st.pdf

Exhibit E: Spreadsheet of Executed Offenders from December 2014 through February 2016

Exhibit F: Clark County Prosecutor's Listing of Executed Offenders from 2000 till 2014 (reverse chronological order)

Exhibit H: Death Penalty Information Center (DPIC), States with and without the Death Penalty; M. Berman, "There are 18 states without the death penalty. A third of them have banned it since 2007," Washington Post (Apr. 30, 2014).

Exhibit J: News article regarding American Samoa and the Death Penalty

Exhibit K: News articles regarding Moratoria States: Washington, Colorado, Oregon, and Pennsylvania

Exhibit L: News article regarding Maryland and DPIC Factsheets on Connecticut and New Mexico

Exhibit M: News articles regarding Wyoming and Montana

Exhibit N: News article regarding Jonathan Carr case (Kansas)

Exhibit O: News article regarding Wood case (Utah)

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[1] Exhibits are in alphabetical order; however, some exhibits have been removed because they have not been updated at the time of the filing of this motion. Defense counsel reserves the right to supplement this memorandum and accompanying motion with additional data and exhibits.

Exhibit Q: DPIC Information regarding Elijah Page (South Dakota)

Exhibit R: California Department of Corrections, List of Executed Offenders

Age Regulations

Exhibit U: Miscellaneous federal age restrictions

Exhibit V: Miscellaneous state age restrictions

Scientific Research

Exhibit W: L. Steinberg, "A Social Neuroscience Perspective on Adolescent Risk-Taking," DEV. REV. Vol. 28(1), Mar. 2008, at pp. 78-106.

Exhibit X: J. Giedd, "The Amazing Teen Brain," Scientific American (June 2008), at pp. 33- 37.

Exhibit Y: National Conference of State Legislatures, "Extending Foster Care Beyond 18" (Oct. 30, 2014) downloaded from http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx; Jim Casey Youth Opportunities Initiative, "The Adolescent Brain: New Research and Its Implications for Young People Transitioning from Foster Care" (2011) downloaded from http://www.jimcaseyyouth.org/sites/default/files/documents/The%20Adolescent%20Brain_prepress_proof[1].pdf [linked from NCLS website]; R. Ramesh, "Young People to be allowed to remain in foster care until age 21," The Guardian (U.K.) (Dec. 3, 2013) downloaded from http://www.theguardian.com/society /2013/dec/04/young-people-allowed-foster-care-21.

Miscellaneous International

Exhibit Z: Amnesty International, *Death Sentences and Executions 2016* (2017) downloaded from http://www.amnestyusa.org/pdfs

Exhibit AA: Transition to Adulthood, *Better in Europe? European Responses to Young Adult Offending: Full Report* (Mar. 2015) downloaded from http://www.t2a.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-_online.pdf

I. INTRODUCTION

Travis Bredhold is charged with murder, first-degree robbery and other offenses in the above-styled indictment. The Commonwealth is seeking the death penalty as punishment against him upon conviction of eligible offenses. At the time of the alleged homicide and robbery on December 9, 2013, Travis was 18 years, five (5) months and 13 days old.

II. LEGISLATIVE POWER IS LIMITED BY THE UNITED STATES AND KENTUCKY CONSTITUTIONS, AND IS SUBJECT TO THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS.

Democracy in the Commonwealth and in the United States is not unlimited. Article VI, Section Two of the United States Constitution states

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the contrary notwithstanding

Similarly, Section Two of the Kentucky Constitution states that "[a]bsolute and arbitrary power" does not exist in the Commonwealth, "not even in the largest majority." A provision of the Kentucky Constitution always takes precedence over a statute. *Fox v. Grayson*, 317 S.W.3d 1 (Ky. 2010); *Commonwealth v. Kash*, 967 S.W.2d 37 (Ky.App. 1997) The power of Kentucky's legislature to make laws also is limited by the federal constitution. *See, e.g., Boyd v. Commonwealth,* 550 S.W.2d 507, 508 (Ky. 1977) (Kentucky's mandatory death penalty scheme was unconstitutional by virtue of United States Supreme Court decisions).

Courts are the guardians of the Constitution, and it is the role of courts to interpret whether laws are in conformity with the Constitution. "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). The Kentucky Supreme Court has echoed this responsibility of the judiciary: "(t)he final authority to say what the law is must reside somewhere in any

governmental structure. In our systems, state and federal, it resides in the judicial department." *Ex parte Farley*, 570 S.W.2d 617, 622 (Ky. 1978). The judiciary plays an important role in checking the power exercised by the legislature. *See Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky. 1989) ("The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated…This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public"). Kentucky courts have long acknowledged the supremacy of the United States Supreme Court on the question of cruel and unusual punishment under the federal constitution and have struck down state death penalty schemes based upon binding federal precedent. *See, e.g., Boyd, supra; Self v. Commonwealth,* 550 S.W.2d 509, 509 (Ky. 1977). In addition to the result, the reasoning of a particular United States Supreme Court case is binding upon lower courts. "As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Cty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 109 S.Ct. 3086, 106 L.Ed.2d 462 (1989) (Kennedy, J., concurring and dissenting); *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound") (citations omitted). Under the holding and reasoning of prior United States Supreme Court opinions, this trial court must declare that the punishment of death for individuals who committed their offenses when they were under the age of 21 years violate the United States Constitution's prohibition against cruel and unusual punishments.

III. THE DEATH PENALTY MUST BE EXCLUDED PUNISHMENT FOR TRAVIS BREDHOLD BECAUSE EXECUTION OF AN OFFENDER WHO WAS UNDER THE AGE OF 21 YEARS AT THE TIME OF THE OFFENSE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

A. Summary of Argument

"When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Kennedy v. Louisiana,* 554 U.S. 407, 420, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). "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 v. Simmons,* 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (citations omitted) (emphasis added). The death penalty is categorically barred for certain groups of offenders if a national consensus develops against executing the particular group and if capital punishment fails to serve the purposes of punishment, namely retribution or deterrence. *See, e.g., Roper,* 543 U.S. at 560 (death penalty categorically barred for offenders under 18 years); *Atkins v. Virginia,* 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (death penalty categorically barred for intellectually disabled offenders); *Kennedy*, 128 S.Ct. at 2650-51 (death penalty categorically barred for offenses not involving homicide); *see also, Gregg v. Georgia,* 428 U.S. 153 (1976) (the death penalty is said to serve two purposes, retribution and deterrence).

A national consensus has developed against executing offenders who were under 21 years of age at the time they committed their offense(s). A glance at the laws and practices of the various states demonstrate this consensus. Nineteen (19) states plus the District of Columbia and five United States territories effectively ban the death penalty. Four (4) additional States have imposed moratoria on executions, and during the last 15 years, seven (7) states have demonstrated an actual practice of neither executing nor sentencing to death

offenders who were under 21 years of age at the time they committed a capital offense.[2] Added together, there are 30 states plus six additional jurisdictions that bar execution of offenders under 21 years by law or in practice.

In addition, the scientific community has confirmed that individuals who are 18 years old do not have fully developed brains and continue to be vulnerable to peer pressure and risk-taking behavior just like their peers who are younger than 18 years old. Neuroscientific research has shown that the human brain does not fully mature until a person reaches her mid-20s. Young adults do grow out of impulsive or reckless behaviors; they become more reflective, more risk-adverse, more mature, and less vulnerable to peer pressure. That young adults ages 18, 19, and 20 are *categorically* not as responsible and mature as those over 21 years is further confirmed by state and federal laws that impose minimum age requirements (e.g., consumption of alcohol, obtaining a concealed carry handgun permit), or that extend protections afforded to those under 18 years (*e.g.*, extending educational opportunities and/or foster care benefits to children up to age 21 years). Because young adults (ages 18, 19, or 20) as a class are not fully mature, they should not be considered among the worst of the worst offenders for purposes of the death penalty. For the reasons explained below, "the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity" without violating constitutional principles. *Roper,* 543 U.S. at 571-72. Because Travis Bredhold was barely over the age of 18 and well under the age of 21 at the time of the offenses charged in this indictment, he should not be subjected to the death penalty.

B. Overview of the United States Supreme Court's Eighth Amendment Jurisprudence

[2] If death sentences have been imposed, they have not withstood the appellate process.

The United States and Kentucky Constitutions prohibit the infliction of cruel and unusual punishment. U.S. Const. Amend. 8, 14; Ken. Const. Part 1, § 17; *see also, Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam). This right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to (the) offense." *Atkins v. Virginia, supra,* 536 U.S. at 311 (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Id.* at 560. Indeed, "barbaric punishments" are unconstitutional under all circumstances, as are punishments that are without penological justification. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). "The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." *Roper,* 543 U.S. at 560. To implement this framework, courts must consider "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.[3] *Trop v. Dulles,* 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion); *Roper,* 543 U.S. at 561. "The

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[3] In his concurring opinion in *Roper v. Simmons,* Justice Stevens noted:

> Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. **If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today.** The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day--Alexander Hamilton, for example--were sitting with us today, I would expect them to join Justice Kennedy's opinion for the Court. In all events, I do so without hesitation.

543 U.S. at 587 (emphasis added) (citations omitted).

Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' " *Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986, 1992, 188 L.Ed.2d 1007 (2014) (quoting *Weems v. United States, supra*). That is, "evolving standards of decency" necessarily evolve, and what may have been acceptable to the courts and society at large historically may not prove acceptable later in time. For example, compare *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), holding constitutional the execution of intellectually disabled people, with *Atkins v. Virginia, supra,* prohibiting the execution of intellectually disabled people. Another example of the evolution of the law is the progress from *Stanford v. Kentucky* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), holding constitutional the execution of offenders under 18 years, to *Roper v. Simmons, supra*, prohibiting the execution of offenders under 18 years.

The Supreme Court's determination that certain groups of people must be categorically barred from capital punishment is based in part on the unacceptable risk that jurors would not give adequate weight to the offenders' diminished culpability in the face of the brutality of their crimes. For example, discussing the need for a categorical bar on executing juvenile offenders, the Court noted that

> (t)he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime could overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective maturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.

Roper, 543 U.S. at 572-73.[4] "These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders." *Id.* at 568-69 (emphasis added).

[4] Indeed, in *Roper*, the prosecutor used Christopher Simmons's youth as an aggravating factor. 543 U.S. at 573.

The United States Supreme Court has set forth a two-part inquiry for considering such categorical exclusions of the death penalty based upon the characteristics of a defendant: first, the courts must examine national consensus. *Id.* at 563. Second, the courts must examine whether the death penalty serves the purposes of punishment for the particular group. *Id.* at 564. In addition, the courts consider other indicia of national and international opinion. *Id.*

C. Analysis of this Issue Requires Courts to Determine National Consensus by Looking at Legislation, Actual Sentencing Practices, Execution Statistics, and Other Objective Indicia.

1. *Atkins*, *Roper* and Progeny

In determining the existence of national consensus on an issue, the United States Supreme Court has examined laws enacted by the various state legislatures and the decisions of sentencing juries, appellate courts, and governors about whether to execute defendants who belong to a particular category of individuals, such as people who are under 18 years of age. *See Roper,* 543 U.S. at 563-65; *see also Atkins,* 536 U.S. at 313-17. "There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment … is regarded as unacceptable in our society." *Kennedy, supra,* 554 U.S. at 433 (precluding the death penalty for individuals convicted of child rape).

For example, in *Atkins v. Virginia,* the Supreme Court examined national consensus regarding executions of intellectually disabled people. The Court found that objective indicia of society's standards included legislative enactments and state practices with respect to executions of intellectually disabled people. At the time the case was decided in 2002, 30 states prohibited the execution of intellectually disabled people, including 12 states that prohibited executions entirely. *Atkins*, 536 U.S. at 313-315. Even in those states that permitted the execution of intellectually disabled people, such killings were rare. *Id. at* 314-315. Based on these indicia, the Court determined that executing intellectually disabled people "has

become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.* at 316.

Likewise, in *Roper v. Simmons,* the United States Supreme Court examined national consensus with respect to the execution of juvenile offenders.[5] According to the Court, "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." *Roper*, 543 U.S. at 564. The Court also considered the practice of executing juvenile offenders:

> [E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford,* six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia... As in *Atkins*, the 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, in the words *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'

Id. at 564-567; *see also, Hall,* 134 S.Ct. at 1997 ("Consistency of the direction of change is also relevant").

The United States Supreme Court also conducted an analysis of national consensus in *Hall v. Florida.* The Court examined state approaches for determining who might qualify as intellectually disabled and thus would be disqualified from imposition of the death penalty. 134 S.Ct. at 1986 (2014). Florida had implemented a strict intelligence quotient test score cutoff of 70 as part of the definition of intellectual disability for purposes of the death penalty.

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[5] Simmons was 17 years old at the time of his offense. The U.S. Supreme Court was not called upon to decide whether it was *per se* constitutional to execute those 18 and older, and thus *Roper* cannot be interpreted as creating such a rule. The Missouri Supreme Court held that it was unconstitutional to execute those under 18 years, and ***that*** was the issue the High Court resolved. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (reaffirming longstanding rule that if a decision does not "squarely addres[s][(an] issue," a court remains "free to address the issue on the merits" in a subsequent case); *Webster v. Fall,* 266 U.S. 507, 512 (1925) (stating that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedent").

Id. at 1990. The Court considered that "(a) significant majority of States implement the protections of *Atkins* by taking the SEM (standard of error measurement) into account, thus acknowledging the error inherent in using a test score without necessary adjustment." *Id.* at 1996. Only Kentucky and Virginia adopted a fixed score cutoff identical to Florida's.[6] *Id.* Alabama also may have used a strict IQ score cutoff at 70, although not as a result of legislative action. *Id.* "In addition to these States, Arizona, Delaware, Kansas, North Carolina, and Washington have statutes which could be interpreted to provide a bright-line cutoff leading to the same result that Florida mandates in its cases." *Id.* However, the Court observed:

> Kansas has not had an execution in almost five decades, and so its laws and jurisprudence on this issue are unlikely to receive attention on this specific question. Delaware has executed three individuals in the past decade, while Washington has executed one person, and has recently suspended its death penalty. None of the four individuals executed recently in those States appears to have brought a claim similar to that advanced here.

Hall, 134 S. Ct. at 1997 (citations omitted). The *Hall* Court concluded that at most, nine states mandate a strict IQ score cutoff at 70 either by statute or judicial decision. But even where there was a legislative pronouncement on the issue, the Supreme Court considered that "[o]f these, four States (Delaware, Kansas, North Carolina, and Washington) appear not to have considered the issue in their courts." *Id.* at 1997. In contrast to those nine states,

> [o]n the other side of the ledger stand the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years. See *Roper*, 543 U.S. at 574. ("[The] Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty.") In those States, of course, a person in Hall's position could not be executed even without a finding of intellectual disability. Thus in 41 States an individual in Hall's position—an individual with an IQ score of 71—would not be deemed automatically eligible for the death penalty.

[6] The Court did not consider the rule in States which used a bright-line cutoff at 75 or greater.

Hall, 134 S. Ct. at 1997 (emphasis added). The Supreme Court conducted this analysis in *Hall* and eventually held that Florida's statute that defined intellectual disability with a strict cutoff score of 70 on an IQ test was unconstitutional.

2. National Consensus Reflects that Individuals Under Twenty-One Years Should Not Be Executed.

a. An Offender Under 21 Years Would Not Be Executed for Any Offense in Twenty-Three (23) States, the District of Columbia, and the Five U.S. Territories.

Currently, 19 States[7] and the District of Columbia have abolished the death penalty as to all crimes. Exhibit B at 1. Although New Mexico, Connecticut, and Maryland did not initially make their abolition retroactive to their then-existing death row population, Maryland has since commuted the death sentences of all its death row inmates, (Exhibit L at 1), and neither New Mexico nor Connecticut have actually executed any of their death row inmates since their respective abolition statutes were enacted.[8] (Exhibit L at 4, 5).

Nor is a death sentence likely to be imposed under the laws of any of the five United States Territories. The death penalty is prohibited under the constitutions of Puerto Rico and the Commonwealth for the Northern Mariana Islands. *See* P.R. Const. Art. II § 7 ("The death penalty shall not exist."); C.N.M.I. Const. Art. I § 4(i) ("Capital punishment is prohibited."). In Guam and the U.S. Virgin Islands, the death penalty is not a possible sentence. *See, e.g.*, 9 G.C.A. § 16.39(b) (punishment for aggravated murder is life); 14 V.I. C. § 923(a) (providing for life in prison as punishment for murder). Although the death penalty is a possible

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[7] The States that have abolished the death penalty (along with the dates of abolition) include Alaska (1957), Connecticut (2012), Hawaii (1957), Illinois (2011), Iowa (1965), Maine (1887), Maryland (2013), Massachusetts (1984), Michigan (1846), Minnesota (1911), New Jersey (2007), New Mexico (2009), New York (2007), North Dakota (1973), Rhode Island (1984), Vermont (1964), West Virginia (1965), and Wisconsin (1853). (Exhibit H at 1, 3; Exhibit B at 1).

[8] One person has been executed in New Mexico since 1976; he was not under 21 years at the time of his offense. (Exhibit L at 5; Exhibit F at 48). There are two people currently on New Mexico's death row, but neither was under 21 years at the time of their offenses. There has been one execution in Connecticut since 1976; he was a volunteer and was not under the age of 21 years at the time of his offense. (Exhibit L at 3; Exhibit F at 33). There are 12 men on Connecticut's death row; three were under the age of 21 years at the time of their offenses.

punishment in American Samoa, the last execution there was in 1939, and no death sentence has been imposed since the 1930s. (Exhibit J at 1-2).

Furthermore, the governors of four states have imposed moratoria on executions: Pennsylvania (which has a sizeable death row population), Oregon, Washington, and Colorado. (See Exhibit K [articles reflecting moratoria]). In *Hall v. Florida,* the Supreme Court characterized the moratoria states as being on the defendant's "side of the ledger" in the national consensus equation. 134 S. Ct. at 1997. For example, Oregon "executed only two people in the last 40 years." *Id.* Oregon's governor extended the State's moratorium in 2015. (Exhibit K at 5). Colorado has not executed anyone in at least the last 15 years. (Exhibit F). Indeed, in granting a reprieve to an offender who killed four people, the governor of Colorado noted in 2013 that some defendants receive life in prison for the same conduct that some defendants receive a death sentence for: "The fact that those defendants were sentenced to life in prison instead of death underscores the arbitrary nature of the death penalty in this State, and demonstrates that it has not been fairly or equitably imposed." (Exhibit K at 8). For its part, Washington has executed two people within the last fifteen years, but neither was under the age of 21 years at the time of their offenses. (Exhibit F at 16, 49; Exhibit K at 4 (moratorium imposed in 2014)). Pennsylvania has not executed anyone in the last 15 years. (Exhibit K at 1 (announcing moratorium in February of 2015)).

Put simply, in 23 States, the District of Columbia, and the five United States Territories, no one under 21 years old at the time of his offense(s) would be executed for his offense(s).

b. Among States that *Theoretically* Authorize the Death Penalty for Offenders Under 21 Years, Seven (7) Reveal a De Facto Prohibition On the Execution of Offenders Under 21 Years: There Have Been No Executions of Such Offenders in the Last 15 Years, and Offenders Under 21 Years Have Not Been Sent to Death Row – Or Remained There – in the Last 20 Years.

Seven States either have not executed any offender under the age of 21 years in the last fifteen years. If those seven states have offenders under 21 years on their death rows, they have not imposed any new death sentences on offenders in that age group in the last 20 years. In *Graham v. Florida,* the U.S. Supreme Court noted that

> under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5–year–old, theoretically, could receive such a sentence under the letter of the law. All would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. Similarly, the many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And "it is fair to say that a national consensus has developed against it."

560 U.S. at 67 (citations omitted). The Court's opinion makes clear that actual practice—even among States that appear to authorize a particular punishment—must be considered in determining national consensus. Thus, the following seven (7) states should be counted on Travis Bredhold's "side of the ledger" for purposes of the national consensus analysis because their execution and sentencing practices reflect a *de facto* prohibition on executions of people who committed capital offenses when they were under 21 years of age. This means that 30 States, plus the District of Columbia and the five U.S. Territories, have banned outright or in practice the imposition of death sentences for offenders who commit capital offenses when they are under the age of 21 years.

(1) Kansas and New Hampshire: No Executions Since 1977, and No One Under 21 Years Currently Under Sentence of Death.

Both Kansas and New Hampshire authorize the imposition of the death penalty. However, neither State has executed anyone since 1977. (Exhibit D at 17 – Table 14). New Hampshire has sent one person to death row since 1977, but he was not under 21 years at the

time of his offense. Kansas has 10 people on its death row and it sent one person (Jonathan Carr) who was under 21 years at the time of his offense to death row in 2002. Thus, these States reflect an actual practice of not executing any offenders under the age of 21 years at the time of their offenses.

(2) Montana and Wyoming: No Executions of Offenders Under 21 Years, and No One Under 21 Years On Death Row.

Montana and Wyoming have not executed anyone who was under 21 years at the time of their offenses, (Exhibit C), and they currently have no offender who was under 21 years at the time of his offense on their death rows. Montana has executed three people since 1976, but none of those executed were under 21 years at the time they committed their offenses. (Exhibit M at 8,9,10; Exhibit F at 28). Montana currently has two people under sentence of death, but neither was under 21 years at the time of his offense. Wyoming has executed one person since 1976, but he was also not under 21 years at the time of his offense. (Exhibit M at 1, 2). Wyoming currently does not have anyone under sentence of death.[9] These States reflect a practice of neither executing nor sentencing to death offenders who were under 21 years old at the time they committed their offenses.

(3) Utah: No Executions of Offenders Under 21 Years Within the Last 15 Years, and No One Under 21 Years Currently On Death Row

Utah has not executed anyone who was under 21 years at the time of their offenses within the last 15 years. (Exhibit C; Exhibit F at 16). Utah has nine (9) offenders on its death row.[10] None was under the age of 21 years at the time of his offense. The past fifteen years

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[9] Dale Eaton was under sentence of death, but his death sentence was vacated in November of 2014. *See Eaton v. Wilson*, Docket No. 09-CV-261, Judgment (D.Wy. 11/20/2014) (unpublished). Eaton was about 43 years old at the time of the offense.

[10] Indeed, in Utah, one offender on death row (Michael Archuletta) and his 20-year-old co-defendant (Lance Wood) tortured and killed a young college student. (Exhibit O at 1). Both offenders were tried, and the State sought death sentences in both cases. *See id.* Only Lance Wood received a life sentence. *See id.* According to a newspaper article, both the prosecuting attorney and the defense attorney agreed that "an important reason for the

demonstrate this State's actual practice of neither executing nor sentencing to death offenders under age 21 years.

(4) Idaho and Kentucky: No Executions of Offenders Under 21 Years in the Last 15 Years, and No New Death Sentences of Those Under 21 Years In Nearly 20 Years.

Idaho and Kentucky have not executed anyone under 21 years in the last 15 years, and even though they have offenders who were under 21 years at the time of their offenses on their death rows, no new death sentence has been imposed on such youthful offenders in more than 20 years. Idaho has executed two offenders in the last 15 years; neither was under the age of 21 years at the time of his offense. (Exhibit C; Exhibit F at 11, 12). Currently, Idaho has nine (9) people on its death row. Although one offender was under 21 years at the time of his offense, his death sentence was imposed in 1996, nearly 20 years ago, and no offender under the age of 21 years has been sent to death row since then.

Similarly, Kentucky has executed one person in the last 15 years, and he was not under 21 years at the time of his offense. (Exhibit C; Exhibit F at 22). Currently, Kentucky has 33 people on its death row. Although two people were under 21 at the time of their offenses, those death sentences were handed down in 1980 and 1992, respectively. That is, no offender under the age of 21 years has been sent to these States' death rows in more than 20 years. These States reflect an actual practice of neither executing nor sentencing to death offenders who were under 21 years of age at the time they committed their offenses.

c. Of the Remaining States that Authorize Executions of Those Under 21 Years at the Time of their Offenses, Executions Are Carried Out In a Minority of States.

Even in those remaining States with the death penalty as an authorized punishment for offenders under 21 years, executions occur in a minority of the States. In the last ten years,

jury's decision and the difference between Archuletta's sentence and Wood's is the defendant's youth. Wood was 20 when Church was murdered. Archuletta was 26." (Exhibit O at 1).

for example, only 12 States have actually executed offenders who were under the age of 21 years at the time of their offenses: Texas, Virginia, Oklahoma, Florida, Delaware, Mississippi, Alabama, Ohio, Georgia, South Carolina, Indiana, and South Dakota. (Exhibit C; *accord* Exhibit F). Since 2011, that number has dropped to nine States. (Exhibit C; *accord* Exhibit F). Indeed, of the 29 States that have had executions since 2000, 14 States did not execute anyone under 21 years, and four of those States have since repealed the death penalty or imposed a moratorium on executions. (Exhibit C).

Texas. In the last 15 years, Texas has executed more offenders who were under the age of 21 years at the time of the offense than all of the other 14 States combined during that same time period. From 2000 till February 2016, Texas executed 80 offenders ages 18, 19, or 20 at the time of their offenses, while the other 14 States executed a combined total of 58 such offenders during the same period of time. (Exhibit C; *accord* Exhibit F). Texas has 249 people on its death row, and 48 were under the age of 21 years at the time of their offenses.

Virginia. Virginia has killed 38 people since 2000; 12 were under 21 years. (Exhibit C). Virginia has executed offenders under 21 as recently as 2011. (Exhibit C; Exhibit F at 13). However, of those executed, the last death sentence was imposed in 2003, (Exhibit F at 13), and none of Virginia's current seven (7) death row inmates were under 21 years at the time of their offense(s). That is, despite being identified by the United States Supreme Court as one of the few States which executed juvenile offenders, Virginia has not sent a person under the age of 21 years to death row in more than 10 years.

Oklahoma. Of 93 total executions in Oklahoma since 2000, 11 offenders were under the age of 21 years at the time of their offenses. (Exhibit C; Exhibit F). The State currently has 49 people on its death row, and six (6) were under the age of 21 years at the time of their offenses. However, the last death sentence imposed on someone under 21 years was in 2008.

Florida. Since 2000, Florida has executed 48 people, three of whom were under 21 years at the time of their offenses. (Exhibit C; Exhibit F). Florida has 389 people on its death row, and 52 were under 21 years at the time of their offenses. The validity of many of those death sentences is in question after the United States Supreme Court struck down Florida's death-sentencing scheme because it allowed a sentence of death to be imposed based upon a non-unanimous jury decision. *Hurst v. Florida*, ___ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

Delaware. The Delaware Supreme Court in 2016 declared the state's death penalty scheme unconstitutional. *Rauf v. State*, 145 A.3d 430 (Del. 2016) Delaware has executed six people in the last 15 years. (Exhibit F). One executed person was an offender under 21 years at the time of his offense, but his death sentence was imposed in 1995. (Exhibit C; Exhibit F at 13). Delaware currently has six (6) people on its death row, a significant reduction in population due in great part to the *Rauf* decision.

Mississippi. Mississippi has killed 17 people in the last 15 years. (Exhibit F). Two of the executed offenders were under 21 years at the time of their offenses, (Exhibit C), and their death sentences were imposed in 1994 and 1997, respectively. (Exhibit F at 11, 27-28). The State has 48 people on its death row, and 12 were under 21 years at the time of their offenses although one has since had his death sentence vacated. The last death sentence imposed on a person under 21 years was almost ten years ago, in 2006.

Alabama. Since 2000, Alabama has killed 38 people; seven (7) were under 21 years at the time of their offenses. (Exhibit C; Exhibit F). Of the 184 people on Alabama's death row, 34 were under 21 years at the time of their offenses, the most recent being in 2013. But Alabama, like Florida and Delaware, does not require unanimous jury recommendations of death. Alabama also permits a judge to override even ***unanimous*** jury recommendations in favor of life. *See Woodward v. Alabama*, 134 S. Ct. 405, 408 n.7 (2013) (Sotomayor, J.,

dissenting from denial of cert.) (noting that jury recommended life by a vote of 8 to 4, and that Alabama judges have overridden even unanimous jury recommendations citing the case of *State v. Waldrop* where the jury unanimously recommended life for the 19-year-old offender and the judge nonetheless sentenced him to death).[11] However, the Alabama legislature has passed a bill that would end judge override of a jury's death penalty decision.

Ohio. Of the 53 people killed by Ohio since 2000, nine (9) were under the age of 21 years. (Exhibit C; Exhibit F). Ohio has 139 people on its death row, and 26 were under the age of 21 years at the time of their offenses. Significantly, in the last 15 years, only four death sentences were imposed on offenders under 21 years. *See id.*

Georgia. Georgia has killed 39 people in the last 15 years; seven (7) of them were under 21 years at the time of their offenses. (Exhibit C; Exhibit F). Georgia currently has 68 people on its death row; eighteen (18) offenders were under 21 years at the time of their offenses. The majority of those offenders were sent to death row before 2000; only three offenders were under 21 years, the most recent being in 2007.

South Carolina. Since 2000, South Carolina has executed 19 people, two of whom were under 21 years at the time of their offenses. (Exhibit C; Exhibit F). South Carolina has 42 people on its death row, and seven were under 21 years at the time of their offenses.

Indiana. Indiana has had thirteen (13) executions in the last 15 years. (Exhibit F). Three (3) of those executed were under 21 years at the time of their offenses, the most recent being in 2007. (Exhibit C; Exhibit F at 25). The death sentences of those youthful offenders were imposed in 1985, 1986, and 1992, respectively. (Exhibit F at 25,33). Of the thirteen (13) people currently on Indiana's death row, only one was under 21 years at the time of his offense, and his death sentence was imposed more than ten years ago in 2002.

[11] Waldrop's judge indicated at sentencing that he imposed the death sentence in part based upon Waldrop's race: Waldrop was white, and the judge had already sentenced three black men to death. *Woodward v. Alabama*, 134 S. Ct. 405 (Sotomayor, J., dissenting from denial of cert).

South Dakota. South Dakota has executed three people within the last 15 years, one of whom (a volunteer) was under 21 years at the time of his offense. (Exhibit C; Exhibit F at 25; *see also* Exhibit Q [article regarding execution of offender under 21 years]). Of the three people currently on South Dakota's death row, one was under 21 years at the time of his offense; he was a co-accused of the youthful offender executed by South Dakota.

Of the remaining states, death sentences are infrequently imposed on offenders under 21 years of age, and actual executions of such offenders are even rarer.

Arizona. Arizona has killed 18 people since 2000; none were under the age of 21 years at the time of their offenses. (Exhibit C; Exhibit F). Arizona has 119 people on its death row; 16 were under 21 years at the time of their offenses. Of the 70 death sentences that have been imposed since 2000, seven inmates were under the age of 21 years. *See id.* A death sentence was last imposed on a person under 21 years in 2010.

Arkansas. Arkansas has executed 10 people since 2000, one of whom was under 21 years at the time of his offense. (Exhibit C; Exhibit F). That execution was in 2004 for a death sentence imposed in 1979 on an individual who was 20 years old at the time of the commission of the capital offense. (Exhibit F at 38). Only two death sentences have been imposed on offenders under 21 years in the last fifteen years, the most recent being ten years ago, in 2005.

Louisiana. Louisiana has executed three people since 2000; none were under 21 years at the time of their offenses. (Exhibit C; Exhibit F). Louisiana has 80 people on death row; 14 were under 21 years at the time of their offenses. Of the 18 people sent to death row by Louisiana juries in the last ten years, however, only one was under 21 years.

Missouri. Missouri has executed 45 people since 2000. Two of the executed offenders were under the age of 21 years at the time of their offenses; the latest execution (of an offender under 21 years) was more than ten years ago in 2002. (Exhibit C; Exhibit F). Their death

sentences were imposed in 1994 and 1995, respectively. (Exhibit F at 46, 49). Twenty-nine (29) people are on Missouri's death row, and six were under the age of 21 years at the time of their offenses. The last death sentence imposed on a person under 21 years at the time of his offense was in 2010, a retrial after a death sentence had been vacated on direct appeal.

Nevada. Nevada has executed four people since 2000, but none were under the age of 21 years. (Exhibit C; Exhibit F). Nevada has 80 people on its death row, and 11 were under the age of 21 years at the time of their offenses. But of that total, death sentences were imposed upon only three offenders under 21 years since 2000. (*Id.*)

North Carolina. Since 2000, North Carolina has executed 28 people; four were under the age of 21 years. (Exhibit C; Exhibit F). North Carolina's last execution was in 2006, and its last execution of a person under 21 years at the time of his offense was in 2005. (Exhibit F at 31). Currently, North Carolina has 152 people on its death row; 24 were under 21 years at the time of their offenses. The latest death sentence was imposed upon an offender under 21 years in 2010.

Tennessee. Since 2000, Tennessee has executed 6 people; none were under the age of 21 at the time of their offenses. (Exhibit C; Exhibit F). Currently, the State has 67 people on its death row. Seven (7) offenders were under the age of 21 years at the time of their offenses. *See id.* However, it appears that four (4) of those death sentences – including the 2000 death sentence of Gdongalay Berry -- have since been vacated by state or federal courts and are pending retrial. *See id.* Not including the 2000 death sentence that appears to have been vacated, the last time Tennessee sent an offender under 21 years to death row was in 1996, approximately 20 years ago.[12]

[12] Christa Pike was sent to Tennessee's death row in 1996. Her attorneys filed a state post-conviction petition seeking a categorical exemption from the death penalty for offenders under 21 years. *Pike v. State*, Slip Op. No. No. E2009-00016-CCA-R3-PD (Tenn. Crim. App. 2011), 2011 Tenn. Crim.App. LEXIS 285, *175-*187. The court rejected the argument; however, it is apparent from the opinion that the court was not presented with

Federal Government. The federal Government has executed three people since the federal death penalty was reinstated; two people were executed in 2001 and one was executed in 2003. (Exhibit C; Exhibit F). None were under the age of 21 years at the time of their offenses. (Exhibit F at 37, 45). Currently, there are 63 people who are listed on the federal death row, and 15 were under 21 years at the time of their offenses.[13] The most recent death sentence was imposed in 2017 on Dylann Roof, who was 20 years old at the time of the commission of his offenses. Of the 15 federal offenders who were under the age of 21 years at the time of their offenses, most of them (10) were people of color.

California. California has executed 13 people since the death penalty was reinstated in 1977. (Exhibit R at 1). (The California Department of Corrections also includes Kelvin Malone; however, Mr. Malone was not executed by the State of California, but rather by the State of Missouri, so the defense has not considered him in the analysis of California.) None of the people actually executed by California were under the age of 21 years at the time of their offenses. (Exhibit R at 2-21). California's last execution occurred in 2006. (Exhibit R at 1). As of February, 2016, there are 746 inmates on California's death row. Of those, 97 were under 21 years at the time of offense.[14]

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evidence regarding national practice with respect to offenders sent to death row, much less actual executions of offenders under 21 years. *See id.* The court's examination of the issue was necessarily incomplete.

[13] One person who was under 21 years at the time of his offense, Donald Fell, has had his death sentence vacated, and is currently pending a new penalty phase.

[14] In 2010, the California Supreme Court rejected on capital defendant's argument that his death sentence was unconstitutional even though he was 18 years old at the time of his offense. *People v. Gamache*, 48 Cal. 4th 347, 405 (2010). The Court stated

> (w)hen the United States Supreme Court recently considered this issue, it identified an emergent consensus that execution of individuals for crimes committed when younger than 18 years of age was cruel and unusual. *Roper v. Simmons, supra*, 543 U.S. at pp. 564-567. It identified no comparable consensus for crimes committed by those age 18 or older. *See id.* at 579-581 (documenting that no state with a death penalty had a minimum age higher than 18). Accordingly, we cannot say evolving standards of decency require abolition of the death penalty for crimes committed by 18 year olds.

Id. (footnote omitted). It appears that Gamache relied primarily upon *Roper v. Simmons* as a basis for his claim; it appears that, unlike Travis Bredhold's case, Gamache did not present anything regarding the actual practice of States in executing (or not) 18 year olds, much less regarding whether judges and juries in the States were actually sending such offenders to death row. Now, unlike in Gamache, there is evidence of an identifiable emergent

3. Second, Courts Must Examine Whether the Death Penalty Has a Legitimate Penological Purpose.

After examining national consensus, the courts must examine whether the death penalty serves the purposes of punishment for the particular group. *Roper,* 543 U.S. at 564. "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.' " *Id.* at 568 (citations omitted). A review of the recent sociological and neuroscientific research and consideration of the state and federal laws that impose restrictions on people under 21 years of age require the courts to conclude that youthful offenders under age 21 have the same vulnerabilities as juvenile offenders under age 18 such that they are not the "worst of the worst." Consequently, execution does not achieve the constitutionally accepted reasons for capital punishment—retribution and deterrence.

a. Scientific and Social-Science Research Demonstrates that that People Under 21 Years of Age Do Not Have Fully Developed Brains, Are Immature, and Are Vulnerable to Peer Pressure and Risk-Taking Behavior.

The *Roper* Court observed that there are "(t)hree general differences between juveniles under 18 and adults (that) demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Roper,* 543 U.S. at 569.

> First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra,* at 115, 71 L. Ed. 2d 1, 102 S. Ct. 869 ("[Y]outh is

consensus against execution of individuals under 21 years of age. In any event, the "evolving standards of decency" query necessarily evolves; so that what may have been true in 2010 does not hold true today.

> more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, (juveniles) lack the freedom that adults have to extricate themselves from a criminogenic setting.").
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. *See generally* E. Erikson, *Identity: Youth and Crisis* (1968).

Roper, 543 U.S. at 569-570. The *Roper* Court concluded that "(t)hese differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' ". *Roper,* 543 U.S. at 570 (*quoting Thompson v. Oklahoma, supra,* 487 U.S. at 835 (plurality opinion)). Additionally,

> [t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, [t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." ...*see also* Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.").

Roper, 543 U.S. at 570 (citations omitted); *see also, Graham,* 130 S.Ct. at 2026. The Supreme Court continued this line of thinking in *Miller v. Alabama,* ___ U.S. ___, 132 S.Ct. 2455, ___ L.Ed.2d ___ (2012), when it held that states may not impose mandatory life-without-parole sentences on juvenile offenders, even for murder:

> Our decisions rested not only on common sense—on what any parent knows—but on science and social science as well. In *Roper*, we cited studies showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. And in *Graham*, we 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. We 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.

132 S. Ct. at 2464-65 (citations omitted) (internal quotation marks omitted). [15] Life without parole was not categorically prohibited for juvenile offenders, but *mandatory* life without parole was unconstitutional as to children. *Id.* at 2468.

But the characteristics that distinguish juveniles from adults do not dissipate when a person turns 18 years old. Those same characteristics persist well into a person's twenties:

> Rates of risk-taking are high among 18- to 21-year-olds, for instance, some of whom may be classified as adolescents and some of whom may be classified as adults. Nevertheless, as a general rule, adolescents and young adults are more likely than adults over 25 to binge drink, smoke cigarettes, have casual sex partners, engage in violent or other criminal behavior, and have fatal or serious automobile accidents, the majority of which are caused by risky driving or driving under the influence of alcohol.

(Exhibit W [Steinberg article] at 1-2). Laurence Steinberg, whose researched was cited extensively in *Roper*, noted that

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[15] The U.S. Supreme Court made similar observations regarding the intellectually disabled in *Atkins* when it considered whether the purposes of punishment were served by execution such offenders:

> [C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318. The personal culpability of a person who is intellectually disabledis diminished even if the offender can distinguish right from wrong. *Id.*

> risk-taking increases between childhood and adolescence as a result of changes around the time of puberty in what I refer to as the brain's *socio-emotional system* that lead to increased reward-seeking, especially in the presence of peers. Risk-taking declines between adolescence and adulthood because of changes in what I refer to as the brain's *cognitive control system* – changes which improve individuals' capacity for self-regulation, which occur gradually and over the course of adolescence and young adulthood. The differing timetables of these changes – the increase in reward-seeking, which occurs early and is relatively abrupt, and the increase in self-regulatory competence, which occurs gradually and is not complete until the mid-20s, makes mid-adolescence a time of heightened vulnerability to risky and reckless behavior.

(Exhibit W at 5 (italics in original)). Another prominent scientist has added:

> The most recent studies indicate that the riskiest behaviors (among adolescents) arise from a mismatch between the maturation of networks in the limbic system, which drives emotions and becomes turbo-boosted in puberty, and the maturation of networks in the prefrontal cortex, which occurs later and promotes sound judgment and the control of impulses. Indeed, we now know that the prefrontal cortex continues to change prominently until well into a person's 20s. And yet puberty seems to be starting earlier, extending the "mismatch years."

(Exhibit X [Giedd] at 3).

Steinberg suggests one neurological process that may account for the decline in risky behavior that occurs between adolescence and adulthood

> concerns the development of self-regulatory capacities that occurs over the course of adolescence and during the 20s. Considerable evidence suggests that higher level cognition, including the uniquely human capacities for abstract reasoning and deliberative action, is supported by a recently evolved brain system including the lateral prefrontal and parietal association cortices and parts of the anterior cingulate cortex to which they are highly interconnected. **The maturation of this cognitive control system during adolescence is likely a primary contributor to the decline in risk-taking seen between adolescence and adulthood**. This account is consistent with a growing body of work on structural and functional changes in the prefrontal cortex, which plays a substantial role in self-regulation, and in the maturation of neural connections between the prefrontal cortex and the limbic system, which permits the better coordination of emotion and cognition. **These changes permit the individual to put the brakes on impulsive sensation-seeking behavior and to resist the influence of peers, which, together, should diminish risk-taking**.

(Exhibit W at 14 (emphases added)). Indeed, the full development of gray matter "peaks latest in the prefrontal cortex, crucial to executive functioning, a term that encompasses a broad array of abilities, including organization, decision making and planning, along with the

regulation of emotion." (Exhibit X at 4). "The prefrontal cortex functions are not absent in teenagers; they are just not as good as they are going to get. Because they do not fully mature until a person's 20s, teens may have trouble controlling impulses or judging risks and rewards." *Id.* at 5. This is because

> [a]n important feature of the prefrontal cortex is the ability to create hypothetical what-ifs by mental time travel – to consider past, present and possible future outcomes by running simulations in our mind instead of subjecting ourselves to potentially dangerous reality. As philosopher Karl Popper phrased it, instead of putting ourselves in harm's way, "our theories die in our stead." As we mature cognitively, our executive functioning also makes us more likely to choose larger, longer-term rewards over smaller, shorter-term ones.
>
> The prefrontal cortex is also a key component of circuitry involved in social cognition-our ability to navigate complex social relationships, discern friend from foe, find protection within groups and carry out the prime directive of adolescence: to attract a mate.

Id. at 5. Steinberg summarized that

> risk taking declines between adolescence and adulthood for two, and perhaps, three reasons. First, the maturation of the cognitive control system, as evidenced by structural and functional changes in the prefrontal cortex, strengthens individuals' abilities to engage in longer-term planning and inhibit impulsive behavior. Second, the maturation of connections across cortical areas and between cortical and subcortical regions facilitates the coordination of cognition and affect, which permits individuals to better modulate socially and emotionally aroused inclinations with deliberative reasoning and, conversely, to modulate excessively deliberative decision-making with social and emotional information. Finally, there may be developmental changes in patterns of neurotransmission after adolescence that change reward salience and reward-seeking, but this is a topic that requires further behavioral and neurobiological research before saying anything definitive.

(Exhibit W at 18).[16] Steinberg concludes that

[16] Studies have suggested that "the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths (mean age 20), but had no effect on the adults, a pattern that was identical among both males and females (not surprisingly, we did find a main effect for sex, with males taking more risks than females). The presence of peers also increased individuals' stated willingness to behave in an antisocial fashion significantly more among younger than older subjects, again, among both males and females." (Exhibit W at 12). Steinberg noted that there is an increase in oxytocin, the bonding hormone, in adolescence and posits that this increase "leads to an increase in the salience of peer relations, and that this increase in the salience of peers plays a role in encouraging risky behavior." (*Id.* at 11). Steinberg suggests the need for further research to study this correlation. (*Id.* at 13).

> (t)he research reviewed here suggests that heightened risk-taking during adolescence is likely to be normative, biologically driven, and, to some extent, inevitable. There is probably very little we can or ought to do to either attenuate or delay the shift in reward sensitivity that takes place at puberty, a developmental shift that likely has evolutionary origins.

Id. at 19. That is, "rather than attempting to change how adolescents view risky activities (such as by focusing on educational programs) a more profitable strategy might be to focus on limiting opportunities for immature judgment to have harmful consequences." *Id.* "Some things just take time to develop, and mature judgment is probably one of them." *Id.* at 19.

This emergent research on the adolescent brain has been used to advocate on behalf of people ages 18, 19, and 20 in non-criminal contexts. For example, after the enactment of The Fostering Connections to Success and Increasing Adoptions Act of 2008, Public Law No. 110-351, the National Conference of State Legislatures (NCLS) published a "toolkit" for extending foster care under this law, which includes a pamphlet on the "brain science" of older youth in foster care. (Exhibit Y [NCLS] at 1; *see also* Exhibit W at 6.) This pamphlet provides that "youth do not move directly from adolescence to full-fledged adulthood, but instead move toward full adulthood through an interim period often called emerging adulthood. This knowledge can inform child welfare practices… ." (Exhibit Y at 17 (internal citations omitted)).[17] "Emerging adulthood" is defined as "(a) developmental period during which a young person moves gradually from adolescence toward independence. This concept recognizes that a young person does not achieve independence at a pre-determined age." (Exhibit Y at 23). "As the understanding of the complex transition from adolescence to adulthood has deepened, there continues to be general consensus about these developmental tasks – coupled with an understanding that they now take longer to achieve. With all these

[17] The NCSL links to a publication by the Jim Casey Youth Opportunities Initiative entitled, "The Adolescent Brain: New Research and Its Implications for Young People Transitioning from Foster Care, downloaded from http://www.jimcaseyyouth.org/sites/default/files/documents /The%20Adolescent%20Brain_prepress_proof%5B1%5D.pdf.

complex tasks to master, researchers theorize that the consolidation of adult status likely occurs not at 18 or 21, but closer to age 30." (Exhibit Y at 28 (footnote omitted)).

Thus, as with juveniles, there are three broad differences between youthful offenders ages 18, 19, and 20 and adults age 21 years and over. First, youths ages 18, 19, and 20 are more prone to impulsive risk-taking behavior than individuals 21 and older, in part attributable to a "mismatch" between the limbic system and the development of the prefrontal cortex. *Compare with Roper,* 543 U.S. at 569. Second, this age group remains vulnerable to peer pressure. *Compare with Roper,* 543 U.S. at 569. Third, their character is still not fully formed: Once their brains are fully mature as biological "adults," risk-taking tends to decline; they are better able to withstand the pressures of peers; and they have the power to fully reflect upon the consequences of their actions. *Compare with Roper,* 543 U.S. at 569. In short, as with juveniles, the character of offenders ages 18, 19, and 20 is not fixed; they still have the capacity "to attain a mature understanding of (their) own humanity." *Roper,* 543 U.S. at 571-72. The considerations mentioned in *Roper v. Simmons* apply with equal force to offenders ages 18, 19, and 20.

b. That People Ages 18, 19, and 20 Are Categorically Less Mature and Less Responsible than Individuals 21 Years and Over Is Corroborated by State and Federal Laws that Set Minimum Age Requirements At 21 Years and Those Laws that Include 18, 19 and 20 Year Olds in the Protections Granted to "Children," "Minors," or Young People in General.

The United States Supreme Court considered state statutes imposing minimum age requirements to buttress its conclusion that the death penalty was a prohibited punishment for juvenile offenders: "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Roper,* 543 U.S. at 569. Likewise, in the context of offenders under 21 years, state and federal laws impose a minimum age of 21 years for

various activities and extend the age of "minority" to 21 years for other activities. For example, all 50 states, plus the District of Columbia, impose a minimum age restriction of 21 years for the consumption, purchase or possession of alcohol or recreational marijuana. (Appendix D). But most States also impose minimum ages related to handguns: 41 States – including Kentucky – impose a minimum age of 21 years to obtain concealed carry permits, (Appendix C), and federal law outright prohibits licensed gun dealers from *selling* handguns and handgun ammunition to people under 21 years of age. *See* 18 U.S.C. § 922(b)(1), (c)(1); 27 C.F.R. § 478.99(b).

In addition, federal immigration law permits a parent who is a United States citizen to petition for an immigrant visa for any "unmarried children under the age of 21." 8 U.S.C. § 1151(b)(2)(A)(i). A child can likewise petition for an immigrant visa for his parents, but only if he is at least 21 years of age. *Matter of Hassan*, 16 I&N Dec. 16 (1976). This age restriction is categorical, and applies regardless of the "child's" ability and maturity to support his immigrating parents. Although a United States citizen can be any age to petition for immigration benefits for "alien" children,[18] prospective adoptive parents must be married, or at least 25 years of age if unmarried, to obtain immigration benefits under the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoptions. (Exhibit U at 1). Indeed, some states impose heightened age requirements on prospective adoptive parents. S*ee, e.g.*, Colo. Rev. Stat. §§ 19-5-202, 14-1-101 (21 years); Del. Code Tit. 13 §§ 903, 951 (21 years); Ga. Code § 19-8-3 (25 years or married); Okla. Stat. Tit. 10 § 7503-1.1 (21 years), and some states allow for the adoption of children up to the age of 21 years.[19] *See, e.g.*, Colo. Rev. Stat. § 19-5-201, 14-1-101.

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[18] However, a person must be at least 18 years old to sign an "Affidavit of Support" which is a requirement to obtain an immigrant visa.

[19] Most States allow for the adoption of any person regardless of age. (*See, e.g.*, Alaska Stat. § 25.23.010; Ark. Code § 9-9-203).

That youth under 21 years old should not be treated the same as those 21 years and older finds support in the various laws that protect those under 21 years the same way that children under age 18 are protected. For example, the Credit Card Act of 2009 bans credit cards for people under the age of 21 unless they have a co-signer aged 21 years or older, or show proof that they have the means to repay the debt. *See, e.g.*, 15 U.S.C. § 1637(c)(8); 15 U.S.C. § 1637(p). Consistent with this rule, 42 States and the District of Columbia impose a minimum age of 21 years to transfer gifts. (Appendix E). That is, by law in the majority of States, people under 21 years cannot dispose of, or use, their property outright; transfers of "gifts" to "minors" must be subject to approval by a custodian until the "minor" reaches the required age: most often, 21 years. (Appendix E). Also, 31 states provide free public education up to age 21 years; two states have higher age maximums; and 10 states provide free education up to age twenty. (*See* Appendix F).

Further, 40 States and the District of Columbia impose a minimum age of 21 years to become a foster parent (Appendix G), and several states extend foster-care benefits to children ages 18, 19 or 20 years. *See, e.g.*, Cal. Fostering Connections to Success Act, Assembly Bill ("AB") 12 (2010) (extending foster care benefits up to age 21 years); Ind. Collaborative Care Program (extending foster care benefits till 20 years and extend voluntary services until 21 years);[20] Minn. Stat. § 260C.451, subdivision 1 (extending foster care benefits to 21 years); Va. Code §63.2-905.1 (extending independent living services to former foster kids). Kentucky law allows a child to extend her commitment to the Commonwealth's Cabinet for Health and Family Services in order to pursue educational goals or acquire independent living skills. KRS 625.025 In 2008, the federal Social Security Act was amended to extend eligibility for certain

[20] Downloaded from Indiana Department of Child Services website: http://www.in.gov/dcs/files/6CollaborativeCare2012.pdf (on Aug. 5, 2015).

foster care, adoption assistance and kinship guardianship payments for foster kids and adoptees up to age 21. Pub. Law 110-351 §§ 201, 202.

There are also categorical age-based limits affecting professional activities, further corroborating scientific observations about the immaturity and impulsivity of those under 21 years. For example, federal law requires a driver to be at least 21 years of age to drive a commercial vehicle interstate, transport passengers intrastate, or transport hazardous materials intrastate. *See, e.g.*, 49 C.F.R. §§ 391.11(b)(1), 390.3(f), 391.2. In Alaska, the minimum age to become a state trooper is 21 years. Alaska Stat. § 18.65.240 (police standards counsel sets minimum requirements); 13 AAC § 85.010 (basic standards for police officers); *accord* Exhibit U at 5 (23 years is minimum age to become an agent of the Federal Bureau of Investigation); Exhibit U at 9 (21 years is minimum age to become a special agent with the Drug Enforcement Agency). Twenty-one (21) years is also the minimum age to become a lawyer in Arizona, Delaware, Illinois, Indiana, Mississippi, New York, Ohio, Rhode Island, South Carolina, and Utah. *See, e.g.*, Ariz. R. Ct. § 43(b)(1)(A); Del. S.Ct. R. 52; Ill. S.Ct. R. 71(a); Ind. R. Admis. B. & Disc. Att'y R. 12(2); Miss. R. Gov'g Admis. B. IV § 5.A; N.Y. R. Ct. § 520.2(a)(1); Ohio Gov. B. Rule I(A); R.I. S.Ct. Art. II Rule 1(b); S.C. App.Ct.R. 402(c)(1); Utah R. Jud. Admin. 14-703(a)(1). Some States impose a minimum age of 21 years to become a licensed pharmacist. *See, e.g.*, Ark. Stat. § 17-92-305(a)(1); La. Rev. Stat. § 37:1202(A)(1); Maine Rev. Stat. § 32:137332(1)(B).

Finally, the federal and various state constitutions impose categorical age-of-candidacy requirements for public office. For example, the minimum age to run for the U.S. House of Representatives is 25 years, U.S. Const. Art. I § 2 cl. 2, while 27 states impose a minimum age-of-candidacy of 21 years for the lower legislative house, and six states have even higher age restrictions. (Appendix B). That is, regardless of an individual's fitness for

office, he or she is categorically barred from holding such an office in 33 states if he or she is under 21 years of age.

In sum, it appears that heightened age requirements apply to activities for which a lack of responsibility may have significant – and potentially irrevocable – consequences for the older adolescent who behaves impulsively, without reflection, and without a greater sense of, or capacity for, responsible action (*e.g.*, consuming alcohol/marijuana, foster parenting, obtaining credit cards, possessing a handgun). Likewise, federal and state laws extend protections that might otherwise only apply to juveniles (see, e.g., foster care benefits, ability to dispose of property, free public education) because legislatures recognize the vulnerability of these individuals and the need for society to protect this class of young people. Appendices A through G set forth the various age minimums and maximums for each state for selected activities.

c. Capital Punishment Imposed Upon Individuals Under 21 Years of Age Has Little or No Penological Purpose and Is Unconstitutionally Excessive.

"[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy,* 554 U.S. at 420. "Rehabilitation, it is evident, is not an applicable rationale for the death penalty." *Hall,* 134 S. Ct. at 1992-93 (citation omitted). "(C)apital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy,* 554 U.S. at 441 (emphasis added); *accord Gregg v. Georgia,* 428 U.S. 153 (1976) (noting that the death penalty should serve these "two principal social purposes"). These are bedrock principles of the Constitution's promise to forbid the infliction of cruel and unusual punishment by government. *Jones v. Chappell,* 31 F.Supp.3d 1050, 1061 (C.D.Cal. 2014).

"Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper,* 543 U.S. at 571. Indeed, "(i)f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, (that is, if the State cannot execute all murderers) the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Atkins,* 536 U.S. at 319.

The reasoning of *Atkins* also applies to the issue discussed in this motion: The culpability and blameworthiness of youthful offenders ages 18 to 20 are diminished to a substantial degree by their youth and immaturity. American society recognizes the dual need to provide greater protections for this group and to prohibit them from participating in activities where youthful impulsivity and immaturity could put them or others at risk. The law does not grant these youth the same rights and entitlements of adults; and for purposes of punishment, they should not be treated the same as adults. Just as with juveniles under 18 years of age, research suggests that this group can mature and "age out" of the recklessness and impulsiveness that can characterize this group of individuals. The fact that this group can mature – can attain a better understanding of their own humanity – necessarily means that they cannot be the "worst of the worst" so as to justify the ultimate sanction.

As for the rationale of deterrence,

> it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for petitioner (the State of Missouri) acknowledged at oral argument. Tr. of Oral Arg. 48. In general (the courts) leave to legislatures the assessment of the efficacy of various criminal penalty schemes, (citation). ***Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.*** In particular, as the plurality observed in *Thompson*, "(t)he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." 487 U.S., at 837. ***To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the***

> ***punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.***

Roper, 543 U.S. at 571 (emphases added); *accord Atkins,* 536 U.S. at 319-320 (noting that the impairments of intellectually disabled offenders – whether "adult" or "juvenile" – make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect particularly in that population).

The reasoning about the lack of deterrence applies to individuals under 21 years of age, too. Deterrence as a rationale for punishment necessarily requires a group to reflect upon the consequences of its actions. Late adolescents suffer from the same impulsivity as younger teenagers: They act rashly, without reflection and full consideration of the consequences of their actions. They do not grow out of this behavior until their mid-twenties. The fact that the death penalty is a punishment is unlikely to deter murderous behavior.

Put simply, capital punishment is only lawful if the offender's "consciousness (is) materially more 'depraved' than that of any person guilty of murder." *Godfrey v. Georgia,* 446 U.S. 420, 433 (1980). The characteristics of youthful offenders – for example, impulsivity and lack of full brain development – so affect their individual responsibility and moral guilt that it categorically precludes such a finding. Thus, their execution is categorically unconstitutional.

D. International Opinion on the Death Penalty and the Treatment of Criminal Offenders Under the Age of 21 Years Further Supports the Premise that the Death Penalty Should be Categorically Prohibited.

The *Roper* Court, and Justice O'Connor in her dissent, considered the laws of the international community as "instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.' " *Roper,* 543 U.S. at 575-76; O'Connor, J., dissenting, ("Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.").

"It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Id.* at 578. The death penalty is not only implemented in a minority of countries, but other countries, and the United Nations, have also recognized the need to extend juvenile punishments, rather than adult punishments, to offenders ages 18, 19 and 20.

1. The Death Penalty Is Implemented in a Minority of Countries.

Imposition of the death penalty has declined internationally. According to Amnesty International, 37 percent fewer executions occurred worldwide in 2016 than in 2015. Exhibit Z, Amnesty International, Death Sentences and Executions 2016 (released 2017) at 4. Saudi Arabia, Iran, Iraq and Pakistan accounted for 87 percent of the global number of executions. *Id.* Two countries – Benin and Nauru – abolished the death penalty for all crimes, and one country – Guinea – abolished it for "ordinary crimes." Exhibit Z at 9.

Although the number of death sentences handed down globally increased in 2016, the trend towards abolition of the death penalty continues, with 104 countries having abolished the punishment by the end of 2016 as compared to 64 countries which had done so as of 1997. Exhibit Z at 24. Twenty-two (22) countries carried out executions in 2016, a decrease of two from the previous year. Exhibit Z at 4.

2. Members of the International Community Also Recognized the Need to Treat Youthful Offenders as Juveniles Rather than As Adults in the Criminal Context.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) require that "(e)fforts shall also be made to extend the principles embodied in the Rules to young adult offenders," and extend the protection afforded by the

Rules to cover proceedings dealing with young adult offenders.[21] *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, Rule 3.3 & Commentary to Rule 3.3, adopted by General Assembly resolution 40/33 of 29 November 1985.[22] The United Nations Committee on the Rights of the Child has noted "that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception." UN Committee on the Rights of the Child (2007) General Comment No. 10 Children's rights in juvenile justice. Para. 38. Geneva: UNCRC.[23]

Paragraph 38 of General Comment No. 10 refers to a number of European countries that have required or authorized that offenders ages 18, 19, or 20 be treated as juveniles or be subject to lesser punishments than adults. All European countries (except Belarus and the Russian Federation) have formally abolished the death penalty. (Exhibit Z at 41, 64). Still, European countries' treatment of offenders under 21 in the criminal context is informative on whether the death penalty should be formally abolished for that age group in the United States. For example, in Germany, all young adults ages 18-21 fall within the jurisdiction of the juvenile courts, but those courts have the option of sentencing according to the juvenile law or the adult law. (Exhibit AA at 41). The German Supreme Federal court has further developed the law by ruling that a young adult has the maturity of a juvenile if his or her personality is still developing; this logic has been used to argue that juvenile justice options

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21 "A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult(.)" (Beijing Rules, Rule 2.2(a)).

22 Available at http://www.un.org/documents/ ga/res/40/a40r033.htm.

23 Available at http://www2.ohchr.org/english/bodies /crc/docs/CRC.C.GC.10.pdf. The Council of Europe in its Rules for the treatment of juvenile offenders recommends that young adult offenders between the ages of 18 and 21 years should, where appropriate, be regarded as juveniles and dealt with accordingly. (Recommendation CM/Rec (2008) 11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, Rules 17 and 21.2; see also Recommendation Rec (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rule 11 ("Reflecting the extended transition to adulthood, it should be possible for young adults under the age of 21 to be treated in a way comparable to juveniles and to be subject to the same interventions, when the judge is of the opinion that they are not as mature and responsible for their actions as full adults.")).

should be available for young adults up to the age of 24 years. (Exhibit AA at 43). Interestingly, it appears that the more serious cases are resolved through the juvenile system while minor cases, like traffic offenses, are handled in the adult system. (Exhibit AA at 46).

In other European countries, youth between the ages of 18 to 21 are not subject to the jurisdiction of adult courts. In Austria, for example, youths who commit offenses before 21 years are subject to special youth courts. (Exhibit AA at 49). Various provisions of the juvenile code, rather than the adult code, apply to these offenders. (Exhibit AA at 49). Croatia, too, provides that persons ages 18 – 21 will be treated by specialized juvenile courts and fall within the juvenile courts act. (Exhibit AA at 51). There are also reduced penalties for offenders under 21 years. (Exhibit AA at 52). In 2014 the Netherlands enacted a law which extends the applicability of juvenile sanctions to young adults aged 18 to 23 years. (Exhibit AA at 59).

There are provisions which grant courts discretion to impose alternative and sometimes lesser punishments for offenders ages 18 to 20 or which allow courts to choose between juvenile or adult punishments. In Finland and Sweden there are no specialized juvenile courts; rather, these countries approach punishment of all offenders from a rehabilitative standpoint. (Exhibit AA at 56-57). Still, offenders under 21 years who are sentenced to prison get released after serving one-third of their time while adults are released after serving one-half or two-thirds of their sentences. (Exhibit AA at 57). In Sweden, imprisonment for youth under 21 years is a last resort, and such offenders can be subject to the same supervision (called "youth service") as juveniles. (Exhibit AA at 57). As for terms of imprisonment, the maximum term for offenders under 21 years is fourteen years. (Exhibit AA at 58).

In general, 20 out of 35 European countries provide for either the application of the educational measures of juvenile law or for special rules concerning specific sanctions for

young adults in the general penal law. Exhibit AA at 67 & 67-69 Table 8. Eighteen out of 35 countries have special rules in the adult criminal law concerning the mitigation of penalties for offenders under 21 years. *See id.* Ten out of 35 countries provide for the mitigation of sanctions according to general criminal law *and* the application of sanctions for juvenile law. *See id.* Only eight countries provide no special rules for offenders under 21 years. *See id.*

In short, there is an international consensus, at least in Europe, that "young adult" offenders should not suffer the same criminal penalties as adult offenders who are 21 years and older.

IV. CONCLUSION

For the reasons stated in this memorandum and in the accompanying motion, Travis Bredhold, by counsel, moves this Court to grant his motion and exclude the death penalty as a potential punishment in the above-styled indictment.

Respectfully submitted,

//s// Joanne Lynch
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CERTIFICATE OF SERVICE

This is to certify that an exact copy of the foregoing motion and appendices has been served upon Lou Anna Red Corn, Commonwealth's Attorney, and Andrew Beshear, Attorney General of Kentucky, by placing it in the United States Mail, first-class postage prepaid and addressed to Ms. Red Corn at 116 North Upper Street, Suite 300, Lexington, Kentucky 40507 and to Mr. Beshear at Criminal Appeals Division, 1024 Capital Center Drive, Suite 200, Frankfort, Kentucky 40601. Service was accomplished in the aforesaid manner on June 7, 2017. A courtesy copy of the memorandum and appendices was sent to Ms. Red Corn by electronic mail on June 7, 2017.

//s// Joanne Lynch
JOANNE LYNCH
ASSISTANT PUBLIC ADVOCATE

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APPENDIX A:
Age Restrictions under Selected Federal Laws

1. **Immigration**
   - U.S. citizen can petition for an immigrant visa for any "immediate relative" defined as spouse, "unmarried children *under the age of 21*," (8 U.S.C. § 1151(b)(2)(A)(i)), or parents. (8 U.S.C. § 1201(a)(1)).
   - To petition for a parent, the petitioner must be a U.S. citizen, *at least 21 years of age*, and must have qualified as the "child" of the beneficiary as defined in 101(b) of the Immigration and Nationality Act. (*Matter of Hassan*, 16 I&N Dec. 16 (1976))
   - To petition for "alien" children or spouse, a U.S. citizen can be any age; however, to sign an "affidavit of support," the petitioner must be at least 18 years old. To obtain an immigrant visa for inter-country adoption pursuant to the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, prospective parents must be married, or if unmarried, at least 25 years of age. (Exhibit U).
2. **Handguns**
   - Sales of handguns and ammunition for handguns by a licensed dealer are limited to persons 21 years of age and older. (18 U.S.C. § 922(b)(1), (c)(1); 27 C.F.R. § 478.99(b)).
3. **Credit Card Act of 2009**
   - Bans credit cards for people under the age of 21 unless they have adult co-signers or show proof that they have the means to repay the debt. (15 U.S.C. § 1637(c)(8); § 15 U.S.C. § 1637(p) (parents, guardian or co-signer required to consent to any increase credit limit where person is under 21 years).

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4. **Commercial Driver's Licenses**

   - Driver must be 21 years of age or older to drive a commercial vehicle interstate, or to transport passengers or hazardous materials intrastate. (49 C.F.R. §§ 391.11(b)(1), 390.3(f) & 391.2).

5. **Health Care**

   - "Medical assistance" may be provided to individuals who are, among other things, "under the age of 21, or, at the option of the State, under the age of 20, 19, or 18 as the State may choose...." (42 U.S.C. § 1396d(a)(i)).

6. **Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub. Law 110-351)**

   - Among other things, amends the Social Security Act to extend and expand adoption incentives; creates an option to extend eligibility for certain foster care, adoption assistance and kinship guardianship payments up to age 21. (Pub. Law 110-351 §§ 201, 202).

7. **Age of Candidacy**

   - President: minimum age of 35 years. (U.S. Const. Art. II § 1 cl. 5).
   - Senator: minimum age of 30 years. (U.S. Const. Art. I § 3 cl. 3).
   - Representative: minimum age of 25 years. (U.S. Const. Art. I § 2 cl. 2).

8. **Miscellaneous Professions / Labor Rules**

   - FBI Special Agent: minimum age of 23 years (Exhibit U at 5).
   - DEA Special Agent: minimum age of 21 years (Exhibit U at 9).
   - "Youth minimum wage" allows employers to pay youth less than the minimum wage to individuals younger than 20 years of age for the first 90 days that they are employed. (Fair Labor Standards Act (FLSA) § 6(g)).

9. **Taxable Gifts**

- Certain gifts (i.e., college tuition) to a person under 21 years are not considered a taxable gift (26 U.S.C. § 2503).

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APPENDIX B:

State Age Restrictions Related to Candidacy for Elected Office (Lower House)

State	Minimum Age	Statute
Alabama	21	Ala. Const. Art. IV § 47
Alaska	21	Alaska Const. Art. 2 § 2
Arizona	25	Ariz. Const. Art. 4 § 2
Arkansas	21	Ark. Const. Art. 5 § 4
California	Not specified	Age not specified; but 18 is the age to vote.
Colorado	25	Colo. Const. Art. 5 § 4
Connecticut	18	Conn. Const. 3d Art. § 4 (representatives shall be "electors"; see also Conn. Const. Amend. Art. IX (an "elector" must be eighteen years)
Delaware	24	Del. Const. Art. II § 3
Florida	21	Fla. Const. Art. III § 15
Georgia	21	Ga. Const. Art. 3 § 2
Hawaii	18	Hawaii Const. Art. III § 6 (at least "age of majority")
Idaho	18	Idaho Const. III § 6 (representative must be "elector"); Idaho Const. Art. VI § 2 (elector must be at least 18 years)
Illinois	21	Ill. Const. Art. IV § 2(c)
Indiana	21	Ind. Const. Art. 4 § 7
Iowa	21	Iowa Const. § 4
Kansas	18	Kan. Const. Art. II
Kentucky	24	Ky. Const. § 32
Louisiana	18	La. Const. Art. III § 4
Maine	21	Me. Const. Art. IV § 4
Maryland	21	Md. Const. Art. III § 9
Massachusetts	Not specified	Age not specified, but 18 years is the age to vote.
Michigan	21	Mich. Const. Art. IV § 4
Minnesota	21	Minn. Const. Art. IV § 6
Mississippi	21	Miss. Const. Art. 4 § 41
Missouri	25	Mo. Const. Art. III § 4
Montana	Not specified	Age not specified, but 18 years is the age to vote.
Nebraska	21	Neb. Const. Art. III § 8
Nevada	21	Nev. Rev. Stat. § 218A.200

New Hampshire	Not specified	Age not specified, but must be at least 18 years to vote in election.
New Jersey	21	N.J. Const. Art. IV § 1
New Mexico	21	N.M. Const. Art. IV § 3
New York	18	N.Y. Public Officers Law § 3
North Carolina	21	N.C. Const. Art. II § 7
North Dakota	18	N.D. Const. IV § 5 (representative must be "qualified elector"); N.D. Const. Art. II § 1 (U.S. citizen and N.D. resident aged 18 is a "qualified elector")
Ohio	18	Ohio Const. Art. 15 § 4 (elected official must be "qualified elector"); Ohio Const. Art. 5 § 1 ("qualified elector" must at least be 18 years old)
Oklahoma	21	Okla. Const. Art. 5 § 17
Oregon	21	Ore. Const. Art. IV § 7
Pennsylvania	21	Pa. Const. Art. 2 § 5
Rhode Island	18	R.I. Const. Art. III § (must be "qualified elector" to hold civil office); R.I. Const. Art. II § 1)
South Carolina	21	S.C. Const. Art. III § 7
South Dakota	21	S.D. Const. Art. III § 3
Tennessee	21	Tenn. Const. Art. II § 9
Texas	21	Tex. Const. Art. 3 § 7
Utah	25	Utah Const. Art. IV § 5
Vermont	Not specified	Age not specified but must be at least 18 years to vote.
Virginia	21	Va. Const. Art. IV § 4
Washington	18	Wash. Const. Art. II § 7 (legislators must be "qualified voter"); Wash. Const. Art. VI § 1 (voters must be at least 18 years).
West Virginia	18	W. Va. Const. Art. IV § 4 (must be eligible to vote to attain office); W. Va. Const. Art. IV § 1 (any citizen of the State can vote if they are not "minors," among other requirements)
Wisconsin	18	Wis. Const. Art. IV § 6 (must be "qualified elector"); Wis. Const. Art. III § 1 ("qualified elector" is at least 18 years old)
Wyoming	21	Wyo. Const. Art. 3 § 2

APPENDIX C:

State Age Restrictions Related to Handguns[24]

State	Minimum Age	Statute
Alabama	18	Ala. Code § 13A-11-57, 13A-11-76.
Alaska	21 (open or concealed carry)	Alaska Stat. § 11.61.210(a)(6); 18.65.705.
Arizona	21 (open or concealed carry)	Ariz. Rev. Stat. § 13-3112(S).
Arkansas	21 (concealed carry)	Ark. Code Ann. §§ 5-73-101(9), 5-73-109, 5-73-309(3).
California	21 (purchase)	Cal. Penal Code § 27505(a) (handgun); Cal. Penal Code § 30300 (handgun ammunition).
Colorado	21 (concealed carry)	Colo. Rev. Stat. § 18-12-108.5(1), (2), 18-12-213(1)(a); 18-12-203(1)(b).
Connecticut	21 (purchase and possession)	Conn. Gen. Stat. § 29-34(b)
Delaware	21 (purchase)	Del. Code Ann. tit. 24 § 903
District of Columbia	21 (purchase and possession)	D.C. Code Ann. § 7-2502.03, 7-2507.06(a), 22-4507
Florida	21 (concealed carry)	Fla. Stat. Ann. § 790.06(2)(b); 790.17(2), 790.18
Georgia	21 (concealed carry)	Ga. Code Ann. § 16-11-132(b); 16-11-129.
Hawaii	21 (purchase and possession)	Haw. Rev. Stat. §§ 134-2(d)
Idaho	21 (concealed carry)	Idaho Code § 18-3302A; 3302(1)(l).
Illinois	21 (purchase and possession)	430 Ill. Comp. Stat. 65/3(a), 65/4
Indiana	18	Ind. Code Ann. § 35-47-2-3(g)(3).
Iowa	21 (purchase and possession)	Iowa Code § 724.22
Kansas	21 (open or concealed carry)	Kan. Stat. Ann. Supp. § 75-7c04 (amended 4/5/15)
Kentucky	18	Ky. Rev. Stat. Ann. § 527.100; 2.Ky. Rev. Stat. Ann. § 527.110(1)(a).
Louisiana	21 (concealed carry permit)	La. Rev. Stat. Ann. § 14:1379(2)

[24] In general the minimum ages to *possess* a handgun is 18 years old, unless otherwise specified. All federally-licensed gun dealers are prohibited from *selling* handguns to people under 21 years in all States. (18 U.S.C. § 922(b)(1)).

Maine	18	Me. Rev. Stat. Ann. 17-A § 554-A, 554-B; 25-2003(1).
Maryland	21 (purchase and possession)	Md. Ann. Code art. Pub. Safety § 5-134
Massachusetts	21 (purchase and possession)	Mass. Gen. Laws ch. 140 § 130.
Michigan	21 (concealed carry permit)	Mich. Comp. Laws Serv. § 28.425b(7)(a).
Minnesota	21 (carry permit)	Minn. Stat. § 624.714, subd. 16
Mississippi	21 (concealed carry)	Miss. Code Ann. §§ 97-37-13; 45-9-101.
Missouri	19	Mo. Rev. Stat. §§ 571.060; 571.101(2)(1) (changed from 21 to 19 by S.B. 656, 2014)
Montana	18	Mont. Code Ann. § 45-8-344
Nebraska	21 (concealed carry permit)	Neb. Rev. Stat. § 69-2404
Nevada	21 (concealed carry)	Nev. Rev. Stat. § 202.310; 202-3657(3)(a).
New Hampshire	--	N.H. Rev. Stat. § 159
New Jersey	21 (purchase, transport and possession)	N.J. Rev. Stat. §§ 2C:58-6.1
New Mexico	19	N.M. Stat. Ann. § 30-7-2.2(C)(1).
New York	21 (possess and purchase)	N.Y. Penal Code § 400.00(1), (12)
North Carolina	21	N.C. Gen. Stat. § 14-415.12(a)(3).
North Dakota	21 (for Class 1 concealed carry license)	N.D. Cent. Code § 62.1-03-02, 62.1-04-03(1)(a).
Ohio	21 (possessing; transporting)	Ohio Rev. Code Ann. §§ 2923.21, 2923.211.
Oklahoma	21 (open and concealed carry)	Okla. Stat. tit. 21 § 1273; 1290.9(3)
Oregon	21 (concealed carry)	Ore. Rev. Stat. § 166.250(1)(c)(A), 166.291(1)(B).
Pennsylvania	21 (concealed carry)	18 Pa. Cons. Stat. § 6110.1, 6109(b).
Rhode Island	21 (purchase)	R.I. Gen. Laws §§ 11-47-30, 11-47-35(a)
South Carolina	21 (concealed carry)	S.C. Code Ann. §§ 16-23-30, 23-32-215(A)
South Dakota	18	S.D. Code Laws § 23-7-7.1
Tennessee	21 (handgun carry)	Tenn. Code Ann. §§ 39-17-1351(b)

Texas	21 (concealed carry)	Tex. Penal Code § 46.06(a)(2), 411.172(a)(2)
Utah	21 (concealed carry	Utah Code Ann. § 76-10-509, 53-5-704(1)(a)
Vermont	16	Vt. Stat. Ann. tit. 13 § 4007
Virginia	21 (concealed carry)	Va. Code Ann. § 18.2-308.02
Washington	21 (concealed carry)	Wash. Rev. Code Ann. § 9.41.070(1)(c)
West Virginia	21 (concealed carry)	W. Va. Code § 61-7-4
Wisconsin	21 (concealed carry)	Wis. Stat. §§ 948.60(2)(a), 175.60(a)(3)
Wyoming	21 (concealed carry)	Wyo. Stat. Ann. § 6-8-104(b)(ii)

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APPENDIX D:
State Age Restrictions Related to the Possession/ Consumption/ Purchase of Alcohol and Marijuana

State	Minimum Age	Statute
Alabama	21	Ala. Code § 28-1-5
Alaska	21	Alaska Stat. §§ 04.16.050, 04.16.051, 04.16.060
Arizona	21	Ariz. Rev. Stat. §§ 4-101, 4-244, 4-249, 4-226
Arkansas	21	Ark. Code Ann. § 3-3-203; no explicit prohibition on consumption
California	21	Cal. Bus. & Prof. Code §§ 25658, 25662; Cal. Veh. Code § 23224;
Colorado	21	Colo. Rev. Stat. §§ 12-47-901, 18-13-122(2)(a) (alcohol); Colo. Rev. Stat. § 18-13-122(3)(b) &(d) (marijuana)
Connecticut	21	Conn. Gen. Stat. §§ 30-1, 30-89, 30-87
Delaware	21	Del. Code Ann. Tit. 4 § 904
District of Columbia	21	D.C. Code Ann. § 25-1002
Florida	21	Fla. Stat. ch. 562-111
Georgia	21	Ga. Code Ann. § 3-3-23
Hawaii	21	Haw. Rev. Stat. §§ 281-101.5, 712-12500.5
Idaho	21	Idaho Code §§ 23-1023, 23-1334, 23-949
Illinois	21	235 Ill. Comp. Stat. 5/6-16, 5/6-16.1, 5/6-20
Indiana	21	Ind. Code §§ 7.1-1-3-25, 7.1-5-7-1, 7.1-5-7-7, 7.1-5-7-17
Iowa	21	Iowa Code § 123.3, 123.47
Kansas	21	Kan. Stat. Ann. §§ 41-2701, 41-727, 41-727a, 41-2652
Kentucky	21	Ky. Rev. Stat. Ann. § 244.085
Louisiana	21	La. Rev. Stat. Ann. § 14:93.10, 14:93.12
Maine	21	Me. Rev. Stat. Ann. 28-A §§ 2, 2051,
Maryland	21	Md. Ann. Code art. 2B §§ 1-201, 1-102; Crim. Law 10-114
Massachusetts	21	Mass. Gen. Laws ch. 138 § 34A, 34C
Michigan	21	Mich. Comp. Laws § 436.1703
Minnesota	21	Minn. Stat. § 340A.503
Mississippi	21	Miss. Code Ann. §§ 67-1-5, 67-1-81, 67-3-54, 67-3-70
Missouri	21	Mo. Rev. Stat. §§ 311.020, 311.325
Montana	21	Mont. Code Ann. § 16-6-305, 45-5-624

Nebraska	21	Neb. Rev. Stat. §§ 53-103, 53-168.06, 53-180.02
Nevada	21	Nev. Rev. Stat. § 202.020
New Hampshire	21	N.H. Rev. Stat. §§ 179:10, 179:10-a, 259:3-b
New Jersey	21	N.J. Rev. Stat. §§ 2C:33-15, 33:1-81
New Mexico	21	N.M. Stat. Ann. § 60-7B-1
New York	21	N.Y. Alco. Bev. Cont. §§ 65-b, 65-c
North Carolina	21	N.C. Gen. Stat. §§ 18B-302, 18B-103
North Dakota	21	N.D. Cent. Code § 5-01-08
Ohio	21	Ohio Rev. Code Ann. §§ 4301.63, 4301.69, 4301.635
Oklahoma	21	Okla. Stat. tit. 21 § 1215, tit. 37 § 163.2, tit. 37 § 246, tit. 37 § 604, tit. 37 § 605
Oregon	21	Ore. Rev. Stat. § 471.430
Pennsylvania	21	18 Pa. Cons. Stat. § 6308
Rhode Island	21	R.I. Gen. Laws §§ 3-8-10, 3-8-13, 3-8-5.1
South Carolina	21	S.C. Code Ann. §§ 63-19-2440, 63-19-2450, 63-19-2460
South Dakota	21	S.D. Code Laws § 35-9-2
Tennessee	21	Tenn. Code Ann. §§ 1-3-113, 39-15-413
Texas	21	Tex. Alco. Bev. Code §§ 106.01, 106.02, 106.04, 106.05
Utah	21	Utah Code Ann. §§ 32A-1-105, 32A-12-209, 77-39-101
Vermont	21	Vt. Stat. Ann. tit. 7 §§ 2, 3, 657; 2000 Vt. Acts & Resolves 160
Virginia	21	Va. Code Ann. §§ 4.1-304, 4.1-305, 4.1-200
Washington	21	Wash. Rev. Code § 66.12.140, 66.44.270, 66.44.290 (alcohol); Wash. Rev. Code § 69.50.4013(3), Initiative 502 § 20(3) (marijuana)
West Virginia	21	W. Va. Code § 11-16-19, 11-16-3, 60-3A-24
Wisconsin	21	Wis. Stat. §§ 125.02, 125.07
Wyoming	21	Wyo. Stat. Ann. §§ 12-6-101, 12-6-103

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APPENDIX E:

State Age Restrictions Related To Uniform Transfers or Gifts to Minors Act

State	Minimum Age	Statute
Alabama	21	Ala. Code § 35-5A-2(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Alaska	18	Alaska Stat. § 13.46.990(1), (11) (defining "adult" as person who has attained 18 years and "minor" as someone under 18 years).
Arizona	21	Ariz. Rev. Stat. §§ 14:7651(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Arkansas	21	Ark. Code Ann. § 9-26-201(1),(11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
California	18	Cal. Probate Code § 3901(a), (k) (defining "adult" as person who has attained 18 years and "minor" as someone under 18 years); but see Prob. Code, § 3920.5(e) ("The time for transfer to the minor of custodial property transferred by irrevocable gift under Section 3904 may be delayed under this section only if the transfer pursuant to Section 3909 provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time may not be later than the time the minor attains 21 years of age.")
Colorado	21	Colo. Rev. Stat. § 11-50-102(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Connecticut	21	Conn. Gen. Stat. § 45a-557a(1), (10) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Delaware	21	Del. Code Ann. Tit. 12 § 4501(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Florida	21	Fla. Stat. § 710-102 (1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Georgia	21	Ga. Code Ann. § 44-5-111(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Hawaii	21	Haw. Rev. Stat. §§ 553A-1 (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).

Idaho	21	Idaho Code § 68-801(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Illinois	21	760 Ill. Comp. Stat. 20/2)1), (12) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Indiana	21	Ind. Code §§ 30-2-8.5-1, 30-2-8.10 (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Iowa	21	Iowa Code § 565B.1(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Kansas	21	Kan. Stat. Ann. §§ 38-1701(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Kentucky	18	Ky. Rev. Stat. Ann. § 385.012(1), (11) (defining "adult" as person who has attained 18 years and "minor" as someone under 18 years).
Louisiana	18	La. Rev. Stat. § 9:751(1), (10) (defining "adult" as person who has attained 18 years and "minor" as someone under 18 years).
Maine	18	Me. Rev. Stat. Tit. 33 § 1652 (1), (11) (defining "adult" as person who has attained 18 years and "minor" as someone under 18 years).
Maryland	21	Md. Ann. Code § 13-301(b), (k) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
Massachusetts	21	Mass. Gen. Laws ch. 201A § 1 (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Michigan	18	Mich. Comp. Laws § 554.523(1), 554.524(4) (defining "adult" as person who has attained 18 years and "minor" as someone under 18 years)
Minnesota	21	Minn. Stat. § 527.21 (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Mississippi	21	Miss. Code Ann. § 91-20-3(a), (k) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Missouri	21	Mo. Rev. Stat. §§ 404.007(1), (14) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Montana	21	Mont. Code Ann. § 72-26-502(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Nebraska	21	Neb. Rev. Stat. § 43-2702(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)

Nevada	18	Nev. Rev. Stat. § 167.020 (1), (11) (defining "adult" as person who has attained 18 years and "minor" as someone under 18 years)
New Hampshire	21	N.H. Rev. Stat. § 463-A:1(I), (XI) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
New Jersey	21	N.J. Rev. Stat. § 46:38-14(a), (k) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
New Mexico	21	N.M. Stat. Ann. § 46-7-12(A), (K) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
New York	21	N.Y. EPT Law. §§ 7-6.1(a), (k) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
North Carolina	21	N.C. Gen. Stat. §§ 33A-1 (1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
North Dakota	21	N.D. Cent. Code § 47-24.1(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Ohio	21	Ohio Rev. Code §§ 5814.01(K) (defining "minor" as someone under 21 years)
Oklahoma	21	Okla. Stat. § 58-1202(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Oregon	21	Ore. Rev. Stat. § 126.805(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Pennsylvania	21	53 Pa. Cons. Stat. § 5301(b) (defining "minor" as someone under 21 years)
Rhode Island	21	R.I. Gen. Laws §§ 18-7-2(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
South Carolina	21	S.C. Code Ann. § 63-5-510(1), (13) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
South Dakota	18	S.D. Code Laws § 55-10A-1(1), (10) (defining "adult" as person who has attained 18 years and "minor" as someone under 18 years)
Tennessee	21	Tenn. Code Ann. § 35-7-102(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Texas	21	Tex. Property Code § 141.002(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)

Utah	21	Utah Code § 75-5a-102(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone not yet 21 years)
Vermont	21	14 Vt. Stat. Ann. § 3211(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)
Virginia	18	Va. Code Ann. §§ 64.2-1900 (defining "adult" as person who has attained 18 years and "minor" as someone not yet 18 years)
Washington	21	Wash. Rev. Code § 11.114.010(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years).
West Virginia	21	W. Va. Code § 36-7-1(1), (11) (defining "adult" as person who has attained 21 years and "minor" as someone not yet 21 years)
Wisconsin	21	Wis. Stat. § 54.854(1), (10) (defining "adult" as person who has attained 21 years and "minor" as someone not yet 21 years)
Wyoming	21	Wyo. Stat. §§ 34-13-114(a)(i), (xi) (defining "adult" as person who has attained 21 years and "minor" as someone under 21 years)

APPENDIX F:

Maximum Age Limit for Free Public Education, by State

State	Age	Statute
Alabama	21	Ala. Const. § 256
Alaska	20	Alaska Stat. § 14.03.070
Arizona	21	Ariz. Const. Art. XI § 6
Arkansas	21	Ark. Const. Art. Xiv, § 1
California	21	Cal Educ. Code § 46300.1
Colorado	21	Colo. Rev. Stat. § 22-1-102
Connecticut	21	Con. Gen. Stat. § 10-186
Delaware	20	Del. Code Ann. Tit. 14, § 202
District of Columbia	None specified	D.C. Mun. Regs. Tit. 5, § 2000.3
Florida	Varies by school district	Fla. Stat. § 1003.21(1)(c) (to be set by individual school boards)
Georgia	20	Ga. Code Ann. § 20-2-150
Hawaii	20	Hawaii Rev. Stat. § 302A-1134
Idaho	21	Idaho Code § 33-201
Illinois	21	105 Ill. Comp. Stat. Ann. § 5/26-2
Indiana	22	Ind. Code Ann. § 20-21-1-6
Iowa	21	Iowa Code Ann. § 282.1
Kansas	None specified	Kansas Stat. § 72-977
Kentucky	21	Ky. Rev. Stat. Ann §158.100
Louisiana	21	La. Rev. Stat. Ann. § 17:221.3
Maine	20	20a Me. Rev. Stat. Ann. § 5201
Maryland	21	Md. Code Ann., Educ. § 7-101
Massachusetts	21	Mass. Gen. Laws Ch. 71b, § 1
Michigan	20	Mich. Comp. Laws § 388.1606
Minnesota	21	Minn. Stat. § 120a.20
Mississippi	21	Miss. Code Ann. 37-45-1
Missouri	21	Mo. Rev. Stat. § 160.051
Montana	19	Mont. Code Ann. § 20-5-101
Nebraska	21	Neb. Const. Art. VII, § 1
Nevada	21	Nev. Rev. Stat. § 392.060 + "sunset" schools for 17-21 years
New Hampshire	21	N.H. Rev. Stat. Ann. § 189: 1-A

New Jersey	20	N.J. Rev. Stat. § 18a: 38-1
New Mexico	21	N.M. Stat. Ann. § 22-8-2
New York	21	N.Y. Educ. Law § 3202
North Carolina	21	N.C. Gen. Stat. § 115c-1
North Dakota	21	N.D. Cent. Code § 15.1-06-01
Ohio	21	Ohio Rev. Code Ann. § 3313.64
Oklahoma	21	Okla. Stat. Ann. Tit. 70, § 1-114
Oregon	21	Or. Rev. Stat. § 339.115
Pennsylvania	21	Pa. Cons. Stat. Ann. § 13-1301
Rhode Island	None specified	R.I. Gen. Laws § 16-19-1 (attend school)
South Carolina	21	S.C. Code Ann. § 59-63-20
South Dakota	21	S.D. Codified Laws § 13-28-5
Tennessee	Varies by school board	Tenn. Code § 49-6-3102
Texas	26	Tex. Educ. Code Ann. § 25.001
Utah	19	Utah Code § 49-6-3102 (up to school boards)
Vermont	None specified	Vt. Stat. tit. 16, ch. 23-7002 § 945
Virginia	20	Va. Code Ann. § 22.1-1
Washington	20	Wash. Rev. Code Ann. § 28a.225.160
West Virginia	21	W. Va. Code § 18-5-15
Wisconsin	20	Wis. Const. Art. X, § 3
Wyoming	21	Wyo. Stat. Ann. § 21-4-301

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APPENDIX G:
State Age Restrictions Related to Foster Parenting

State	Minimum Age	Statute
Alabama	19	Ala. Code § 38-7-3; 38-7-4; Admin. Code § 660-5-29.02
Alaska	21	7 A.A.C. § 50.200; Alaska Stat. §§44.29.020, 47.35.010
Arizona	21	Ariz. Admin. Code § 6-05-5823
Arkansas	21	Ark. DHS Pub-22 (Aug. 2013), at page 5.
California	18	DSS Manual tit. 22, § 89317; 89318 (any "adult" may apply); § 89201(a)(1) (defining "adult" to be person 18 and older)
Colorado	21	12 Colo. Code Regs. 2509-8; 7.708.7.A.2
Connecticut	21	Conn. Gen. Stat. § 17a-114(a)
Delaware	21	9 Del. Code of Regs. § 201.95.1
District of Columbia	21	D.C. Code of Municipal Regs. § 29-6001
Florida	21	Fla. Admin. Code § 65C-13.030
Georgia	Married, or if unmarried, at least 25 years	Ga. DFCS website (Exhibit V at 1)
Hawaii	"a married couple" or "an adult" (implicitly 18 years)	Hawaii Code of Rules § 17-1625-8
Idaho	21	Idaho Admin. Code § 16.06.02.402.01
Illinois	21	Ill. Admin. Code Tit. 89, §§ 402.12(c)
Indiana	21	Ind. Admin. Code Tit. 465 § 2-1.5-3(a)
Iowa	21	Iowa Admin. Code § 441-113.12(a)
Kansas	21	Kan. Admin. Regs. § 28-4-802(b)
Kentucky	21	Ky. Admin. Regs. Tit. 922 § 1:310 § 4(1)(3)(e)2
Louisiana	21	La. Admin. Code § 67:7313(B)
Maine	21	Me. Code of Rules 10-148-016, § 2; 9
Maryland	21	Md. Code of Regs. 07.02.25.04.C

Massachusetts	Does not specify, but implicitly 18 years	110 Code Mass. Regs. §§ 7.100; 7.103; 7.104
Michigan	18	Mich. Admin. Code R. 400.1902 Rule 2.(1)(a)
Minnesota	21	Minn. Admin. Code R. 2960.3060 subp.3.A.
Mississippi	21	Miss. DHS DFCS Regs. § F.II.A, page 522-523
Missouri	21	Mo. Code of State Regs. Tit. 13, § 35-60.030(1)
Montana	18	Mont. Admin. Rules, Rule 37.51.301(1)(a)
Nebraska	19	474 Neb. Admin. Code §§ 6-003.25B (foster parents must attain age of majority which is 19 years)
Nevada	21	Nev. Admin. Code § 424.260
New Hampshire	21	N.H. Admin. Rules He-C 6446.04(b)(2)
New Jersey	18	N.J. Admin. Code §§ 10:122C-2.1(b).1
New Mexico	18	N.M. Admin. Code § 8.26.4.8.A.
New York	21	18 N.Y. Comp. Codes R. & Regs. § 443.2(c)(1)(i)
North Carolina	21	N.C. Admin. Code Tit. 10A § 70E.1104(b)
North Dakota	21	N.D. Admin. Code § 75-03-14-01.1. (defining "adult" as person 21 years and older)
Ohio	21	Ohio Admin. Code § 5101:2-7-02(A)
Oklahoma	21	Okla. Admin. Code § 340:75-7-12(a)
Oregon	21	Ore. Admin. Rules § 413-200-0308(2)
Pennsylvania	21	Penn. Admin. Code Tit. 55 § 3700.62(a)
Rhode Island	21	R.I. DCYF, Foster Care & Adoption Regs § 3.I.B.1.
South Carolina	21	S.C. Code of Regs. § 114-550.G.(4)(a)
South Dakota	21	S.D. Admin. Code § 67:42:05:06(1)
Tennessee	18	Tenn. Code § 37-5-501(b)(2) (defining child as person under 18 years)
Texas	21	40 Tex. Admin. Code § 749.2403
Utah	21	Utah Admin. Code § R501-12-5(1)(c)
Vermont	21	Vt. Code of Rules § 13 162 007 § 3 204
Virginia	21	22 Va. Admin. Code § 40-141-30.C.

Washington	21	Wash. Admin. Code § 388-148-1365(1)
West Virginia	21	W. Va. Code of State Rules § 78-2-13.1.c
Wisconsin	21	Wis. Admin Code DCF § 56.05(1)(d)
Wyoming	21	Wyo. DFS Website (Exhibit V at 8, 11).

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