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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES HAIRSTON,	)	
	)	
Petitioner-Appellant,	)	
	)	**DOCKET NO. 46665-2019**
v.	)	
	)	**(Bannock County District Court No.**
STATE OF IDAHO,	)	**CV-2018-1033)**
	)	
Respondent.	)	**CAPITAL CASE**
_____	)	

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the
Sixth Judicial District for Bannock County
Honorable Robert C. Naftz, District Judge presiding

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I. STATEMENT OF THE CASE

This is a successive, capital post-conviction case raising the question of whether it is constitutional to execute someone who was under the age of twenty-one at the time of the offense.

The course of the proceedings below began on March 16, 2018, when Appellant James Hairston filed his original petition for post-conviction relief. *See* R. 6. In the petition, Mr. Hairston's first ground for relief was that his death sentence violated the cruel-and-unusual-punishment clauses of the United States and Idaho Constitutions because it was imposed for crimes that were committed when he was only nineteen and a half years old. R. 8–23. The second ground alleged that Mr. Hairston's death sentence was unconstitutional because the trial court failed to give adequate consideration to the mitigating factors that must be taken into account with youthful defendants. R. 23–26.

On May 4, 2018, Mr. Hairston submitted a motion to amend his petition, along with the amended petition itself. R. 257–703; 714–20. The amended petition raised the same claims, but included additional evidentiary support for Mr. Hairston's assertion that Idaho had evolved beyond the practice of sentencing adolescent defendants.[1] R. 257–703. On May 30, 2018, the State moved for summary dismissal of the petition. R. 728–36. A hearing was held in the case on October 29, 2018. At the hearing, the district court granted Mr. Hairston's motion to amend the petition and took judicial notice of all of his exhibits. Tr. 10–11, 13.

[1] As he did below, Mr. Hairston will at times refer to under-twenty-one individuals as "young" and "adolescent" defendants.

On December 17, 2018, the district court denied the petition for post-conviction relief and entered judgment the same day. R. 761–87. Mr. Hairston filed a timely notice of appeal on January 8, 2019. R. 789–94.

II. ISSUES PRESENTED ON APPEAL

The issues presented on appeal are:

A. Whether Mr. Hairston's death sentence is unconstitutional because he was under twenty-one at the time of the offense.

B. Whether Mr. Hairston's death sentence is unconstitutional because the mitigating factors associated with his youth were not given proper consideration.

III. STANDARD OF REVIEW

In the post-conviction context, the Court "exercises free review over questions of law," which includes "[t]he constitutionality of Idaho's capital sentencing scheme." *Rhoades v. State*, 149 Idaho 130, 132 (2010).[2] Summary disposition of a petition "is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the relief requested." *State v. Payne*, 146 Idaho 548, 561 (2008). Thus, "this Court applies the same standard as the trial court and must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if accepted as true." *Dunlap v. State*, 159 Idaho 280, 295 (2015). Here, the State did not dispute any of the facts upon which Mr. Hairston relied in his petition. *See* R. 725–

[2] In this brief, all internal quotation marks and citations are omitted, and all emphasis is added unless otherwise noted.

36; Tr. 14–18, 24–25. For that reason, and because Mr. Hairston's allegations are supported by the substantial evidence discussed below, the factual assertions in his petition "must be regarded as true" on appeal. *Ridgley v. State*, 148 Idaho 671, 675 (2010).

IV. ARGUMENT

Mr. Hairston asserted two claims below: (1) that his age at the time of the offense renders his death sentence categorically unlawful; and (2) that the sentencing court did not weigh the mitigating circumstances associated with that age when the death penalty was imposed. The district court committed reversible error in denying both claims. Mr. Hairston addresses each in turn.[3]

A. Mr. Hairston's death sentence is unconstitutional because he was under twenty-one at the time of the offense.

Mr. Hairston's first claim is that his death sentence runs afoul of the cruel-and-unusual punishment clauses of the United States and Idaho Constitutions because it was handed down for offenses committed when he was under the age of twenty-one. *See* U.S. Const., Ams. VIII, XIV; Idaho Const., Art. I, § 6.[4]

[3] Mr. Hairston reserves the right to respond in his reply brief to any arguments raised by the State for affirmance that were not relied upon by the district court. Because Mr. Hairston does not currently know what arguments the State will make in that regard, he does not address them here.

[4] With respect to any reference to the Idaho Constitution herein, Mr. Hairston argues that if the U.S. Constitution is deemed not to protect the asserted right, the parallel provision of the Idaho Constitution is broader and still does. *See State v. Thompson*, 114 Idaho 746, 748 (1988) ("[I]n interpreting provisions of our constitution that are similar to those of the federal constitution we are free to extend protections under our constitution beyond those granted by the United States Supreme Court under the federal constitution.").

The claim has two parts: (1) that the sentence is inconsistent with national evolving standards; and (2) that it is inconsistent with Idaho evolving standards. Each will be taken up separately below.

1. National Evolving Standards

The discussion of the first element of Claim One—national evolving standards—must begin with *Roper v. Simmons*, 543 U.S. 551 (2005). There, the Supreme Court held that it is unconstitutional to impose the death penalty on a defendant who was under the age of eighteen at the time of his offense. *See id.* at 568. The Court had previously set the cut-off at age sixteen. *See Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality op.). National evolving standards of decency show that the same prohibition should be extended again, this time to defendants who were under twenty-one when they committed their crimes.[5] Mr. Hairston was slightly more than nineteen and a half years old at the time of his offenses, *see* R. 316, and he should accordingly be relieved of his unconstitutional death sentence.[6]

The findings of professionals in the medical and scientific communities inform the inquiry into whether evolving standards of decency preclude capital punishment for certain types of offenders. *See Hall v. Florida*, 572 U.S. 701, 710 (2014). *Roper* designated eighteen as a

[5] In the interest of economy, Mr. Hairston will refrain at times from phrases like "when they committed their crimes." When this brief refers to the age of a defendant, it is—unless otherwise noted—referring to the age of the defendant at the time the offense took place.

[6] Because Mr. Hairston himself was nineteen, the Court need only extend *Roper* by two years to grant him relief. If the Court is not prepared to adopt the twenty-one cutoff urged here, Mr. Hairston respectfully requests that it hold that it is unconstitutional to execute anyone who was nineteen or younger at the time of the offense.

bright-line rule prior to modern research producing a more comprehensive understanding of the maturation in those ages eighteen to twenty-one. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 653 (2016). As explained in an affidavit from Laurence Steinberg, Ph.D., that was presented below, the new, emerging medical and scientific consensus across the country, based on recent studies of brain development in eighteen to twenty-one year olds, is that defendants twenty-one and younger are just as deserving of constitutional protection from the death penalty as are defendants eighteen and younger. *See* R. 292–311; *see also Pike v. Gross*, --- F.3d ---, 2019 WL 3955846, at *9 (6th Cir. 2019) (Stranch, J., concurring) (observing that "[r]ecent research in neuroscience and developmental psychology indicates that individuals between the ages of 18 and 21 share many of [the] same characteristics" as minors for *Roper* purposes).

A developmental psychologist specializing in adolescence, Dr. Steinberg described the emerging scientific consensus that "many aspects of psychological and neurobiological immaturity characteristic of early adolescents and middle adolescents are also characteristic of late adolescents." R. 296. As a result, he concluded that the science "does not support the bright-line boundary that is observed in criminal law under which 18-year-olds are categorically deemed to be adults." R. 296. It follows from the undisputed facts set forth in Dr. Steinberg's report that *Roper* "should be extended to late adolescents." R. 296. Dr. Steinberg's position is based on research establishing that "brain maturation continues into late adolescence and early adulthood," a principle that "has become widely accepted among neuroscientists." R. 298. Consequently, in the late teen years, individuals are more attentive to rewards but less able to

control themselves, plan ahead, and weigh costs and benefits. R. 304. For people in that age range, "the attractiveness of immediate rewards often overwhelms their ability to regulate their emotions and impulses." R. 304.

As Dr. Steinberg notes, "[s]tudies of structural and functional development of the brain" track the same phenomenon. R. 305. In particular, the maturation of the connections that "govern self-regulation" does not end at the age of twenty-one. R. 305. Experiments conducted by Dr. Steinberg and his peers have confirmed the point. R. 306. Finally, the late-adolescent brain has greater plasticity than the adult brain, meaning that nineteen-year-olds have "continued capacity for behavioral change" and the vast majority of them "age out of crime," including those who have committed violent offenses. R. 306–07. In addition to neuroscience, Dr. Steinberg's opinion is also founded on psychological studies. R. 299–303. Such studies have proven that adolescents take more risks than adults, have worse impulse control, and are more susceptible to pressure from others. R. 299–303.

Dr. Steinberg's report is replete with exhaustive citations to the leading scientific literature. R. 295–307. And it comes from one of the preeminent authorities in the field, someone who has been repeatedly invoked by the U.S. Supreme Court in this area of law. *See Miller v. Alabama*, 567 U.S. 460, 471 (2012); *Roper*, 543 U.S. at 569–70. Neither the State nor the district court questioned the correctness of Dr. Steinberg's report. *See* R. 725–36, 761–85; Tr. 14–18, 24–25. Accordingly, the report must now be taken as true, *see Ridgley*, 148 Idaho at 675, and it forms a powerful piece of evidence in favor of Mr. Hairston's claim.

Apart from the medical and scientific communities, legal institutions and society as a whole now recognize that the brains in those under twenty-one years old are—like those under eighteen—sufficiently immature such that all individuals under twenty-one are undeserving of death sentences. This part of the analysis takes into account state laws as well as decisions by juries, appellate courts, and governors. *See Roper*, 543 U.S. at 563–65; *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002). "Statistics about the number of executions" are also relevant. *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008).

Considering all of these sources, there is a strong trend away from executing defendants twenty-one and younger.

First, no such individual would be executed for *any* offense in twenty-five states and the District of Columbia, as all of those jurisdictions have either abolished the death penalty[7] or have suspended executions through moratoria.[8] *See Hall*, 572 U.S. at 716 (including states that have

[7] The twenty-one states that have abolished the death penalty are Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Washington. and Wisconsin. *See* R. 339; *see also State v. Gregory*, 427 P.3d 621, 633–37, 642 (Wash. 2018) (declaring Washington's death penalty unconstitutional and converting every death sentence in the state to life imprisonment); H.B. 455, 2019 Gen. Ct., 166th Sess. (N.H. 2019).

[8] The four states with moratoria are California, Colorado, Oregon, and Pennsylvania. *See* Governor Gavin Newsom, Executive Order N-09-19, March 13, 2019, available at https://perma.cc/4WGM-NXQ2; Governor John W. Hickenlooper, Executive Order D-2013-006, May 22, 2013, available at https://perma.cc/94KD-SYZU; Governor John Kitzhaber, Executive Order, November 22, 2011, available at https://perma.cc/PAU8-SBTP; Governor Tom Wolf, Memorandum of Moratorium, February 13, 2015, available at https://perma.cc/NLG5-9Q2K. *See* R. 340. The website perma.cc allows the user to freeze a website for perpetuity in its present version with a constant address. Mr. Hairston uses the service here to guarantee that the cited websites are not altered or destroyed during the litigation.

abolished and that have moratoria on the anti-death "side of the ledger" while determining whether capital punishment is allowed for a particular class of defendants). Since Mr. Hairston was sentenced to death in 1996, *see* R. 326, nine states have abolished the death penalty and none have reinstated it. *See State by State*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Aug. 26, 2019).[9] This is a reflection of the fact that the momentum is moving overwhelmingly in one direction—away from the death penalty.

Second, the Court should consider the states that technically allow for twenty-one-year-old defendants to get death sentences but do not in reality impose or carry out such sentences. *See Graham v. Florida*, 560 U.S. 48, 66–67 (2010); *Atkins*, 536 U.S. at 316. Again, that data favors an extension of *Roper*.

Of the states that have the death penalty on the books and no moratoria, seven have effectively abandoned the practice of executing anyone under the age of twenty-one.

To begin, three of those states do not have a single under-twenty-one defendant on their death rows: Wyoming, Montana, and Utah. *See* R. 341. In terms of executions, only one of those states has executed someone under twenty-one in the modern era—Utah—and that

[9] In 2015, Nebraska's state legislature voted in favor of eliminating the death penalty, but due to a referendum the bill "never went into effect," *State v. Jenkins*, 303 Neb. 676, 711 (2019), so it does not count in the analysis. Even if it did, though, the momentum would still be overwhelmingly in the direction of life.

execution took place in 1992. *See* R. 341. These three states can be added to the pro-life column.

So too can four other states which, although they continue to have under-twenty-one defendants on death row, are plainly moving in the opposite direction. That trend is apparent both in terms of how much the states have drifted away from executions and in terms of how long it has been since any of them have sentenced a young defendant to death. Kansas has not executed anyone since 1965. *See* R. 341. Of its current death-row inmates, only one was under twenty-one and he was sentenced in 2000. *See* R. 341. In Nebraska, there have not been any executions since 1997, there has not been a young defendant executed since 1996, and the only under-twenty-one inmate on its death row was sentenced in 2002. *See* R. at 342. Kentucky's death row is thirty-five inmates strong—only two of them were under twenty-one, and the more recent of those to receive his sentence got it all the way back in 1989. *See* R. 342. Finally, as discussed in much greater detail below, Idaho has moved definitively away from adolescent death sentences. *See infra* at Part IV.A.2. In sum, these four states are no longer giving death sentences to younger defendants or executing them, along with the other three that lack any young defendants on their death rows at all. All seven of these states accordingly fall on the pro-life side of the equation.

Counting both the non-death jurisdictions (twenty-five), and these other jurisdictions that have abandoned the practice of sentencing younger defendants to death and executing them (seven), there is a total of thirty-two jurisdictions who do not believe the government should kill under-twenty-one defendants. The current pattern of states' use of the death penalty is

"remarkably analogous" to the patterns invoked by the Supreme Court in *Graham* to rule that juvenile life sentences without parole for non-homicidal offenses are unconstitutional. Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 171 (2016) (hereinafter "Michaels"). In *Roper*, a total of thirty states was found sufficient to justify a ruling banning death for defendants below the age of eighteen. *See* 543 U.S. at 564. Accordingly, the same result is now required for those just one to three years older.

Even taking into account the states that are still sentencing those under twenty-one to death, the result remains the same. Across the country, there has been a precipitous drop in such sentences. *See* David McCord & Talia Roitberg Harmon, *Lethal Rejection: An Empirical Analysis of the Astonishing Plunge in Death Sentences in the United States From Their Post-Furman Peak*, 81 Alb. L. Rev. 1, 33–34 (2017–2018) (finding that "death sentences for defendants aged 18 to 20 as a percentage of all death sentences declined from 15.2% in 1994 to 12.7% in 2004 to 4.1% in 2014"). Indeed, the reduction in death sentences for defendants in that narrow age group is one of the reasons for the sharp overall reduction in capital punishment over recent years. *See id.* at 40.

The reduction in death sentences for late-adolescent offenders is especially telling because individuals in that age group are *more* likely to commit violent crime. *See* Erica L. Smith & Alexia Cooper, U.S. Dep't of Justice, NCJ 243035, Homicide in the U.S. Known to Law Enforcement, 2011, 1 (2013), available at https://perma.cc/FAR2-ALNL ("From 2002 to 2011, young adults ages 18 to 24 had the highest homicide rate of any age group . . . .").

Statutory developments also help illuminate whether a particular custom has become offensive to our modern civilization. *See Roper*, 543 U.S. at 565–66. The age of a defendant is a mitigating factor in twenty-one of the twenty-nine states that still have a death penalty on the books.[10] Because it is unconstitutional to execute anyone younger than eighteen, these statutes plainly reinforce the mitigating significance of a defendant who is nineteen. Indeed, under such statutes, youth is especially mitigating for a nineteen year old defendant, since if he were only a year and a half younger he would not be eligible for death at all.

Apart from the criminal law, other statutes confirm that under-twenty-one year olds do not have enough maturity to be treated as full adults. *See Roper*, 543 U.S. at 569 (considering non-criminal statutes while assessing the evolving standards of decency).

Most obviously, American society does not consider a nineteen or twenty-year old person responsible enough for us to trust him with alcohol. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 589 (2001) ("[E]very state prohibits the sale of alcohol to those under age 21 . . . ."). In the same vein, such individuals are generally not allowed to purchase a handgun, gamble in a casino, obtain a credit card on their own, or—in states where it is now legal—buy marijuana.

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[10] *See* Ala. Code § 13A-5-51(7); Ariz. Rev. Stat. § 13-751(G)(5); Ark. Code Ann. § 5-4-605(4); Cal. Penal Code § 190.3(i); Colo. Rev. Stat. Ann. § 18-1.3.1201(4)(a); Fla. Stat. Ann. § 921.141(7)(g); Kan. Stat. Ann. § 21-6625(a)(7); Ky. Rev. Stat. Ann. § 532.025(2)(b)(8); La. C. Cr. P. Art. 905.5(f); Miss. Code Ann. § 99-19-101(6)(g); Mo. Ann. Stat. § 565.032.3(7); Neb. Rev. Stat. Ann. § 29-2523(2)(d); Nev. Rev. Stat. Ann. § 200.035(6); N.C. Gen. Stat. Ann. § 15A-2000(f)(7); Ohio Rev. Code Ann. § 2929.04(B)(4); 42 Pa. Stat. § 9711(e)(4); S.C. Code Ann. § 16-3-20(C)(b)(7); Tenn. Code Ann. § 39-13-204(j)(7); Utah Code Ann. § 76-3-207(4)(e); Va. Code Ann. § 19.2-264.4(B)(v); Rev. Code Wash. § 10.95.070(7); Wyo. Stat. Ann. § 6-2-102(j)(vii).

See 18 U.S.C. § 922(b)(1), (c)(1) (establishing a minimum age of twenty-one for purchasing a handgun from a licensed dealer); Lisa Boikess, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: The Pitfalls of Prohibition*, 12 N.Y.U. J. Legis. & Pub. Pol'y 151, 177 n.161 (2008) ("[M]ost states require gamblers in a casino to be 21 years old."); 15 U.S.C. § 1637(c)(8), 1637(p) (obligating those under the age of twenty-one to have an older co-signer in order to obtain a credit card); Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temp. L. Rev. 769, 778 (2016) (noting that "the age of purchase" for marijuana "has uniformly been set at twenty-one"). Federal immigration law even defines "child" for some purposes as someone under twenty-one. *See* 8 U.S.C. §§ 1101(b)(1), 1151(b)(2)(A)(i). In addition, "[s]everal states have extended foster care services from the age of eighteen to the age of twenty-one at the behest of Congress." Michaels, *supra*, at 154.

Even some of the lines the law previously drew at eighteen are now being moved to twenty-one. For example, "as of 2016, all fifty states and the District of Columbia recognized extended age jurisdiction for juvenile courts beyond the age of 18, in comparison to only 35 states in 2003." *Cruz v. United States*, No. 3:11-cv-787, 2018 WL 1541898, at *22 (D. Conn. March 29, 2018). Likewise, "between 2016 and 2018, 5 states and 285 localities raised the age to buy cigarettes from 18 to 21." *Id.* These changes are bringing the country back to its common-law roots. *See NRA v. ATF*, 700 F.3d 185, 201 (5th Cir. 2012) ("[T]he term 'minor' or 'infant'—as those terms were historically understood—applied to persons under the age of 21.").

All of these laws show that American society regards those under twenty-one as childlike in many respects. We protect society from their frequently poor decision-making, and we protect the youths from their own irresponsibility. Under the same logic, those under twenty-one are less culpable than older defendants, as they are through no fault of their own more likely to act recklessly, impulsively, and criminally.

Additionally, many of America's current cultural norms indicate an evolving understanding of what constitutes full adulthood. Between 1996 and 2018, the average age at a first marriage increased by nearly three years for both men and women. U.S. Census Bureau, *Census Historical Marital Status Tables, Table MS-2 Estimated Median Age at a First Marriage, by Sex: 1890 to Present* (Nov. 2018), https://www.census.gov/data/tables/time-series/demo/families/marital.html (last visited Aug. 26, 2019).

For financial aid purposes, a student can be considered his parent's dependent until the age of twenty-four. Federal Student Aid, U.S. Department of Education, *Dependency Status* (2018), available at https://perma.cc/3F2F-5SGN. Under the federal Affordable Care Act, age twenty-six is the cut-off to be a dependent on a parent's health insurance. U.S. Department of Health and Human Services, *Young Adult Coverage* (Jan. 2017), available at https://perma.cc/D32H-DQ7Z. Some of the largest car rental companies, including Enterprise and Alamo, will not rent cars to those under the age of twenty-one. Enterprise, https://perma.cc/98ZQ-XTSS; Alamo, available at https://perma.cc/3M2A-MJW9. These numerous sources confirm that defendants who are twenty-one and younger are not fully formed adults. It follows that sentencing them to death is unconstitutionally disproportionate.

International developments, too, are "instructive for [the] interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments." *Roper*, 543 U.S. at 575–76; *accord Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977).

There is a strong and unambiguous trend against the death penalty worldwide, which is by definition a trend against the execution of defendants in late adolescence as well. By the end of 2018, 106 countries had officially abolished the death penalty and 142 countries had abolished it "in law or practice." *See Death Sentences and Executions 2018*, Amnesty International, at 48 (2019), available at https://perma.cc/EZ28-F3TC. That compares to only fifty-six countries that have retained the death penalty. *See id.*

The trend is unmistakably downward. In the last year for which data is available, "the number of known executions dropped by over 30% and reached the lowest figure" in the last decade. *Id.* at 7. The vast majority of executions take place in a tiny minority of countries, and they are states that America's legal system has little else in common with. Collectively, Iran, Saudi Arabia, Vietnam, and Iraq accounted for 78% of the world's executions. *See id.* at 9.

The international community has taken a far different view than these countries. In 2018, the United Nations General Assembly voted overwhelmingly to adopt a resolution "calling for a moratorium on executions with a view to abolishing the death penalty." *Death penalty: global abolition closer than ever as record number of countries vote to end executions*, Amnesty International, available at https://perma.cc/6LG5-23EE.

There are three potential rationales for any punishment: "rehabilitation, deterrence, and retribution." *Kennedy*, 554 U.S. at 420. Rehabilitation is never "an applicable rationale for the death penalty," as an executed offender is deprived of any chance to become rehabilitated. *Hall*, 572 U.S. at 708–09. On top of that, there is no foundation to "presume that" a defendant "is incapable of reform even though the stories of other teenage killers, many of whom have been rehabilitated behind bars, reveal other possibilities." *Pike*, 2019 WL 3955846, at *8 & n.1 (Stranch, J., concurring). That leaves retribution and deterrence. *See Kennedy*, 554 U.S. at 441; *accord Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

"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. That is the case with individuals who are twenty-one and younger. *See* R. 295 ("Over the past two decades, considerable scientific evidence has accumulated demonstrating that, compared to adults, adolescents are more impulsive, prone to engage in risky and reckless behavior, motivated more by reward than punishment, and less oriented to the future and more to the present."). As explained above, in a multitude of different ways, society does not treat individuals as adults upon their eighteenth birthdays. *See supra* at 11–13. Rather, for at least three years thereafter, such individuals continue to show irresponsible behavior, poor judgment, and impulsivity. *See supra* at 11–13; R. 300–07. Those same features diminish their culpability, and mean that the need for retribution does not justify their execution. *See* Michaels, *supra*, at 173 ("With respect to traits that bear upon culpability—including risk-taking, temperance, and resistance to peer pressure—eighteen- to twenty-year-olds have been

shown to be more similar to juveniles than older adults. These predispositions diminish the blameworthiness of eighteen- to twenty-year-olds. Just as 'the case for retribution is not as strong with a minor as with an adult,' the case for retribution is not as strong with an eighteen- to twenty-year-old as with an older adult." (quoting *Roper*, 543 U.S. at 571)).

The same holds true for deterrence. "The 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 572. In fact, "[t]o 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." *Id.* That is certainly the case with someone who was nineteen at the time of the offense. Because their brains are not fully formed, individuals of that age behave rashly. They do not reflect and thoughtfully consider the consequences of their actions. *See* R. 300–07. Deterrence is more than adequately served by life without parole, and the execution of a nineteen year old is categorically unconstitutional. *See* Michaels, *supra*, at 174 ("[T]he psychological and neurological makeup of eighteen- to twenty-year-olds suggests that they are less likely to be deterred than older adults. They are less adept at anticipating future consequences than older adults. They have lower levels of temperance and they are also more likely to engage in risk-taking behavior. In addition, the marginal deterrent effect of the death penalty is weak because life imprisonment is a particularly severe sanction for a young adult." (footnotes omitted)).

Because the execution of nineteen-year-olds is categorically unconstitutional, Mr. Hairston is not required to show that he in particular was sufficiently immature at the time of his

crime to qualify for the exemption. *See Pike*, 2019 WL 3955846, at *10 (Stranch, J., concurring) ("I believe that society's evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense."). Nevertheless, Mr. Hairston's specific circumstances do in fact demonstrate that he is a suitable candidate for the prohibition, as he demonstrated notably immature conduct around the time of the offense. As discussed in Dr. Steinberg's report, there is substantial evidence that Mr. Hairston was a passive follower who was influenced to engage in crime by older peers; that the murders were impulsive acts; and that Mr. Hairston's behavior after the offense "was marked by the sort of reward-focused, shortsighted, and impetuous actions characteristic of adolescents." R. 309.

In particular, Dr. Steinberg observed that Mr. Hairston was greatly impacted by two older men with lengthy criminal records, each of whom played major roles in his criminal conduct. R. 307–08. As Dr. Steinberg references in his report, one of these men felt that calming Mr. Hairston down after a violent incident "was like dealing with my 14-year-old son when he had his heart broken for the first time." R. 308. The other man drove the vehicle associated with the Idaho murders and "made the decisions about where and when to travel." R. 308. Dr. Steinberg also encountered indications "that the murders committed in Idaho were impulsive acts committed under emotionally arousing circumstances," insofar as the defendants planned a robbery but then committed a murder on the "spur of the moment" "motivated by the prospect of an immediate reward—cash." R. 308. Lastly, Dr. Steinberg felt that "Mr. Hairston's behavior following the crime" "was marked by the sort of reward-focused, shortsighted, and impetuous actions characteristic of adolescents." R. 309. For example, he signed his own name on receipts

for items bought with the victims' credit card, suggesting that "he clearly . . . was more focused on his purchases than on avoiding apprehension." R. 309. Mr. Hairston's purchases likewise reflected a childlike personality, including "cowboy clothes, remote-control cars, and stereo equipment." R. 309. By contrast, Mr. Hairston's older accomplice "used a false name when signing credit card slips and refused to permit police to search his car without a search warrant." R. 309. *He* behaved like an adult, while Mr. Hairston acted "like an adolescent." R. 309.

Thus, Mr. Hairston is especially deserving of a rule protecting those under the age of twenty-one from the death penalty. Moreover, if the Court rejects the categorical exception for those under twenty-one, it should still vacate Mr. Hairston's death sentence based on his own lack of maturity at the time of the offense.

2. Evolving Standards in Idaho

There is also Idaho-specific evidence of an emerging agreement within the state that defendants twenty-one and below are still developing and should not be condemned as beyond hope. This evidence suggests that even if the Court finds that there is no national consensus validating Mr. Hairston's Eighth Amendment claim, there is still an Idaho consensus validating his claim under the cruel-and-unusual-punishment clause of the state constitution.

As an Eighth Amendment matter, it is well-established that defendants cannot be sentenced to death when the penalty conflicts with the evolving standards of decency. *See, e.g.*, *Kennedy*, 554 U.S. at 435; *Roper*, 543 U.S. at 560–61; *Atkins*, 536 U.S. at 321. The Idaho Constitution's cruel-and-unusual-punishments clause uses the same language as the Eighth Amendment. *Compare* U.S. Const., Am. VIII, *with* Idaho Const., Art. I, § 6. In Idaho, the

"analysis of whether a sentence violates Article I, Section 6, has traditionally tracked the U.S. Supreme Court's Eighth Amendment jurisprudence." *State v. Draper*, 261 P.3d 853, 876 (Idaho 2011). Because the Eighth Amendment compels an evolving-standards approach on a national scale, and because Article I, Section 6 contains the same language and applies only to Idaho, it compels the same approach on a state-wide scale.

Mr. Hairston was sentenced to death on November 14, 1996. Between that date and the present, sentences were imposed on at least twenty-five defendants in Idaho who were convicted of first-degree murder and who were under twenty-one at the time of their offense and were constitutionally eligible for the death penalty. Not a single one of those defendants was sentenced to death. *See infra* at 20. This is compelling evidence that Idaho no longer believes an under-twenty-one defendant should be given up for dead by the legal system.

There are two types of defendants who were under twenty-one and eligible for death. One class encompasses defendants who were under twenty-one but older than fifteen and were sentenced prior to *Roper*. For during that period, it was unconstitutional to execute a defendant who was fifteen or younger. *See Thompson*, 487 U.S. at 838.[11]

The second class of defendants covers those who were under twenty-one but eighteen or older and were sentenced after *Roper*. For by then, it was unconstitutional to execute a defendant who was under eighteen. *See Roper*, 543 U.S. at 568.

[11] If the Court determines that juvenile cases are irrelevant to Mr. Hairston's claim, he argues in the alternative that there are enough eighteen-to-twenty examples (twenty-one) to demonstrate the evolving standard of decency against executing late adolescents in Idaho.

Taking these two groups together, the data sample includes twenty-five defendants and every one of them received a sentence less severe than death. *See* R. 272–74 & exhibits cited therein[12]; R. 747, 750–52, 754–56, 759. And that does not even account for the numerous adolescent defendants who were charged with first-degree murder but then convicted of lesser offenses. They all wind up ineligible for the death penalty, because the punishment is on the table only for first-degree murder. *See* Idaho Code § 19-2515. Nonetheless, the State has elected to remove them from the capital world, even though many of them could likely have been convicted of first-degree murder if the prosecution had so desired. If anything, then, the statistics here underrepresent the degree to which Idaho has given up on capital punishment for adolescents.

Significantly, eleven Idaho defendants were sentenced to death during the same period in which the younger first-degree murder convicts were spared. *See State v. Hall*, 163 Idaho 744, 765 (2018), *cert. denied*, 139 S. Ct. 1618 (2019); *State v. Abdullah*, 158 Idaho 386, 405 (2015); *State v. Dunlap*, 155 Idaho 345, 357 (2013) (resentencing); *State v. Shackelford*, 150 Idaho 355, 362 (2010); *State v. Payne*, 146 Idaho 548, 557 (2008); *State v. Lovelace*, 140 Idaho 53, 59 (2003); *State v. Fetterly*, 137 Idaho 729, 730 (2002) (resentencing); R. 577, 585, 590, 611. All

[12] The record in this appeal comprises a public and a sealed volume, both of which contain court documents from Idaho murder cases to show the age of the defendants. In the public volume, personal identifiers have been redacted pursuant to I.R.C.P. 2.6, including days and months for dates of birth. For consistency and ease of reference, this brief cites only the public record. If the Court wishes to confirm any of the statements here about the ages of defendants for whom the redactions prevent a precise calculation, it can review the corresponding exhibits in the sealed record, which have the same numbers.

of these defendants were over twenty-one. R. 543, 550, 563, 571, 579, 580, 591, 601, 608, 615, 619, 622, 623, 626, 633, 634, 637, 641, 645.

The fact that death sentences in Idaho are now levied exclusively on defendants older than twenty-one, and that less harsh sentences are given to younger offenders, is the result of decisions by a number of different actors, including prosecutors, judges, and juries. All of these actors reflect the sentiments of Idaho citizens, and all of these decisions therefore reflect the consensus in Idaho that defendants under the age of twenty-one not be sentenced to death. Moreover, the consensus covers a broad swath of the state. Of the twenty-five defendants under the age of twenty-one who were convicted of first-degree murder and not sentenced to death since Mr. Hairston's case, a total of sixteen different counties are represented.[13] These counties are dispersed throughout Idaho. *See* R. 654. Collectively, the counties represent roughly eighty percent of Idaho's total population. *See* R. 656. The counties also cover all seven judicial districts. *Compare* Idaho Code § 1-802 et seq. (listing the counties in each district), *with supra* at 20 and records cited therein (showing that there were under-twenty-one defendants in each district). In short, the agreement that individuals under twenty-one are not mature enough to face the death penalty is an agreement endorsed in all corners of the state.

Importantly, this agreement is shared in counties that have readily pursued death sentences against *adult* offenders. If one compares the counties where death sentences have been

[13] The counties are Ada, Bannock, Bingham, Bonner, Bonneville, Boundary, Canyon, Elmore, Jefferson, Kootenai, Latah, Madison, Power, Shoshone, Twin Falls, and Washington. *See supra* at 20 and records cited therein.

imposed since Mr. Hairston's with the counties in which young first-degree murderers have *not* been sentenced to death, there is significant overlap. *Compare Hall*, 163 Idaho 744 (reflecting a death sentence in Ada County); *Abdullah*, 158 Idaho 386 (same); *Payne*, 146 Idaho 548 (same); *Shackelford*, 150 Idaho 355 (Latah County); *Lovelace*, 140 Idaho 53 (Bonner County); *Fetterly*, 137 Idaho 729 (Canyon County); R. 589 (Shawn Smith, in Bonneville County); R. 584, 585 (J.D. Renfro, in Kootenai County), *with* R. 347–51, 362–65, 372–78, 391–98, 453–60, 462–68, 477–83, 491–92, 494–99, 501–02, 504–09, 523–28 (indicating that death sentences were not imposed on young death-eligible defendants from those same counties). The very same communities have thereby shown that they are both willing to seek capital punishment when they feel it is appropriate and unwilling to seek it against young defendants, proving that adolescent death sentences are no longer consistent with the state's values.

Temporally as well, the death sentences demonstrate a steady march away from executing adolescents. During the relevant time period (November 16, 1996 to the present), under-twenty-one defendants have been given sentences less than death in fifteen different years. *See* R. 658.[14] Furthermore, the life sentences are quite evenly dispersed over time. If one considers the years in which *no* under-twenty-one defendant was sentenced for first-degree murder, none of them occur in consecutive years. *See id.* These life sentences are not the product of a temporary fad. They are the product of a consistent trend over a long period of time, just as one would expect with an evolving standard of decency.

[14] The cited exhibit reflects young defendants with non-death sentences in a cumulative fashion, reflecting how each new sentence adds to the previous sentences over time.

The fact that young defendants were spared the death penalty after Mr. Hairston was condemned is a reflection of evolving standards of decency rather than of any difference in the crimes involved. That is underscored by the fact that many of the later defendants' offenses involved extreme aggravation that was absent from Mr. Hairston's own case.

For example, several of the victims in the other cases suffered painful, long deaths. *See State v. Williams*, 135 Idaho 618, 620 (2001) ("Williams did not merely participate in the murder of another human being; he inflicted a protracted beating in which the victim was terrorized and tortured, and while engaged in this activity, Williams taunted and mocked his victim."); *State v. Eby*, 136 Idaho 534, 536 (Ct. App. 2001) (describing how the victim was beaten to death by blows to the head "with a baseball bat and with a large wrench"); R. 416 (indicating that the defendant beat a child to death); R. 454 (showing that the defendant murdered the victim by kicking him, striking him with rocks, and throwing him off a cliff). By contrast, the victims in Mr. Hairston's case were both shot twice in the head in swift succession and both succumbed from their wounds rapidly. R. 318–19. Additionally, a number of the other defendants had child victims. R. 354, 381, 416. The victims in Mr. Hairston's case were adults. *See State v. Hairston*, 133 Idaho 496, 500–01 (1999). One defendant was found guilty of committing a murder for hire, *see State v. Meister*, 148 Idaho 236, 238 (2009), which constitutes an aggravating factor under state law, *see* Idaho Code § 19-2515(9)(d). Again, that factor was absent from Mr. Hairston's case. Another defendant was convicted of raping and murdering the victim, *see State v. Tapp*, 136 Idaho 354, 358 (Ct. App. 2001), while there was never a

suggestion that any sexual crimes were committed as part of the homicides in Mr. Hairston's case.

In short, many young defendants whose cases followed Mr. Hairston's had serious aggravation that was not present in his own crime. The common thread of these other cases was not that their crimes were all less heinous than Mr. Hairston's. Rather, the common thread was that they benefitted from Idaho's growing consensus against executing late adolescents. Mr. Hairston simply had the misfortune to be sentenced before there was a universal practice in Idaho of avoiding the death sentence for late adolescents, so his youthfulness did not receive the decisive weight that it should have.

That is not to say that Mr. Hairston's crime was devoid of aggravation. Most obviously, there is the fact that the crime could be considered an "execution-style" murder. Yet other young defendants were also convicted of such murders and did not receive death sentences. *See Booth v. State*, 151 Idaho 612, 614 (2011) (discussing a case in which the defendant shot the victim "five times using an improvised silencer made out of a plastic soda bottle"); *Meister*, 148 Idaho at 238 (involving a case where the defendant accepted $1,000 in exchange for killing the victim, approached the back entrance of her trailer, and when she opened it shot her "twice, once in the chest and once in the face"); *State v. Brown*, 130 Idaho 865, 867–69 (1997) (describing a defendant who asked the victim for a drink of water and as he obliged shot the victim "once in the back of the head with a .357 magnum handgun" and then stole various items from him).

It also weighed in favor of a death sentence for Mr. Hairston that there were two victims. But another young defendant had two victims as well and still got a life sentence. *See* R. 407–

08. And many of the adult defendants in Idaho sentenced to death in the relevant time period were given that penalty for murdering a single victim, so that circumstance alone cannot be relied upon here as a distinguishing feature. *See Hall*, 163 Idaho at 765–66; *Abdullah*, 158 Idaho at 405–14; *Payne*, 146 Idaho at 555–57; *Lovelace*, 140 Idaho at 58–59; *Fetterly*, 137 Idaho at 730.

A final aggravating factor in Mr. Hairston's case was that robbery was committed along with the murder. *See Hairston*, 133 Idaho at 509. As before, though, that factor is equally present in several other cases involving young defendants. *See* R. 367, 373, 423, 436, 478, 523.

In light of this evidence, there is no basis for assuming that other young defendants are being protected from the death penalty because their crimes were less aggravated than Mr. Hairston's. Instead, youth is their defining feature. Had Mr. Hairston been sentenced after the evolving standard had solidified, he too would have joined their ranks rather than being sent to death row.

In summary, Idaho no longer views defendants under the age of twenty-one as so far beyond hope that they can be exterminated by the State, and the practice is therefore cruel and unusual under the state and federal constitutions.

3. The district court committed reversible error in denying Claim 1

The district court's rejection of the foregoing reasoning was mistaken.

For starters, the district court applied the wrong test to the claim. It employed "a presumption in favor of the" State, under which it was "obligated to seek an interpretation" that

foreclosed the aggrieved party's claims. R. 778. Governed by that standard, relief would only be appropriate, in the district court's view, "in clear cases." R. 778.

The rule utilized by the district court is appropriate when a party is attacking the constitutionality of a statute or regulation. *See Regan v. Denney*, 165 Idaho 15, 19, 21–27 (2019); *Stuart v. State*, 149 Idaho 35, 40, 44–48 (2010); *Lochsa Falls, LLC v. State*, 147 Idaho 232, 237, 240–42 (2009); *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 872–73 (2007). Mr. Hairston lodged no such attack. For there is no statute that says late adolescents *can* be executed. Rather, Idaho simply has a statute that authorizes the death penalty for defendants convicted of first-degree murder. *See* Idaho Code § 19-2515. It has always been the judiciary's independent duty to determine what categories of defendants are constitutionally ineligible for death. *See Hall*, 572 U.S. at 710 (reiterating that the Court "must express its own independent determination" about what categories of defendants are shielded from the death penalty by the evolving standard of decency). There is no legislative judgment under review, and nothing to defer to.

By subjecting Mr. Hairston to a heightened standard, the district court erred. The inquiry should instead have asked, as in every post-conviction case, whether Mr. Hairston had proven his allegations "by a preponderance of the evidence." *Marr v. State*, 163 Idaho 33, 34 (2017). Because the district court's entire analysis was colored by its incorrect frame of reference, a remand would be salutary for that reason alone, so that the case can be reviewed below through the right lens. *See, e.g.*, *Climax, LLC v. Snake River Oncology of E. Idaho, PLLC*, 149 Idaho 791, 798 (2010) (determining that the district court abused its discretion by applying the wrong

legal standard and remanding for it to use the correct one); *Robertson v. Richards*, 115 Idaho 628, 629 (1987) (similar).

If the Court declines to remand for the trial judge to review the case again with the true test in hand, it should reverse with instructions to grant relief, or—in the alternative—to hold an evidentiary hearing.

This is so because, apart from using the incorrect test, the district court's analysis of the evidence was fundamentally flawed. In its order on the petition, the district court rightfully acknowledged that "much of the reasoning and data" behind the prohibition of juvenile death sentences in *Roper* "is analogous to the reasoning and data cited in favor of banning the death penalty as against all young adult defendants in general." R. 779. It also recognized that "the statistical samples and scientific and legal data presented by Mr. Hairston were compelling." R. 781. Even so, the district court went on to make the conclusory statement that Mr. Hairston's presentation failed to supply enough evidence of either a national consensus against death sentences for young adults or an Idaho consensus in the same direction. R. 780. In the district court's eyes, while "compelling," the evidence of a consensus was "still emergent." R. 781.

The district court's summary assertions were not supported with any articulated reasoning or any meaningful engagement with the extensive evidence proffered by Mr. Hairston, none of which was disputed by the State. And, perhaps more fatally, the assertions are inconsistent with binding caselaw from the U.S. Supreme Court. As pointed out earlier, there are *more* jurisdictions that have moved away from late-adolescent executions than had abandoned juvenile executions at the time of *Roper*. *See supra* at 9–10. It is simply not the case that there

is insufficient evidence of a national consensus, notwithstanding the district court's unsubstantiated ruling to the contrary. The numbers are in and the consensus has fully emerged, as dictated by *Roper*.

Nor is it persuasive to say, with the district court, that the evidence is inadequate on the state-wide front. Since Mr. Hairston's death sentence was imposed almost a quarter-century ago, not a single adolescent in Idaho has been given the same punishment, even though dozens have been convicted of the identical offense around the state, and often under more aggravating circumstances. *See supra* at 19–25. If that is not enough evidence of an Idaho consensus, it is difficult to imagine what would be.

The district court faulted Mr. Hairston for not pointing to any "controlling case holding what he urges." R. 781. But it is every court's responsibility to interpret the cruel-and-unusual-punishment clauses of the state and federal constitutions. *See Lanham v. Fleenor*, 164 Idaho 355, 360 (2018) ("This function, determining the applicable law, is a bedrock of judicial decision-making. As Chief Justice John Marshall wrote in the landmark decision *Marbury v. Madison*, 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 necessarily expound and interpret that rule."). The highest court in the country has declared that the scope of cruel-and-unusual-punishment clauses is set by the evolving standards of decency. *See supra* at 18. Those standards are by definition in flux. It follows that every court has an obligation to assess the state of the consensus at the time it conducts its review. The fact that no higher court has done so yet was an improper basis to avoid the necessary judicial work that was called for below, and

it is an improper basis to avoid the necessary judicial work that is called for now. *See, e.g.*, *Cruz*, 2018 WL 1541898, at *14–25 (extending a similar rule based on new information); *State v. Santiago*, 122 A.3d 1, 48–82 (Conn. 2015) (declaring the death penalty in Connecticut unconstitutional after reviewing the practices on the ground both state-wide and around the country); Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 Wis. L. Rev. 669, 682 & nn. 69, 70 (2018) (hereinafter "Gupta-Kagan") (recounting a case in which a Kentucky state trial court granted relief on an identical claim).

It was doubly erroneous for the district judge to pin his ruling to an absence of precedent when the evidence bolstering Mr. Hairston's claims has never been addressed by this Court or the U.S. Supreme Court. The question presented in *Roper* was whether "the imposition of the death penalty on a person who commits a murder at age *seventeen* [is] cruel and unusual." Petition for Writ of Certiorari, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2003 WL 26089783, at *i. Since then, neither tribunal has ever taken up the question of whether *Roper* should be extended to a slightly older cohort. And certainly neither tribunal has had an opportunity to consider the substantial new evidence brought forward by Mr. Hairston, most of which did not exist at the time of *Roper*. That is obviously true of the legal developments discussed above. It is also true of the science. As Dr. Steinberg attested: "At the time of *Roper v. Simmons* . . . the science of adolescent brain development was still in its early stages, and there were no systematic studies of brain development that focused specifically on the period between 18 and 21." R. 299; *accord* R. 296 (describing how it was "[i]n the past ten years" that "additional scientific evidence has accrued indicating that many aspects of psychological and

neurobiological immaturity characteristic of early adolescents and middle adolescents are also characteristic of late adolescents"); R. 298 ("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 beyond age 20."). It is illogical to hold prior cases against Mr. Hairston when those courts did not have his claim or his evidence before them.

Because Mr. Hairston advanced in the district court a voluminous body of uncontested evidence proving the merits of Claim 1, he is entitled to relief as a matter of law. *See* Idaho Code § 19-4906(c) (allowing Idaho courts to summarily grant relief where the petitioner "is entitled to judgment as a matter of law"). This Court should accordingly remand with instructions for the petition to be granted and the death sentence vacated.

In the event the Court does not do so, a remand for an evidentiary hearing is in order. At a minimum, the summary denial of relief is unjustified. Accepting all of Mr. Hairston's allegations as true, and drawing all inferences "liberally" in his favor, as the Court must, *Charboneau v. State*, 140 Idaho 789, 792 (2004), he has presented a substantial amount of information to suggest that there is a consensus on a both a national and a state level against executing adolescents. Those allegations cannot be dismissed without an evidentiary hearing. *See, e.g., McKay v. State*, 148 Idaho 567, 572 (2010) (remanding a post-conviction case for an evidentiary hearing); *Hauschulz v. State*, 144 Idaho 834, 839 (2007) (same). Such a hearing would be especially beneficial because Dr. Steinberg could explain and elaborate upon his report, the State could subject his opinion to cross-examination, and the district court could

render an opinion on this important issue based on the fullest, most comprehensive record possible. *See Cruz*, 2018 WL 1541898, at *3 (noting that Dr. Steinberg testified at a similar hearing in federal district court); Gupta-Kagan, *supra*, at 682 & nn. 69, 70 (2018) (mentioning that Dr. Steinberg testified in a Kentucky state trial court before the judge granted relief on an identical claim). There is at least "a genuine issue of material fact" as to the evolving standards and "an evidentiary hearing must be conducted." *Dunlap*, 159 Idaho at 295.

If the Court is not convinced that either relief or an evidentiary hearing are yet warranted, it ought to remand for the district judge to take into account the new evidence in support of a national consensus that was not addressed below. Most significantly, two states have subsequently abolished the death penalty for all offenses. *See* H.B. 455, 2019 Gen. Ct., 166th Sess. (N.H. 2019); *Gregory*, 427 P.3d at 633–37. Plus, California has declared a moratorium on executions. *See supra* at 7 n.8. That development is especially salient because California has the largest number of death-row inmates in the country by a hefty margin and is by far the most populous state to boot. *See* James R. Acker, *Snake Oil With a Bite: The Lethal Veneer of Science and Texas's Death Penalty*, 81 Alb. L. Rev. 751, 751 n.2 (2017–2018) (calculating that California had 744 prisoners on death row as of Spring 2017, and the next closest state was Florida, which had only 386); Mirko Bagaric & Peter Isham, *A Rational Approach to the Role of Publicity and Condemnation in the Sentencing of Offenders*, 46 Fla. St. U. L. Rev. 239, 251 n.54 (2019) ("As of 2017, California was the most populous U.S. state with 39.5 million residents; Texas ranked second with 28.3 million residents."). California's transition into the anti-death column is a seismic development in the evolving-standards calculus. Assuming this Court is not

prepared to declare a consensus now, it would be appropriate to send the case back down so the district judge can look at the much stronger new data and analyze it in the first instance. *See Herrera v. Estay*, 146 Idaho 674, 681 (2009) (remanding for the district court to address an issue in the first instance).

In overview, Mr. Hairston should be granted relief on Claim 1 or, in the alternative, an evidentiary hearing.

B. Mr. Hairston's death sentence is unconstitutional because the mitigating factors associated with his youth were not given proper consideration.

When by dint of his age a defendant belongs to a group that is categorically less deserving of a certain punishment, he is constitutionally entitled to probing consideration of the features associated with youthfulness before he receives that punishment. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016) (holding that a defendant who is under eighteen cannot be sentenced to life without parole unless there is "[a] hearing where youth and its attendant characteristics are considered as sentencing factors"). Specifically, the sentencer in such a situation must consider the following factors:

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

Id. at 733 (quoting *Miller*, 567 U.S. at 471). The promise of that consideration is heightened in a capital case, where the defendant also has a constitutional right to present any evidence that

might weigh in favor of life. *See Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality op.). When the sentencer does not consider these factors, post-conviction relief must be granted and the prisoner must receive a new penalty hearing. *See Windom v. State*, 162 Idaho 417, 424–25 (2017), *cert. denied*, 138 S. Ct. 977 (2018).

Montgomery dealt with under-eighteen defendants sentenced to life without parole. *See Montgomery*, 136 S. Ct. at 732. However, Mr. Hairston established above that the eighteen-year cutoff for capital cases is no longer consistent with the evolving standards of decency. *See supra* at Part IV.A. For the same reasons, the Constitution obligates a sentencing court to consider the special mitigating force of youth before condemning a nineteen-year-old boy to die at the State's hands. *See Cruz*, 2018 WL 1541898, at *14–25 (extending the *Montgomery* rule from defendants under eighteen to defendants under nineteen); *People v. House*, --- N.E.3d ---, 2019 WL 2718457, at *12–14 (Ill. Ct. App. 2019) (similar).

That constitutionally required consideration did not take place at Mr. Hairston's sentencing. Not a single expert testified for the defense at the penalty phase. *See* R. 693–703. By definition, then, there was no consideration of the neurological and psychological evidence distinguishing late adolescents from older defendants. Although there were sporadic references by lay witnesses to the fact that Mr. Hairston was, as a child, small for his size and lagging behind his peers, *see* R. 696, there was no testimony about any of the *Montgomery* factors outlined earlier.

Furthermore, in the trial court's fifteen-page written explanation of its sentencing determination, it conducted only the most perfunctory analysis of Mr. Hairston's youth as mitigating. R. 313–27. While the trial court found Mr. Hairston's age at the offense to be mitigating, R. 316, it barely addressed the issue. The only comment the Court made that could even arguably be considered substantive was: "The fact that Mr. Hairston is now only twenty (20) years of age is indeed troubling to this Court; however, this fact is not a compelling mitigating factor regarding the circumstances of these murders." R. 323.

Such cursory statements do not come remotely close to the searching, detailed review of youth and the specific mitigating effects associated with it that is required under *Montgomery*, *Miller*, and *Windom*. The sentencing judge certainly did not canvass the various ways in which Mr. Hairston's youth counseled against death. Consequently, Mr. Hairston did not receive the process to which he was entitled, and his sentence is unconstitutional for that reason as well.

The district court denied Mr. Hairston's second claim for the exact same reasons that it rejected his first. *See* R. 783–84. Accordingly, its decision should be reversed for the same reasons outlined earlier, and Mr. Hairston respectfully requests relief or the alternative remedies set forth there.

V. CONCLUSION

Mr. Hairston was a nineteen-year-old boy when he committed the acts for which he is now on death row. As a society, we do not let kids of that age do a host of things, including buy alcohol, because they tend to be reckless and impulsive. The latest science confirms the same qualities, and shows that people who are so young have trouble controlling their behavior and

resisting bad influences. Legal developments point in the same direction. They demonstrate that America as a whole—and Idaho specifically—is no longer comfortable with having the government kill a defendant who was too immature to fully understand the consequences of his actions and who is capable of growing beyond the person he was at the worst moment of his short life. Mr. Hairston is such a defendant, and he respectfully requests that the Court set aside his death sentence or, in descending order of preference, that it (1) remand for an evidentiary hearing; (2) remand for the district court to apply the correct standard; and/or (3) remand for the district court to analyze the latest evidence in support of the claims.

Respectfully submitted this 28th day of August 2019.

/s/ Jonah J. Horwitz
Jonah J. Horwitz
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August 2019, I caused to be served two true and correct copies of the foregoing document by the method indicated below, postage pre-paid where applicable, addressed to:

L. LaMont Anderson	_____ U.S. Mail
Deputy Attorney General	_____ Hand Delivery
Chief, Capital Litigation Unit	_____ Facsimile
Statehouse Mail, Room 10	_____ Federal Express
PO Box 83720	__X__ ICourt file and serve
Boise ID 83720-0010	

/s/ Jonah J. Horwitz
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