CASE No. _____

In the Supreme Court of the United States

OCTOBER 2016 TERM

RONALD PHILLIPS,
Petitioner-Appellant,

v.

STATE OF OHIO,
Respondent-Appellee.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: EXECUTION DATE JULY 26, 2017)

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QUESTION PRESENTED

Capital Case

I

Is the infliction of the death penalty on a person who was nineteen years old at the time of the offense cruel and unusual punishment, and thus barred by the Eighth and Fourteenth Amendments?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Constitutional Provisions

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald Phillips respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio, dated February 22, 2017. *State v. Phillips*, Entry (Feb. 22, 2017), attached hereto. (Appx. 0001.)

OPINIONS BELOW

The Supreme Court of Ohio's decision declining review of the federal constitutional claims raised by Petitioner in that court is reported at *State v. Phillips*, 2017-Ohio-573, 2017 Ohio LEXIS 293 (Ohio, Feb. 22, 2017). (Appx. 0001.)

The February 23, 2015 journal entry of the trial court dismissing Petitioner's successor post-conviction petition is attached hereto. (Appx. 0002.) *State v. Phillips*, Court of Common Pleas, Summit County, Case No. CR 1993 02 0207(A), Journal Entry (Feb. 23, 2015).

The Ninth District Ohio Court of Appeals' affirmance of the trial court's opinion is reported at *State v. Phillips*, 2016-Ohio-1198, 2016 Ohio App. LEXIS 1096 (Ohio App., Mar. 23, 2016), and is attached hereto. (Appx. 0008.)

JURISDICTION

The Supreme Court of Ohio entered its order on February 22, 2017. The time for filing Petitioner's petition for a writ of certiorari was extended by the Honorable Justice Elena Kagan, to June 22, 2017. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Eighth and Fourteenth Amendments.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction.

Does the Eighth Amendment, as it currently applies, permit the execution of a teenage offender? In the modern era of capital punishment, this Court has periodically revisited this question. The time and circumstances are again ripe for its review. The line drawn in *Roper v. Simmons*, 543 U.S. 551 (2005), no longer comports with our standards of decency. Asking a teenager to pay for his crime with his life is too great a toll for a just and moral society to exact. This Court should accept review and hold that the Eighth Amendment prohibits capital punishment for those who have not yet reached the age our society reserves for the attainment of most privileges and responsibilities of adulthood—age 21.

B. The Capital Trial Proceedings.

Ronald Phillips, age 19, was indicted on February 1, 1993, for killing Sheila Marie Evans, age 3, the oldest daughter of his 26-year-old girlfriend. Among other non-capital charges, Phillips was charged with one capital specification for the aggravated murder of Sheila during the commission of a rape on or about January 18, 1993.

Phillips's capital trial began six months after indictment, on August 9, 1993. Phillips, still 19, was represented by court-appointed attorneys. He was convicted of all counts.

C. Sentencing.

The penalty phase began on September 7, 1993, and concluded the following morning with closing arguments.

1. Testimony

In total, six witnesses testified for Phillips: (1) Hazel Phillips, his grandmother; (2) Williams David Phillips, Jr., his older brother; (3) William David Phillips, Sr., his father; (4) Donna Phillips, his mother; (5) Dr. James L. Brown, a psychologist; and (6) Lonnie Bell, a longtime neighbor. Phillips made an unsworn statement. The witnesses described Phillips's childish activities, struggles in school, and deep emotional immaturity.

Donna, Phillips's mother, testified that Ronald never attended kindergarten and failed the first grade, which he had to repeat, because "[h]e was just more slow, you know, in doing things." (Mitigation Transcript ("MT") 64.)

Phillips also shared this fact in his unsworn statement: "I repeated the first grade cause I was a little slow." (MT 90.)

Hazel, Phillips's grandmother, stated that Phillips would talk to her about his model cars and his difficulty with schoolwork. (MT 21) "He likes school but he said 'sometimes I don't understand the answers,' and sometimes he'd say to me 'well, grandma, can you tell me?' I said 'nope, forget it.' I'd tell him that, I said, 'no, you forget it.'" (*Id.*) Her reason for not helping Phillips with his homework was because she had "had enough of schooling." (*Id.*)

Phillips's father, William, Sr., testified that Phillips "acted like he wanted to be an adult but he still was like a child." (MT 49-50.) He described his son's room at that time as being filled with "[a]ll his model cars" which Phillips had been building since about age 10. (*Id.*) Phillips would deviate from the easy-to-follow model instructions. (*See* MT 54 ("I don't care how it came in a package, the motor, says you build it this way, he'd try to build the motor a different way. He spend [sic] hours at a time upstairs in his room just working on models.").) Phillips's prized model was a "'59 Cadillac that looks like Elvis Presley['s]...he was so proud of that one....that's the first thing he used to show off to everybody because he was so proud of it. His models was his life until he met this girl [Shelia's mother, Fae Evans]." (MT 50.)

One of Phillips's older brothers, William, Jr., testified about Phillips's negative experiences at their high school, South Alternative School, which was a non-traditional school for kids who "have problems" or "need help." (MT 36.)

Phillips was still attending the high school at the time of these offenses. William, Jr. noted that Phillips was physically bullied by other students. (MT 38.)

A psychologist, Dr. James L. Brown, testified about Phillips's low I.Q. and his emotional immaturity. (MT 106-09, 113, 122.) His assessment "revealed that Mr. Phillips was essentially as he came across in the interview, a rather simple, emotionally immature, psychologically inadequate person." (MT 106.) Dr. Brown testified generally that Phillips needs a structured environment, alluding to Phillips's ability to adapt to incarceration. (MT 108-09.) He also noted that Phillips's I.Q. was "in the low average range." (*Id.*) Dr. Brown explained that Phillips was a "19-year old who came off much more like a 12-year old." (MT 107.)

Phillips's long-time neighbor, Lonnie Bell, a substance abuse counselor at a veteran's hospital, testified he had a close relationship with the Phillips family. (MT 129-30.) He explained that, with Phillips, "I always felt, I felt like there was some emotional problems over the years, not being a psychiatrist, I don't know, can't name them, I can't label them, I call it 18 going on 12". (MT 131.)

Several of the witnesses also testified to the fact that Phillips had no history of criminal offenses, either as an adult or as a juvenile (*see, e.g.,* MT 47, 77, 108), and that he was generally regarded as a helpful kid who was respectful of adults (*see, e.g.,* MT 19, 22, 49, 66.) The State attempted to contradict this mitigating testimony by cross-examining Phillips's parents and Dr. Brown about Phillips's school suspension for using vulgar language, fighting, and insubordination to a teacher. (MT 55-56; 79-81.)

2. Closing arguments.

In its closing argument, the State continued to use Phillips's behavior in high school against him as evidence of his character: "[He] has a combative personality, and I think that bears out with his school history. Any time he's in a position where he's under stress, where there is authority figures, he has difficulty dealing with it. He is, in fact, a violent person, even though he does not have a prior criminal history of violence." (MT 140-41.)

In a brief closing argument, spanning less than twelve pages of the transcript, defense counsel explained, "with the emotional immaturity of a 12-year old[,]" Phillips "is truly an individual who has one foot in childhood and one foot in adulthood," who "lacks significant skills to analyze and think through problems[,]" and "had a tremendous amount of difficulty trying to tell you his story." (MT 148-49.) Accordingly, "the youthfulness of this offender should clearly be considered and weighed appropriately as a mitigating factor in this case." (MT 146.)

In rebuttal, the State suggested that defense counsel "doesn't have a lot to talk about when it comes to mitigating factors," and while defense counsel "wants to change the laws" she, as a prosecutor, and the jury, are under a "sworn duty to follow the law." (MT 153.) The prosecutor then explained that "the matter of age, the matter of lack of a significant prior [criminal] history[,]" which are statutory mitigating factors under Ohio law, were instead up to "the jury, [to] determine whether or not these are mitigating factors and whether or not you want to consider them in reducing this Defendant's degree of blame and this Defendant's degree of punishment." (*Id.*)

To counter the defense's explanation of the crime as "a moment in this person's life, that he just lost it, that it was a fit of rage[,]" the State cited to Phillips's school suspensions: "This Defendant's way of dealing with life is through violence. And basically that's what the Doctor is saying. *His whole school record supports that; he is a violent person.*" (MT 156-57 (emphasis added).)

Reinforcing to the jury their "duty to follow the law" the prosecutor explained that "[i]f you follow the law, quite frankly, you're going to be doing justice by this man [Phillips] and if you follow the law, you're going to be doing your duty as to this man because, you see, he has been able to reap the benefits of our society. He's been permitted to reap the benefits, and he, too, deserves the consequences as do any of us if we commit these kind of crimes." (MT 158-59.)

The mitigation proffered by the defense—based almost entirely on Phillips's youth and severe emotional immaturity—was characterized by the State as offensive and not worthy of consideration by the jury: "[T]here is just no way the items that the Defense is trying to tell you that mitigate against [the crime], there is no comparison. It's almost impossible, as my Co-counsel said, to even stand up here and try to talk about it . . . . How can you compare what was offered here in mitigation against the aggravating circumstance in this case? I submit to you it's like comparing apples and oranges, it is almost unspeakable. . . . [D]eath is the appropriate penalty for that man for what he did." (MT 159-60.)

For Phillips's jury, life without the possibility of parole (LWOP) was not a sentencing option; it did not become an option in Ohio until July 1996.

Therefore, the maximum non-capital sentence Phillips could have received was 30 years to life, meaning that then-19-year-old Phillips could have been released as young as age 49 were he not given a death sentence. (*See* MT 163.) The only way for the jury to ensure he was never released was to impose death. Nonetheless, according to the juror tally sheet, at least one juror voted initially for a sentence of 30 years to life.

The jury recommended the death penalty. (MT 174, 177.) On September 14, 1993, the court sentenced 19 year-old Phillips to death. In its sentencing opinion imposing the death sentence, the trial court noted that, "unlike many defendants in cases such as this," Phillips "appears to have a supportive family" and there was no evidence that Phillips had been abused or mistreated as a child. *State v. Phillips*, Court of Common Pleas, Summit County, Case No. CR 1993 02 0207(A), sentencing opinion (Oct. 5, 1993).

D. State Court Appeals.

1. Direct appeal.

Phillips's conviction and sentence were affirmed on direct appeal by the court of appeals and the Ohio Supreme Court. *State v. Phillips*, Case No. 16487, 1994 WL 479164 (9th Dist. August 31, 1994); *State v. Phillips*, 74 Ohio St. 3d 72, 656 N.E. 2d 643 (Ohio 1995) (Appx. 0023.)

In its independent proportionality review of Phillips's death sentence, the Ohio Supreme Court discounted the mitigating value of the evidence presented regarding his youth. The court afforded "little weight" to Phillips's young age:

"This court has determined in prior cases that *when a defendant kills at the age of eighteen or nineteen, the element of youth pursuant to R.C. 2929.04(B)(4) is entitled to little weight.* Accordingly, we assign little weight to this factor." *Phillips*, 74 Ohio St. 3d at 105 (internal citations omitted and emphasis added) (Appx. 0047-48.) Likewise, Phillips's emotional immaturity, and other youthful characteristics which contributed to the crime, were assigned little or no weight: "Immaturity, however, deserves little if any weight in mitigation. *Many, if not most, murderers are immature, and their crimes result from immature selfishness, ego or rage.*" *Id.* (internal quotation marks and citations omitted; emphasis added) (Appx. 0048.)

The Ohio Supreme Court also found negligible the evidence about Phillips's capacity for change, because of the countervailing accounts of his high school record. The court noted that, at trial Phillips "stresse[d] his ability to adjust to prison life" based on the testimony of Dr. Brown, who "expressed the opinion that appellant may do well in a highly structured, regimented atmosphere." *State v. Phillips*, 74 Ohio St. 3d at 104 (Appx. 0047.) While the court recognized that "[t]his evidence is mitigating if true," it found Dr. Brown's conclusion "*undermined by appellant's record of rebelling against authority*" as evidence by his "*suspen[sions] from school on numerous occasions, including once for gross insubordination to a teacher*, and again...for threatening the same teacher." *Id.* at 104-05 (emphasis added) (Appx. 0047.)

Similarly, the facts that Phillips's family members and neighbor described him as hardworking, respectful to adults, helpful to others, and uninvolved with drugs or alcohol, were counterbalanced in the court's view because Phillips "*was suspended on various occasions after the transfer to a new school* for fighting, threatening others, and assaulting a girlfriend." *Id.* at 105 (emphasis added) (Appx. 0047.)

2. Original post-conviction proceedings.

Phillips's post-conviction counsel uncovered substantial evidence of physical and sexual abuse, and neglect, within the Phillips household, which was not presented at trial. *See Phillips v. Bradshaw*, 607 F.3d, 199, 224-25 (6th Cir. 2010) (Cole, J. dissenting).

The accounts of abuse from Phillips's older half-sisters and half-brother, as documented in affidavits, were corroborated by hundreds of pages of Children's Services Board (CSB) records detailing the accounts of social workers following up on reported abuse. *Id.* Phillips's sister reported that his father—her step-father—molested them, beat them black and blue while naked, openly fondled them, and broke dishes over their heads. *Id.* Phillips's brother believed his step-father was having sexual relations with their younger sister, and the CSB had investigated a similar allegation. *Id.* These detailed accounts of abuse were especially relevant to Phillips's personal culpability for the sexual assault and beating death of Shelia since that type of physical and sexual abuse was the "status quo" in his home. *Id.* at 224, 229.

Phillips's first petition for post-conviction relief in state court was ultimately denied, without discovery or a hearing. The denial was affirmed on appeal. *State v. Phillips*, 2002-0hio-823 (Ohio App. Feb. 27, 2002); *State v. Phillips*, 95 Ohio St. 3d 1488 (2002), 769 N.E. 2d 403 (Ohio 2002).

E. Federal habeas proceedings.

In 2003, Phillips petitioned for a writ of habeas corpus. *Phillips v. Bradshaw*, Case No. 03-875 (N.D. Ohio). After an evidentiary hearing held in spring 2004, the district court ultimately denied Phillips's petition but granted him a certificate of appealability on six claims. *Phillips v. Bradshaw*, No. 5:03-CV-875, 2006 WL 2855077 (N.D. Ohio Sept. 29, 2006).

A divided three-judge panel affirmed the denial of the writ. The dissenting judge would have granted the writ because "[t]he jury that recommended Phillips be sentenced to death...heard little evidence about his childhood because his counsel failed to investigate the red flags leading to a large body of mitigating evidence that would have considerably altered the picture of his culpability." *Phillips*, 607 F.3d at 224 (Cole, J. dissenting).

F. Successor post-conviction petition.

On November 13, 2013, Ohio's governor issued Phillips a temporary reprieve of his November 14, 2013 execution, to investigate the feasibility of his request to donate a kidney to his ailing mother.[1] During that reprieve, this Court issued its opinion in *Hall v. Florida*, 134 S. Ct. 1986 (2014). There, the Court reasoned that,

[1] Mrs. Phillips passed away in January 2016.

though intellectual disability entitles a capital defendant to categorical protection from execution under the Eighth Amendment, it is the defining characteristics of that condition, and not a number assigned to it, which merits that categorical protection. *Id.* at 2001 ("Intellectual disability is a condition, not a number.").

Based on the reasoning in *Hall*, and the sea change in the law concerning the sentencing of youthful offenders, Phillips filed a successor post-conviction petition raising multiple claims. These claims included the question presented here: Is it cruel and unusual punishment to execute someone who was still a teenager at the time of their offense? In support of his petition, Phillips submitted additional evidence about his background and social history, and about the advancements made, since 1993, in the relevant fields of adolescent development, psychology, and neuroscience.

Without discovery or a hearing, the trial court granted the State's motion to dismiss the petition, "find[ing] no legal basis for such an expansion" of "Supreme Court precedent to be excluded from execution." *State v. Phillips*, Journal Entry at p. 6 (Appx. 0007.) Similarly, the state court of appeals found that "[a]lthough Mr. Phillips has cited to several United State Supreme Court cases that have issued since he was sentenced to die, he has not shown that any of those cases *specifically* created a right that would apply retroactively to him." *State v. Phillips*, 2016-Ohio-1198 at ¶ 27 (emphasis added) (Appx. 0019-20.)

On May 9, 2016, Phillips sought discretionary review in the Ohio Supreme Court. During the nine months his Memorandum in Support of Jurisdiction (MISJ)

was pending, Phillips's execution was becoming imminent.[2] On January 26, 2017, Phillips filed a federal habeas petition raising only two questions, including the one presented here. *Phillips v. Jenkins*, Case No. 5:17-cv-184 (N.D. Ohio). The Warden filed a motion to transfer the petition to the circuit court for a determination of whether it is second or successive, and Phillips opposed that motion. The district court has not yet ruled.

In the meantime, the Supreme Court of Ohio, on February 22, 2017, declined review of the Phillips's federal constitutional claims. (Appx. 0001.)

[2] Phillips has had numerous execution dates, and for several years has been first-in-line for execution, if and when executions resume in Ohio. As relevant here, while his MISJ was pending, Phillips's execution dates were January 12, February 15, and May 10, 2017. His current execution date is July 26, 2017.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE EXECUTION OF A PERSON WHO COMMITTED THEIR OFFENSE WHILE STILL A TEENAGER CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The Eight Amendment guarantees individuals the right to be free from excessive sanctions. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). An individual has the right to be free from cruel and usual punishment. This fundamental right springs from one of the basic "precept[s] of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

To determine which punishments are so disproportionate as to be cruel and unusual, the Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society.'" *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 560.

As explained in *Graham v. Florida*, the Court has taken the following approach in cases adopting categorical rules: First, it "considers objective indicia of

society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." 560 U.S. 48, 61 (2010) (internal citations and quotation marks omitted).

As discussed more fully below, and to give proper effect to the principles in *Atkins*, *Roper*, and other controlling cases, the Eighth Amendment requires the categorical exemption for youthful offenders to cover those who were under the age of 21 at the time of their offense.

A. Youth is a Condition Defined by Specific Characteristics.

"[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage[.]" *Roper*, 543 U.S. at 569 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). The governing case law from this Court recognizes three general differences between children, as defined as those under 18, and adults, defined as those over 18. These hallmark characteristics of youth are: (1) a lack of maturity, (2) an increased susceptibility to negative influences and outside pressures, and (3) an unformed or underdeveloped character. *Id.* at 569-70.

"First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

Second, the young are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" because, in part, they "have less control, or less experience with control, over their own environment." *Id.* at 569.

Finally, the character of someone under 18 "is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 570. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.*

"For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood[.]" *Id.* (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

These defining characteristics of youth make it difficult, even for experts, to differentiate between youthful offenders "whose crime reflects unfortunate yet

transient immaturity" and the rare youthful offender "whose crime reflects irreparable corruption." *See Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. 573); *see also Miller v. Alabama*, 567 U.S. 460, 471-72 (2012).

B. Age 18 is "a Conservative Estimate of the Dividing Line Between Adolescence and Adulthood."

"The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. As some members of this Court have already observed, "age 18...is in fact 'a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.'" *In re Stanford*, 537 U.S. 968, 971 (2002) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) (quoting *Brief for American Society for Adolescent Psychiatry et al. as Amici Curiae*).

Today, there is a strong professional consensus about adolescent brain development based on incontrovertible evidence. Neuroscientific evidence continues to demonstrate that "adolescent brains are not fully developed, which often leads to erratic behaviors and thought processes in that age group." *Id.* at 968 (internal citations and quotation marks omitted). "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68 (citing *Brief for American Medical Association et al.*; *Brief for American Psychological Association*).

Based on "the studies underlying *Miller*, *Roper*, and *Graham*—studies that establish a clear connection between youth and decreased moral culpability for criminal conduct[,]" and "the benefit of those advances in the scientific literature"—the Washington Supreme Court in 2015 overturned an outdated 1997 opinion of that court which barred any exceptional downward departure from a standard sentence on the basis of youth. *See State v. O'Dell*, 358 P.3d 359, 366-68 (Wash. 2015) (*en banc*). The state supreme court found that the "reasoning" supporting its earlier decision "has been thoroughly undermined by subsequent scientific developments[,]" *id.* at 368, because "we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." *Id.*

Courts have recognized that "[t]he young adult brain is still developing, and young adults are in transition from adolescence to adulthood." *People v. House*, 72 N.E.3d 357, 387 (Ill. App. Dec. 24, 2015) (quoting Kanako Ishida, *Young Adults in Conflict with the Law: Opportunities for Diversion, Juvenile Justice Initiative*, at 1 (Feb. 2015)). "Young adults are, neurologically and developmentally, closer to adolescents than they are to adults." *Id.*

"[T]he bright line cut-off of age eighteen does not accurately reflect the realities of adolescent brain development[.]" *United States v. C.R.,* 792 F. Supp. 2d 343, 502 (E.D.N.Y. May 16, 2011) (characterizing hearing testimony of Dr. Steinberg, the lead scientist who assisted the American Psychological Association's counsel in preparing its amicus brief in both *Roper* and *Graham*), *decision vacated and remanded sub nom. United States v. Reingold*, 731 F.3d

204 (2d Cir. 2013). As Dr. Steinberg explained during hearing testimony in *C.R.*, "impulse control, susceptibility to influence, thinking ahead, considering the future consequences of one's actions, those [psychosocial capacities] are all still immature at age 18." *Id.* at 505. "On average" "a normal 19-year-old's brain is not fully developed[.]" *Id.* at 503.

While "the age of 18 is the point where society draws the line for many purposes between *childhood* and *adulthood*[,]" *Roper*, 543 U.S. at 574 (emphasis added), science now accepts that there is a period of adolescence that exists between the stages of "childhood" and "adulthood" considered by the Court in drawing the line in *Roper*. During this period of adolescence, though legally an "adult," youths in this age category, on average, still possess all the relevant psychosocial deficiencies deemed worthy of protection in *Roper*.

C. There is a Consensus that Persons Under 21 at the Time of Their Offense Do Not Possess the Requisite Level of Culpability Necessary for the Government to Impose a Death Sentence Upon Them.

In addition to the existing scientific consensus, there is also a societal consensus about those under 21. Society agrees these young adults have neither attained a level of maturity, nor an appreciation for the consequences of their actions, sufficient to participate in numerous activities requiring those characteristics.

When setting the cutoff at 18, the Court acknowledged that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," however "a line must be drawn." *Roper*, 543 U.S. at 574.

That line was drawn at 18 because that is "the point where society draws the line for many purposes between childhood and adulthood." *Id.* Yet, society draws the line higher, at age 21, for a significant number of activities.

As noted by the Court in *Miller*, the decisions in *Roper* and *Graham* relied on significant gaps between juveniles and adults including that juveniles possess a "'lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking.'" *Miller*, 567 U.S. 471 ((quoting *Roper*, 543 U.S. at 569). These gaps remain at age 18, and our society accepts, particularly as to risky behaviors such as drinking or gambling, that the necessary faculties required to responsibly engage in these behaviors are only sufficiently developed, at a minimum, at age 21. Thus, as a result, we, as a society, exclude those who are over 18, but still under 21, from these types of activities.

Age 21—the line for entry into "full" adulthood—is also consistent with our societal values, as reflected through countless legislative enactments. Age-based classifications found in legislation across the U.S. reveal our implicit societal beliefs regarding levels of responsibility among the young. These regulations are abundant and well-known. They are directly relevant to the issue here. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 824-25 (1988) ("All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.").

Generally, laws using age 18 as a threshold age can be characterized broadly as involving inherently personal decisions. These decision include marriage, voting, entering the military, purchasing tobacco, pursuing (or abstaining) from certain medical treatments, and entering personal contracts. These decisions impact, either directly or primarily, the individual making the decision, and the individual usually can take their time in making the decision or acting upon it in the future.

On the other hand, laws using the age of 21 as a threshold generally govern activities or decisions that require the exercise of good judgment, self-control, or involve the weighing of risk. Such activities include purchasing and consuming alcohol, purchasing a handgun, casino gambling, and recreational marijuana use in states which permit it. These types of activities involve actions or decisions made in the relative short-term, which have the potential to jeopardize the health, finances, or physical safety of the person engaging in the activity or others.

Because the legislature may fail to act to extend protections to an unpopular or disfavored group, like criminal defendants, the Court aptly recognizes that in cases of this nature "[t]here are measures of consensus other than legislation." *Graham*, 560 U.S. at 62 (quoting *Kennedy*, 554 U.S. 433). "Actual sentencing practices are an important part of the Court's inquiry into consensus." *Id.* (citing *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982)); *see also Atkins,* 536 U.S. at 316; *Roper,* 543 U.S. at 564-65; *Kennedy,* 554 U.S.

supra at 412. In Ohio and throughout the country, there has been a marked decline in recent years in the imposition of new death sentences. Death Penalty Information Center (DPIC), *Death Sentences in the United States From 1977 By State and By Year.*[3]

In addition to the reduction in the number of new death sentences imposed, there has also been a precipitous drop in the number of executions actually carried out upon those who were under 21 at the time of their crime. A careful study analyzing the relevant data, conducted in 2016, concluded that executions of emerging adults—those who were 18, 19 or 20 at the time of their offenses—"are rare and occur in just a few states":

> From 2001 to 2015, twenty-eight states executed at least one adult, but only fifteen states executed anyone between eighteen and twenty. Over those fifteen years, a total of 130 emerging adults were executed, in comparison to 730 people (excluding pre-*Roper* juveniles) executed in total. Of those emerging adults, 77.69% of them were executed in just four states—Texas, Oklahoma, Virginia, and Ohio—whereas the top four full-adult executing states (which were the same, save the substitution of Florida for Virginia) accounted for only 61.17% of executions. Texas alone accounted for 55.38% of all emerging adult executions, but only 36% of full-adult executions.
>
> In other words, 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. In the last five years (2011–2015), the concentration of emerging adult executions has grown, even as the overall practice has become less frequent. Only nine states executed an emerging adult in that time, with Texas executing eighteen (representing 58.06% of all executions of this age

[3] Available at: https://deathpenaltyinfo.org/death-sentences-united-states-1977-present.

> group) emerging adults over those years. The next highest state, Georgia, executed just three emerging adults. In those five years, only thirty-one emerging adults were executed, out of 187 total executions. In 2015, only Texas executed any emerging adults at all, killing five.

Brian 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. L. & SOC. CHANGE 147, 152 (2016) (footnotes omitted). *See also* Andrew Michaels, *A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139 (2016).

The data in Ohio also confirms the evolution of standards of decency away from execution of youthful offenders. There were 42 death sentences imposed in Ohio upon youthful offenders who were between ages 18 and 21 at the time of their offense, during the fifteen-year period between 1981 (when capital prosecutions resumed in Ohio) and June 30, 1996 (when LWOP became available as a sentencing option). (*See* Exhibit 45 to Successor Post-conviction Petition (attached hereto at Appx. 0050).) During the eighteen-year period, from July 1, 1996 through 2014 (when Phillips filed his petition making this claim in state court), there were only 8. (*Id.*) While three additional individuals in this age category have been added to the list in the interim, to date, none of their death sentences has been reviewed nor affirmed by any appellate court. Nonetheless, the data indicates that the practice of sentencing those under 21 to

death is now increasingly rare, and that rarity reveals a national consensus opposed to their execution. *See Graham*, 560 U.S. at 62-65. *See also* Michaels, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 149-51, 168-72. (2016).

Although it is true that no state has enacted legislation raising the minimum age for death-eligibility above 18, that is likely because, instead of taking this incremental step, states have chosen to abandon the death penalty altogether. States which have abolished the death penalty are to be counted as part of the national consensus against the execution of those under 21. *See Hall v. Florida*, 134 S. Ct. at 1997.

Nineteen states (19) and the District of Columbia have abolished the death penalty either in full or for new offenses. *See* Death Penalty Information Center, *States with and without the death penalty*.[4] In eleven other states that still retain the death penalty as a sentencing option, no execution has taken place in at least ten years. *See Glossip v. Gross*, 135 S. Ct. 2726, 2773 (2015) (Breyer, J., dissenting) (citing to DPIC, *Executions by State and Year*). Thus, in total, 30 states have either formally abolished the death penalty or have not conducted an execution in more than a decade. *See id.* Accordingly, in practice, the *majority* of states have not executed *anyone* under 21 in over a decade.

It is of no consequence that legislation has not been enacted specifically in this regard—to "benefit" a disfavored group, capital defendants. That

[4] Available at http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

omission, when coupled with the multitude of laws establishing age-based distinctions between 18-year-olds on the one hand, and 21-year-olds on the other, supports the need in this context for this Court to recognize the inherent judgments embodied in those laws. Such laws reflect society's acceptance of meaningful differences between 18-year-olds and 21-year-olds which have significant impact on their respective culpability in the capital context. In this way, legislatures have already weighed the relevant issue countless times.

"The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. . . . An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). Because Phillips is seeking to vindicate a fundamental right protected by the Eighth Amendment, the minimum age for capital punishment is a question properly before the courts.

D. There is an Unacceptable Risk That the Brutal Nature of a Capital Crime Will Render the Sentencer Unable to Afford Mitigating Arguments Based on Youth Their Proper Weight.

A central feature of capital sentencing is an individualized assessment of the circumstances of the crime and the characteristics of the offender. "The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case." *Roper*, 543 U.S. at 572. As a result, raising the age of offenders protected by the categorical ban may seem unnecessary. But the risk is

too great that the sentencer will be unable to give youth, and its attendant characteristics, the mitigating value to which they are entitled.

The Court has voiced significant concern over the known "risks" which accompany the prosecutions of crimes which should, by definition, be factually among the "worst of the worst." When determining if a defendant accused of committing a capital crime is also among "the worst of the worst" offenders, the risk is "unacceptable" "that the brutality or cold-blooded nature" of the offense crime may "overpower mitigating arguments based on youth". *Id.* at 573. There is also the risk that youth will be improperly treated as an aggravating factor rather than a mitigating one. *Id.* Further, it is difficult even for experts to know when a youthful offender's actions reflect "transient immaturity" versus "irreparable corruption." *See id. See also Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016); *Miller*, 567 U.S. at 479-80.

Phillips's case exemplifies the potential for the facts of the crime, as presented by the State, to overwhelm the sentencer's ability to properly consider the weight of youth and its attendant features. Phillips presented information in mitigation at trial of his severe emotional immaturity, low-average I.Q., and struggles in school. He repeated the first grade, he was "more slow, you know, in doing things" (MT 64), he indulged childhood hobbies, including model cars, well into his late teens, and, as his father testified, he "acted like he wanted to be an adult but he still was like a child." (MT 49-50.) The psychologist, Dr. Brown, described Phillips as "a rather simple, emotionally immature, psychologically

inadequate person." (MT 106.) Phillips's I.Q. was noted to be "in the low average range." (*Id.*) Dr. Brown told the jury Phillips was a "19-year old who came off much more like a 12-year old" (MT 107), a sentiment echoed by Phillips's long-time neighbor, a substance abuse counselor, who testified "there was some emotional problems over the years, not being a psychiatrist, I don't know, can't name them, I can't label them, I call it 18 going on 12." (MT 131.) Several of the witnesses also noted that Phillips had no history of criminal offenses, either as an adult or as a juvenile (*see, e.g.*, MT 47, 77, 108), and that he was generally regarded as a helpful person who was respectful to adults. (*See, e.g.*, MT 19, 22, 49, 66.)

All of the characteristics that prompted the Court in *Roper* to recognize a categorical ban against the death penalty for offenders under 18 years of age were possessed by Phillips at the time of the subject offense: immaturity, an undeveloped sense of responsibility, impulsivity, vulnerability to negative influences including peer pressure (in his case, that of a much older woman), a lack of control or less experience with control over his environment, and unformed or transitory personality traits and character. *Roper*, 543 U.S. at 569-70. These characteristics were relevant and constitutionally required to be considered. *Eddings*, 455 U.S. at 116; Ohio Rev. Code § 2929.04(B)(4). Yet, this evidence was explicitly put to the side by the state courts, or used to reduce the mitigating value assigned to Phillips's youthful characteristics.

In its independent proportionality review, the Ohio Supreme Court afforded "little weight" to Phillips's age: "This court has determined in prior cases that *when*

a defendant kills at the age of eighteen or nineteen, the element of youth pursuant to R.C. 2929.04(B)(4) is entitled to little weight. Accordingly, we assign little weight to this factor." *Phillips*, 74 Ohio St. 3d 106 (internal citations omitted and emphasis added) (Appx. 0047.). Likewise, Phillips's immaturity, and other youthful characteristics such as sub-average intelligence, were assigned little or no weight: "Immaturity, however, deserves little if any weight in mitigation. *Many, if not most, murderers are immature, and their crimes result from immature selfishness, ego or rage.*" *Id.* (internal quotation marks and citations omitted and emphasis added) (Appx. 0048.)

Indeed, Phillips's youth was, if anything, used *against* him. The Ohio Supreme Court further improperly discounted Phillips's evidence regarding his youth and capacity for change. Phillips "stresse[d] his ability to adjust to prison life" based on the testimony of Dr. Brown who "expressed the opinion that [Phillips] may do well in a highly structured, regimented atmosphere." *Id.* at 104. While the court noted that this would be mitigating, Dr. Brown's conclusion was "undermined by [Phillips's] record of rebelling against authority" as evidenced by his "suspen[sions] from school on numerous occasions." *Id.* at 104-05 (emphasis added). Similarly, the facts that Phillips's family members and neighbor described him as hardworking, respectful to adults, helpful to others, and uninvolved with drugs or alcohol, were discounted by the court because Phillips "*was suspended on various occasions after the transfer to a new school . . . .*" *Id.* at 105 (emphasis added).

Though given the opportunity in 2016 to rectify the constitutional violation, the Ohio courts adhered to the outdated position they took in 1995 about the relevance of youthful characteristics when sentencing a youthful offender. *Phillips*, 2016-Ohio-1198 at ¶ 25 ("'[W]hen a defendant kills at the age of eighteen or nineteen, the element of youth . . . is entitled to little weight.' *Phillips* at 105. Likewise, '[i]mmaturity[] . . . deserves little if any weight in mitigation.' *Id.* Because Mr. Phillips did not satisfy his burden under R.C. 2953.23(A)(1), the trial court did not err by dismissing his claims regarding potential mitigation evidence.") (Appx. 0019.)

E. There are Insufficient Penological Justifications for the Execution of Youthful Offenders, and, in Application, Minorities are Disproportionately Executed.

There are insufficient penological justifications for the use of capital punishment as a sentencing option for youthful offenders. There are two distinct "social purposes" served by the death penalty: "retribution and deterrence of capital crimes by prospective offenders.'" *Atkins*, 536 U.S. at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ)).

However, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. "Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Eddings*, 455 U.S. at

115 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

As far as deterrence is concerned, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Thompson*, 487 U.S. at 837 (plurality opinion).

There is also evidence that in practice, when youthful offenders—those aged 18, 19, or 20 at the time of their crime—are executed, they are disproportionately young minorities. "As the number of executions in the country has decreased, however, the minority percentage in this age group has increased, from 54.2% in the years preceding *Roper* (2000-2005), to 64.1% in the years since (2006 through mid-2014). In other words, in the past 8 ½ years, over 64% of these 'youth executions' were of minorities." Hollis A. Whitson, *The Case Against Execution of People who Were Youths Under the Age of Twenty-One Years Old at the Time of the Offense*, p. 2-4 (Rev. July 2014).[5]

Looking at individual death penalty states, the percentages of minority youth executed are even higher. "In Texas, since 2000, over 76% of those executed who were ages 18, 19, and 20 years old at the time of the offenses were minorities." *Id.* And, as of July 2014, "[i]n Colorado, 100% of the death row inmates are African-

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[5] Available at: https://deathpenaltyinfo.org/documents/YouthExecutionPositionPaper.pdf.

American men who were convicted of committing offenses that occurred when each man was a youth under 21 years old." *Id.*

These significant racial disparities provide concrete evidence in the capital context tending to confirm the research that "race blunts the mitigating value of youth." Robin Walker Sterling, *Symposium: "Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 Loy. L.A. L. Rev. 1019, 1068 (2013). Such research includes a 2012 Stanford University study that found "participants who were primed to believe that offenders were black were more likely to impose extremely harsh sentences, such as life without the possibility of parole, on youths than when they were primed to believe the offender was white." *Id.* (citing to Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction between Juveniles and Adults*, PLOS ONE (May 23, 2012)).[6]

"Relying on race to impose a criminal sanction poisons public confidence in the judicial process. It thus injures not just the defendant, but the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (internal citations and quotation marks omitted). Such a sentencing practice does not serve any valid penological purpose.

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[6] Available at: http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0036680.

F. Drawing the Line at Age 18 Arbitrarily Excludes Those Who Possess All the Characteristics Deemed Worthy of Protection Under the Categorical Ban.

The categorical ban protecting youthful offenders from disproportionate death sentences is no longer sufficient for its intended purpose. Based on all we have learned from and since *Roper*, the arbitrary cut-off at age 18 fails to protect all those youthful offenders slightly over age 18 whom—because they share the exact same characteristic vulnerabilities and weaknesses as those under 18—are equally justified in being exempted from a death sentence. They are excluded from this protection not because they are unworthy of it but, rather, because they fall just outside a line that this Court can and should adjust to properly include them.

The Court recently did just that in the context of another exemption from the death penalty, intellectual disability. In *Hall v. Florida*, the Court found unconstitutional a Florida rule that prevented a person under a death sentence from presenting additional evidence that qualified under *Atkins* as intellectual disability unless they had an I.Q. score of 70 or lower. 134 S. Ct. at 1994, 2000. Cognizant of the fact that "[i]ntellectual disability is a condition, not a number," *id.* at 2001, the Court struck down the "rigid rule" concerning I.Q. scores because it "create[s] an unacceptable risk that persons with intellectual disability [would] be executed." *Id.* at 1990. *Hall* also stressed the importance of the medical community in defining and diagnosing the condition. *Id.* at 1994-96, 2000-01.

Hall clarifies that in the context of a categorical ban with a foundation in science, the underlying characteristics which define the class of persons is what entitles the person to protection—not the number associated with it. Just as an I.Q. score of 70 is an approximation of intellectual disability, so too is age 18 a proxy for youth. That proxy is now deficient for many of the same reasons a score of 70 is deficient for intellectual disability.

Recently, in overturning the mandatory life sentence of a 19-year-old defendant, an Illinois appellate court concluded that "[a]lthough the Court in *Roper* delineated the division between juvenile and adult at 18, we do not believe that this demarcation has created a bright line rule. . . . Rather, we find the designation that after age 18 an individual is a mature adult appears to be somewhat arbitrary." *House*, 72 N.E. 3d at 386-87. The court placed heavy reliance on the fact that the "young adult brain is still developing, and young adults are in transition from adolescence to adulthood. Further, the ongoing development of their brains means they have a high capacity for reform and rehabilitation. Young adults are, neurologically and developmentally, closer to adolescents than they are to adults." *Id.* at 387 (quoting Kanako Ishida, Young Adults in Conflict with the Law: Opportunities for Diversion, Juvenile Justice Initiative, at 1 (Feb. 2015)).

Science and society have progressed to such a point that it is now widely accepted that there is a time of adolescence between the stages of "childhood" and "adulthood" as they were considered and understood in *Roper*. As a result, today "[t]he bright line cut-off of age eighteen does not accurately reflect the

realities of adolescent brain development[.]" *United States v. C.R.*, 792 F. Supp. 2d at 502. The Court should now adjust that line to include at least those under age 21.

G. The Line Drawn by *Roper* is Now Ripe for Reevaluation.

Given the steady progression of societal standards toward a "more humane justice" and the tremendous consequences, the question of the minimum age for capital punishment in the modern era has been revisited by this Court every twelve years or so. The Court has similarly revisited questions on other categorical bans, such as intellectual disability, within that same timeframe. Given this past practice, the time is ripe for reexamination of this sentencing practice. A review of the relevant cases confirms the point.

Twelve years after the Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), the first challenge to the imposition of the death penalty based on age was decided in 1988 in *Thompson,* 487 U.S. at 818-38 (plurality) (offenders under 16 may not be executed).

The following term, the Court revisited the minimum age of execution, this time to address "whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at 16 or 17 years of age." *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989). The Court, 5 to 4, declined to extend the age bar established in *Thompson* the previous term. Coincidentally, the same day *Stanford* was decided, another 5 to 4 opinion was issued in the intellectual disability case *Penry v.*

Lynaugh, 492 U.S. 302 (1989). In *Penry*, the Court declined to categorically prohibit the execution of offenders with intellectual disability. *Id.* at 335.

Thirteen years after declining the categorical relief sought in *Penry*, the Court in 2002 established categorical protection for those with intellectual disability in *Atkins*. The Court reassessed the evidence of a national consensus under the then-prevailing standards of decency, finding that in the intervening years since its last review, meaningful development in areas supporting the ban had developed—evidence the Court had notably found lacking in *Penry*.

Within months of *Atkins'* issuance, relying on the parallels between the limitations of those with intellectual disability and those under age 18, one of the petitioners in *Stanford v. Kentucky* sought an original writ of habeas corpus in this Court. Though four Justices voted to hear the case, procedurally, five votes are required before the Court could take up the case. Thus, the writ was denied, but four Justices dissented in an opinion by Justice Stevens. *In re Stanford*, 537 U.S. at 968 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting).

Sixteen years after the Court's last substantive evaluation of the minimum age for execution in *Stanford v. Kentucky*, the Court revisited the minimum age question in 2005 in *Roper*, to reevaluate the appropriateness of the juvenile death penalty in terms of contemporary standards of decency. *Roper*, 543 U.S. at 560-64. The Court found that the standards prevailing in 2005, and the Court's own independent judgment, compelled the categorical prohibition on the execution of those under age 18 at the time of their offense. *Id.* at 564-70.

In 2014, twelve years after *Atkins*, this Court revisited its holding in that case in *Hall v. Florida*. The question posed by *Hall* was how intellectual disability must be defined in order to implement the principles and the holding of *Atkins*. The Court reaffirmed its ruling in *Atkins*, admonishing the rigid conformity of states like Florida who enforced a strict numerical cutoff of 70 for I.Q. scores in ID cases.

Now, twelve years after *Roper*, Phillips presents his petition to the Court requesting that the minimum age question be revisited under today's prevailing standards of decency. As outlined above, there has been, since his sentence was imposed in 1993, a sea change in youth sentencing standards, reflected in the robust body of relevant case law developed since that time. Phillips's death sentence was reviewed immediately after it was imposed, without the benefit of any of these substantive legal developments. Consequently, the society that *imposed* Phillips's death sentence barely resembles the one that would seek to *inflict* that death sentence on July 26, 2017.

But by it terms the Eighth Amendment protects against the *infliction* of cruel and unusual punishment. Phillips timely brought, and diligently pursued, his age-claim in the lowers courts after this Court's decision in *Hall* provided the necessary and sufficient legal basis to do so. Just as Christopher Simmons brought a successor post-conviction petition after *Atkins* seeking a reevaluation of the age bar, now comes Ronald Phillips seeking the same relief: a holding by this Court which precludes the execution of a teenage offender.

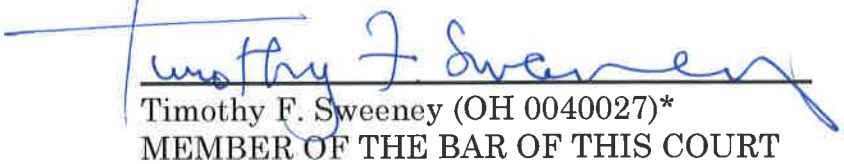
Nearly a quarter century has passed since 1993 and, in those years, science, society, and relevant sentencing practices have evolved in critical respects that undermine the validity of Phillips's death sentence—and those of others similarly situated. Phillips's death sentence reflects a judgment made by a different society than the one that is required under the current law to carry it out. Worse, that judgment was rendered on the basis of incomplete information about Phillips because "his counsel failed to investigate the red flags leading to a large body of mitigating evidence that would have considerably altered the picture of his culpability." *Phillips v. Bradshaw*, 607 F.3d at 224 (Cole, J. dissenting).

While the State can and should punish youthful offenders severely for their crimes, asking a teenager to pay for his crime with his life is too great a toll for a just and moral society to exact. This Court should revisit the question of the minimum age of execution and raise the categorical bar to age 21 to bring the controlling case law in conformance with prevailing standards of dignity.

CONCLUSION

For all these reasons, and in the interest of justice, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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