COMMONWEALTH OF KENTUCKY
SUPREME COURT
Case No: 2017-SC-436-MR

COMMONWEALTH OF KENTUCKY — APELLANT

vs.

Appeal from Fayette Circuit Court
Hon. Ernesto Scorsone, Judge
Seventh Division, Criminal No. 14-CR-00161

TRAVIS BREDHOLD — APPELLEE

BRIEF OF *AMICI CURIAE*
THE COLORADO JUVENILE DEFENSE CENTER

AND

THE COLORADO CRIMINAL DEFENSE BAR
IN SUPPORT OF APPELLEE TRAVIS BREDHOLD

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CERTIFICATE REQUIRED BY CR 76.12(6):
The undersigned does hereby certify that copies of this brief were served upon the following individuals by U.S. mail on this 28th day of June, 2018: Hon. Judge Ernesto Scorsone, Fayette Circuit Court, Robert F. Stephens Circuit Courthouse, 120 N. Limestone, Lexington, KY 40507; Emily Rhorer, Timothy G. Arnold, Brandon Neil Jewell, Assistant Public Advocates, Department of Public Advocacy, 5 Mill Creek Park Suite 101, Frankfort, KY 40601; Andrew Graham Beshear, Office of the Attorney General, 1024 Capital Center Drive, Suite 200, Frankfort, Ky 40601.

STATEMENT OF POINTS AND AUTHORITIES

INTEREST OF AMICI CURIAE

The Colorado Juvenile Defense Center (CJDC) is a non-profit advocacy group that provides training and support for lawyers and others who defend Colorado youth in both delinquency and criminal cases. The Colorado Criminal Defense Bar (CCDB) is a non-profit organization that provides training and support to the criminal defense community to promote zealous advocacy for those accused of crimes. Both CJDC and CCDB members represent individuals against whom Colorado is seeking the death penalty, including individuals between 18 and 21 years old at the time of the offenses.

The Institute for Compassion in Justice is a Kentucky non-profit legal services organization dedicated to seeking justice for all young people in Kentucky by bringing to bear the realities of youthful immaturity as they impact questions of accountability for youth and young adults in our juvenile and criminal justice systems.

In this case, the lower court ruled that the defendant was categorically ineligible for the death penalty because he was below the age of 21 at the time the offense was committed. In light of the number of capital cases they defend, CJDC and CCDB members have a direct and substantial interest in this question. CJDC and CCDB members have substantial expertise in both the jurisprudence and societal evolution surrounding the relative culpability of youth and this brief addresses the propriety of the trial court's order relative to the evolving standards of decency relevant to that issue.

ARGUMENT

Our system has long struggled with the legality of executing people for acts committed in their youth. The Supreme Court first held that it was unconstitutional to execute persons for acts committed under the age of 16 years old. *Thompson v. Oklahoma,*

497 U.S. 815, 818-838 (1988). The following year, the Court upheld the legality of executing people for acts committed between the ages of 16 and 18. *Stanford v. Kentucky,* 492 U.S. 361 (1989). But 14 years later, the Court, compelled by the growing body of scientific knowledge about brain development, overruled *Stanford* and categorically banned executing people for acts committed when they were under 18 years old. *Roper v. Simmons,* 543 U.S. 551 (2005)("*Roper*"). Developments since *Roper* support extending a categorical ban on capital punishment for acts committed by people under the age of 21 years old.

Viewed superficially, a defendant under the age of 21 years old at the time of the crime is not foreclosed from arguing that his immaturity renders him ineligible for the death penalty. After all, youth is a statutory mitigating factor in almost all death penalty statutes in the country, including Kentucky's. *See* KRS § 532.025(2)(b)(8) (2012). However, a jury's ability to properly assess the mitigating factor of youth is often overpowered by the facts of a particular crime. *Roper,* at 572-73 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course...."). This same risk led the Court to conclude that the Eighth Amendment demands a categorical ban for certain severe punishments for certain classes of offenders. *Graham v. Florida*, 560 U.S. 48, 77-78 (2010)(life imprisonment for youth under 18 years old); *cf. Atkins v. Virginia,* 536 U.S. 304, 320-321 (2002)("*Atkins*")(execution of persons with intellectual disability). The same reasoning demonstrates that an individualized sentencing hearing in this case is an insufficient remedy for purposes of the Eighth Amendment.

The Eighth Amendment requires courts to assess a challenged practice in light of "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 100-101 (1958). It is this standard, rather than a historical prism, that determines whether a punishment is proportional under the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 469 (2012). This moral judgment "must change as the basic mores of society change." *Graham v. Florida,* 560 U.S. at 58 (internal quotations omitted). Simply put, the Eighth Amendment is not trapped in amber.

To discern evolving standards of decency, courts look to both objective indicia and their own judgment. *Atkins,* at 312. This Court is not "reduced to a mere tabulation of societal preferences, as expressed through statutes," *Roper*, at 563, but make determinations "in the exercise of our own independent judgment...." *Ibid.*

There has been a marked decline in the practice of executing people who were under the age of 21 at the time of their offenses.

Emerging data regarding the rarity of executions of youth who committed their offenses while under the age of 21 years old show the same type of objective indicia that resulted in the Supreme Court's declaration of Eighth Amendment violations in *Graham, Miller, Roper, Atkins*, and other cases, including (1) a sharp decline in the penalty as reflected in legislative enactments and/or "actual sentencing practices,"[1] (2) change in a

[1] *Graham v. Florida*, *supra,* 560 U.S. at 62-63 ("actual sentencing practices" were observed to be "an important part of the Court's inquiry into consensus.") (*citing Enmund v. Florida*, 458 U.S. 782, 794-96 (1982)); *ibid* ("an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use"); *Thompson v. Oklahoma*, *supra,* 487 U.S. at 831-832 (citing statistics showing infrequency of actual use of the penalty); *Atkins,* at 316 ("even in those States that allow the execution of [intellectually disabled] 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. Thus there is little need to pursue legislation barring the execution of the [intellectually disabled] in those States.

consistent direction away from the practice,[2] (3) rarity in the use of the death penalty or practice is rare or unusual, especially compared to its potential use,[3] (4) regardless of the absolute numbers related to use of the sentencing practice, confinement in practice, geographically or otherwise, to only a smaller subset of jurisdictions.[4]

In *Graham v. Florida*, the Court ruled that a sentence of life imprisonment without parole ("LWOP") for a nonhomicide offense by a person under the age of 18 years old violated the Eighth and Fourteenth Amendments. Important to its holding was not simply the absolute number of non-homicide juvenile offenders who received LWOP sentences, but also the frequency of the practice "in proportion to the opportunities for its imposition." *Graham*, 560 U.S. at 66. The Court considered the geographical distribution of the sentencing practice throughout the country. *Id,* at 65. Of special importance was the relationship between the jurisdictions in which the LWOP penalty was legally available (39) and the much smaller number of jurisdictions in which defendants were actually serving such sentences (11).[5] *Graham,* 560 U.S. at 82, 62–67. The Court found a national

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And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the [intellectually disabled], only five have executed offenders possessing a known IQ less than 70 since we decided [*Penry v. Lynaugh*, 492 U.S. 302 (1989)]. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.")(footnote omitted); *Roper*, at 567 ("the infrequency of its use even where it remains on the books"); *id*., at 572; *Kennedy v. Louisiana*, 554 U.S. 407, 432-434 (2008)(same); *Miller v. Alabama*, 567 at 483 n. 10 (same).

[2] *Atkins, supra*, at 315; *Roper*, at 566.

[3] *Graham v. Florida*, *supra,* 560 U.S. at 62-63 ("an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.").

[4] *See Graham v. Florida*, 560 U.S. at 63; *Roper v. Simmons*, 543 U.S. at 565.

[5]The LWOP penalty was available for juvenile conduct in 37 states plus the District of Columbia and the U.S. Government.

consensus against such sentences because only 123 juveniles in 11 jurisdictions were actually serving them. *Id.* at 64-67.

Buttressing this conclusion was the fact that of those 123 sentences, 77 were from a single state (Florida) and the remaining 46 had been meted out in only 10 additional states. In contrast, 26 states and the District of Columbia permitted the sentence but had not imposed it. Thus, outside of the state of Florida, the imposition of such a sentence was so rare as to constitute cruel and unusual punishment under the Eighth Amendment. *Id.*, at 64. "*Graham* stands for the principle that the mere infrequency of a particular punishment suffices to establish a national consensus against the practice." Michaels, *supra,* at 150.

To date, 16 states have banned the imposition of the death penalty in its entirety, two states have banned the prospective imposition of the death penalty, and one state has declined to replace a death penalty statute that was held unconstitutional. See A. Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, n 179 (2016) (hereinafter, "Michaels").

No jurisdiction that permits the death penalty specifically exempts defendants who were between 18 and 21 years old at the time of the crime. Thus, if a national consensus is to be found, it must be found in the penalty's application by examining its infrequency, regional concentration, and the trend away from such executions in practice. Researchers and scholars are beginning to make such data available. *Amici curiae* provide available data here.

Data covering executions of youths who were aged 18 or 19 years old at the time of the offense between 2001 to 2015 are collected in a recent article by Brian Eschels.[6] Eschels relied upon data from the Bureau of Justice Statistics of the U.S. Department of Justice[7] and the Execution Database maintained by the Clark County, Indiana Prosecuting Attorney.[8] The data show that executions of persons who were 18 or 19 years old at the time of the offense "are rare and occur in just a few states." Eschels, *supra* note 6, at 147. For example, between 2011 and 2015, only nine states executed persons who were 18 or 19 years old at the time of the offense, and one state – Texas -- was responsible for over 58% of these executions. *Id.*, at 147.

Eschels concludes that when the number of executions of 18- and 19-year olds (whom he terms "emerging adults") was compared to the number of homicides committed by those in the same age group, the only conclusion to be drawn is that such executions are indeed rare.[9] As he noted, Bureau of Justice Statistics data between 1990 and 2010 show that persons ages 18 and 19 were responsible for 1453 homicides, more than for any other age group. It could be expected, therefore, that there would be a correspondingly high

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[6] B. Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus against Executing Emerging Adults in Conversation With Andrew Michaels's a Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. REV. LAW & SOCIAL CHANGE, THE HARBINGER 40:147 (June 15, 2016)(hereinafter, "Eschels").

[7] Howard N. Snyder, Bureau of Justice Statistics, U.S. Dep't of Justice, Arrest in the United States, 1990–2010, at 17–18 (2012), http://www.bjs.gov/content/pub/pdf/aus9010.pdf, cited in Eschels, *supra*, at 152 n. 35.

[8] *U.S. Executions Since 1976*, Clark County, Indiana Prosecutor's Website, http://www.clarkprosecutor.org/html/death/usexecute.htm (hereinafter "Clark County Prosecutor").

[9] This same analytical method was used by the Court in *Graham* to support its conclusion that there was a national consensus against the imposition of a life-without parole sentence for a non-homicide juvenile offender.

number of executions for individuals in this age group, but this was not the case. Eschels found that, between 2001 and 2015, 28 states executed adults, but only 15 states executed a person for a murder who was 18 or 19 years old at the time of the crime.

When Eschels narrowed his time frame to include only data from 2010 (when *Graham v. Florida* was decided) to 2015, the result was even more stark. In that five-year period, the number of states executing emerging adults dropped from 15 to 9, with Texas once again responsible for over 50% of those executions. In 2015, only five people were executed for conduct occurring at the age of 18 or 19. All five of these executions were in Texas. Eschels concludes: "the practice of executing emerging adults appears to be localized in just a handful of states and that localization is not entirely explained by general trends in execution frequency." *See* Eschels, *supra*, pp 152-153.

More recent data continue to show a dramatic decrease in both the practice of executing persons under the age of 21, and the practice of sentencing them to death. In the six years before *Roper v. Simmons* was decided (2000 through 2005), fifty-nine (59) people who were between 18-21 years old at the time of their crimes were executed; in the most recent complete years (2012-2017), only thirty-two (32) 18-21 year olds were executed. This represents a 47% reduction in the number of executions.[10] The number of states executing inmates decreased by 25%, from twelve states (2000-2005) to nine states (2012-2017).[11]

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[10] This data was obtained from Clark County Prosecutor, *supra* (for data through 2014), and from the Death Penalty Information Center's website, https://deathpenaltyinfo.org/executions-united-states (for data 2015-2017)(hereinafter "DPIC Website"). For cases contained only in the latter resource, it is sometimes necessary to also consult the official website of the executing states' corrections department or similar agency responsible for the execution.

[11] *Ibid.*

This data irrefutably supports two conclusions of constitutional magnitude: first, execution of youths who were under the age of 21 years old at the time of the offense is infrequent even in states that maintain a death penalty; second, there is a clear trend away from this practice. These conclusions compel a finding that execution for conduct occurring before the age of 21 years old is inconsistent with "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, *supra,* 356 U.S. at 100-101.

The penalty is so unusual that it violates the Eighth Amendment.

Some members of the United States Supreme Court have suggested that a punishment may be so unusual that it runs afoul of the Eighth Amendment on that basis alone, *see, e.g., Furman v. Georgia*, 408 U.S. 238, 331 (1972) (Marshall, J., concurring); *Weems v. United States*, 217 U.S. 349, 390 (1910) (White, J., dissenting). For example, in *Furman,* the controlling opinions[12] found that the infrequent and seemingly random imposition of the death penalty upon only a small percentage of those eligible to receive it violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See e.g. Furman*, 408 U.S. at 242 (Douglas, J., concurring). Douglas observed, "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Ibid.* Justice Stewart opined that when the death penalty is imposed on only a "random handful" of the defendants who are statutorily eligible for the punishment, then the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."

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[12] See James S. Liebman, Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006, 107 COLUM. L. REV. 1, 8 (2007) (describing the opinions of Justices Douglas, Stewart, and White as the controlling holdings in *Furman*).

Id. at 309–10 (Stewart, J., concurring). *See also id.* at 311-312 (White, J., concurring)("when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked."); *id.*, at 293 (Brennan, J., concurring)("When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."). For these Justices, the infrequency with which the death penalty was imposed was sufficient reason to invalidate the punishment on constitutional grounds.[13]

The practice of executing youths who were under the age of 21 years old at the time of the crime is unconstitutional under these standards. It is so infrequent that it fails to satisfy any penological justification, it invites arbitrariness, and it is so unusual that it must be condemned as violative of the Eighth Amendment. This is one of the reasons that, on February 5, 2018, the American Bar Association House of Delegates passed a resolution calling for jurisdictions still practicing capital punishment to prohibit

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[13] *See Furman*, 408 U.S. at 304–05 (Brennan, J., concurring) ("The asserted public belief that murderers ... deserve to die is flatly inconsistent with the execution of a random few."); *id.* at 311 (White, J., concurring) ("[W]hen imposition of the [death] penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied."). *See also e .g. Graham v. Florida*, 560 U.S. at 71, and *Gregg v. Georgia,* 428 U.S. 153, 183 (1976) (opinion announcing judgment), noting that a sentence materially lacking any legitimate penological justification would be nothing more than the "gratuitous infliction of suffering" and, by its very nature, disproportionate.

death sentences for defendants under the age of twenty-two at the time of their offenses. American Bar Association, Death Penalty Due Process Review Project Section of Civil Rights and Social Justice, Report and Resolution (2018)(hereinafter "ABA Resolution and Report").[14] This decision was supported by "a growing medical consensus that key areas of the brain relevant to decision-making and judgment continue to develop into the early twenties." *Id.*, at 1. The ABA supported the move by noting that, in 2016, 31 individuals received death sentences, yet only two of those individuals were under the age of 21 at the time of their crimes. *Id.*, at 2.

Youth under the age of 21 years old are members of a protected class.

The law has long restricted people under the age of 21 from some activities, in recognition of their immaturity and concomitant diminished legal capacity. This is highly relevant to the question presented in this case. "The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson v. Oklahoma, supra,* at 835. There are many examples of legal disability and protected status for individuals who are over 18, but less than 21, years old, including for example:

- The Gun Control Act of 1968 prohibits purchase of a handgun, see 18 U.S.C. §922(b)(1), (c)(1)(1968). In *National Rile Ass'n of America, Inc. v. ATF,* 700 F.3d 185, 188, 199 (5th Cir. 2012), the Fifth Circuit upheld the restriction and cited Congressional testimony describing the "tendency" of young people under

[14] Available at https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf

the age of 21 years old "toward wild, and sometimes irrational behavior." *See also Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013).

- The National Minimum Drinking Age Act of 1984, which effectively required states to raise the drinking age to 21 years old. 23 U.S.C. §158 (2012).
- The Foster Care Act, which permits states to classify as a "child" any person who has not yet attained the age of 21 and to extend the age of eligibility for foster care services from 18 to 21 years old. Pub. L. No. 110-351, §201, 122 Stat. 3949 (2008), codified at 42 U.S.C.A. § 675 (8)(b)(iii) (2018) (At the option of a State, the term "child" shall include an individual "who has not attained 19, 20, or 21 years of age, as the State may elect"). *See* Ky. Rev. Stat. Ann. § 610.110 (6)(2017) ("Upon motion of the child and agreement of the Department of Juvenile Justice or the cabinet, as appropriate, the court may authorize an extension of commitment up to age twenty-one (21) for the purpose of permitting the Department of Juvenile Justice or the cabinet, as appropriate, to assist the child in establishing independent living arrangements if a return to the child's home is not in his or her best interest.").
- Ky. Rev. Stat. Ann. § 403.211(7)(c)(iii) (1990)(If a parent's health care coverage provides for covered services, "then any unmarried children up to twenty-five (25) years of age who are full-time students enrolled in and attending an accredited educational institution and who are primarily dependent on the insured parent for maintenance and support shall be covered.").
- Persons under the age of 24 years old cannot serve on a local board of education. Ky. Rev. Stat. Ann. § 160.180 (2)(a) (2018).

- Persons between the ages of 18 and 21 years old may not have a full drivers' license without first having an instruction permit for at least 180 days. Ky. Rev. Stat. Ann. § 186.450 (3)(d) (2017).

See also ABA Resolution and Report, *supra*, at 8-10 (collecting numerous statues). State and federal laws recognize that youths under 21 deserve special protection based on their immaturity. This cannot be squared with defining this same class as "the worst of the worst" for purposes of the law's harshest punishment.

Because of the lessened moral culpability and diminished capacity of youth under the age of 21 years old, the death penalty for such persons is not justified by legitimate penological goals.

The death penalty is justified only so long as it serves two purposes: "retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia,* 428 U.S. 153, 183 (1976). "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham v. Florida, id.* at 71. In addition to actual sentencing practices and the distribution, rate and direction of change in these practices, an Eighth Amendment death penalty proportionality analysis asks whether executing a particular class "measurably advance[s] the deterrent or the retributive purpose of the death penalty." *Atkins v. Virginia, supra* at 321. *Atkins* found the penalty's retributive justification was diminished for intellectually-disabled defendants because their "disabilities in areas of reasoning, judgment, and control of their impulses," reduce their "level of moral culpability." *Id.*, at 306. As a result, the Court concluded that execution of those with intellectual disabilities was disproportionate. Those same characteristics nullify the death penalty's theoretical deterrent effect.

The *Roper* Court scrutinized actual sentencing practices and then conducted an independent proportionality analysis of the death penalty's penological justifications. Ultimately, the Court concluded that those purported justifications do not warrant its imposition upon persons under the age of 18 years old. Relying on scientific evidence of adolescent brain development in amicus briefs filed by the American Medical Association and the American Psychiatric Association, the Court concluded that, as a class, 16- and 17-years olds were not fully developed mentally, socially or emotionally, were uniquely vulnerable to peer pressure, and were more capable of change than adults and therefore could not be considered the "worst offenders." *Roper*, 543 U.S at 569-70.

Continuing breakthroughs in scientific evidence demonstrates that the death penalty's penological considerations cannot justify executions for conduct occurring before the offender's 21st birthday. "[T]he lesser culpability of the juvenile offender" means "the case for retribution is not as strong with a minor as with an adult." *Roper,* 543 U.S. at 571. And "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* As the court below correctly concluded, the death penalty's penological justifications are similarly unavailing for conduct committed by defendants below the age of 21 years old.

"Capital punishment must be limited to those 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, supra*, at 319). Given the available knowledge about developmental neuroscience and the greatly diminished use of the death penalty overall in this country, it simply cannot be said that offenders under the age of 21 years old at the time of their offenses are among the "worst of the worst."

In fact, older adolescents are especially prone to risky behaviors. *See* Alexandra O. Cohen, et. al, *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCH. SCI. 549, 549 (2016). Rather than decreasing at age eighteen, the desire to seek risk actually *increases* between the ages of eighteen and twenty-one before starting to taper off later. So "individuals in the young adult period (*i.e.* ages 18-21)" are even more likely to engage in risky behavior than younger adolescents. *See* M.D. Rudolph, *At Risk of Being Risky: The Relationship between 'Brain Age' under Emotional States and Risk Preference*, 24 DEV. COGNITIVE NEUROSCI. 93, 102 (2017).

"[P]enological justifications for the sentencing practice are ...relevant to the [Eighth Amendment] analysis." *Graham*, 560 U.S. at 71, citing *Kennedy v. Louisiana*, 554 U.S. 407, 440-447 (2008); *Roper,* 543 U.S., at 571–572; *Atkins v. Virginia, supra,* 536 U.S. at 318–320. While in an earlier case not involving the death penalty, Justice Kennedy observed that legislatures have discretion to choose from among penological justifications, and "the Eighth Amendment does not mandate adoption of any one penological theory," *Harmelin v. Michigan* 501 U.S. 957, 999 (1991) (opinion of Kennedy, J.), almost two decades later, when writing about sentencing practices that are informed by developmental neuroscience, Justice Kennedy declared that "[t]he case-by-case approach to sentencing must, however, be confined by some boundaries." *Graham v. Florida*, *supra,* 560 U.S. at 77. Observing that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense," *id.*, at 71, the *Graham* Court concluded that neither retribution, deterrence nor incapacitation adequately justifies an LWOP sentence for nonhomicide juvenile conduct. *Id.,* at 77. These same considerations support the lower

court's ruling that execution of a person for conduct occurring before that person's 21st birthday is categorically unsupported by the same type of penological justification, even if those claims may justify imposing the death penalty on a defendant who was at least 21 years old at the time of the offense.

CONCLUSION

Just as the intervening years between the Court's 1988 decision in *Thompson v. Oklahoma* and its 2005 decision in *Roper v. Simmons* supported a shift in the line — from age 16 to 18 years old — at which a categorical exclusion from the death penalty is constitutionally required, the intervening years since *Roper* support a shift in that line from 18 to 21. The punishment of death upon an individual who was under the age of twenty-one years old at the time of the commission of the crime is so disproportionate as to be cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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