No. _____

IN THE

Supreme Court of the United States

ERIC SCOTT BRANCH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, FEBRUARY 22, 2018, AT 6:00 P.M.

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CAPITAL CASE

QUESTION PRESENTED

Thirteen years ago, in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court stated: "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.* at 572. Later, in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court was again concerned with the "unacceptable risk" that a defendant lacking the requisite culpability might receive a death sentence. *Id.* at 1990. To avoid such a risk, the Court determined that it is impermissible to disregard the teachings of the scientific community. *Id.* at 1995. Instead, where a scientific consensus supports a defendant's lesser culpability, "[p]ersons facing that most severe sanction [the death penalty] must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 2001.

The question presented by this case is:

> Given the advancements in the scientific understanding of late adolescent brain development since *Roper*, should Florida have allowed Petitioner the opportunity to present proof that his execution for a crime he committed during late adolescence would violate the Eighth and Fourteenth Amendments because his age and particular lack of mental development reduced his culpability and rendered him ineligible for a death sentence?

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Petitioner, Eric Scott Branch, a death-sentenced Florida prisoner scheduled for execution on February 22, 2018, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

DECISION BELOW

The decision of the Florida Supreme Court is not yet reported but is available at 2018 WL 897079, and is reprinted in the Appendix (App.) at 2.

JURISDICTION

The judgment of the Florida Supreme Court was entered on February 15, 2018. App. 2. This Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

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:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Eric Branch was twenty-one years old at the time of the offense, but his mental functioning was no better than that of a juvenile. Petitioner "lack[ed] mature adaptive functioning" and exhibited "childish, child-like, immature" behaviors. App. 42, Report of Dr. Faye Sultan; *see also id.* ("[H]is brain structures were still developing and not yet formed at the time of the offense.").[2] He had a compromised ability to control his actions, manage his impulses, or appreciate consequences. App. 42 (Sultan). *See also*

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[1] Petitioner requests expedited consideration of this petition in order to ensure it is circulated with the accompanying stay application.

[2] Petitioner proffered case-specific reports from Dr. Faye Sultan and Dr. James Garbarino, and other evidence, in support of his request for a hearing in the state courts.

App. 50, Report of Dr. James Garbarino (noting Petitioner was "demonstrably impulsive and immature"). He lacked social skills and practical thinking, and he was as reckless as a child. App. 42 (Sultan). *See also* App 52 (Garbarino) ("In his late teens and early 20's he . . . [was] immature, impulsive, often not functional, unable to recognize cause and effect, emotionally labile, acting out, lacking an appropriate understanding of legal proceedings and their consequences, and lacking in self-control.").

As Dr. Sultan summarized, Petitioner's "thinking and behavior [were] consistent with . . . . [his] 'undeveloped' brain." App. 42 (Sultan). Dr. Garbarino concurred that Petitioner displayed "developmental brain immaturity." App. 52 (Garbarino); *see also id.* ("As his history demonstrates, at the time of the offense and trial, his functioning was still that of a child.").

Today, medical science teaches that brain development and maturation continues through late adolescence—the period from late teens into early twenties. App. 41 (Sultan) ("[T]he human brain is not appropriately 'formed' or mature until an individual reaches their mid-20's."). *See also* App. 51 (Garbarino) ("The process of brain maturation is not complete in any person until he/she reaches their mid 20's."). Medical science also teaches that life experiences may detrimentally affect brain maturation. App. 50 (Garbarino); *see also id.* ("[H]uman brain maturation is ordinarily not complete until the mid-20's . . . [which] is especially significant to . . . the case of Eric Branch, who was 21 at the time of the offense, demonstrably impulsive and immature, and suffered an abusive developmental history."). *See also*

App. 51 (Garbarino) ("Youth who have experienced significant trauma and deprivation are especially prone to developmental delays on these same dimensions of executive function and affective regulation, with their situation being appropriately categorized as 'adolescence squared.'").

Petitioner "spent his childhood and adolescence suffering brutal abuse, [] neglect," and deprivation; given his small stature and immaturity, he was also the victim of sexual assaults while incarcerated as a youth. App. 42 (Sultan); *see also id.* (explaining that "dysfunction and trauma" such as that suffered by Petitioner "has an additive effect that impedes and delays brain development to a greater extent"). *See also* App. 44 (Sultan) ("If trauma occurs repeatedly and for a prolonged time, as it did for Eric Branch, it impedes brain development even further."); App. 51 (Garbarino) (explaining there is a "double whammy experienced by youths such as Eric Branch . . . [who] suffer from both the general limitations of unformed brains and the disadvantaged functioning that arises from their adverse childhood experiences"); App. 46 (Sultan) (noting that Petitioner's brain was undeveloped at age twenty-one and his cognitive development was "significantly impaired" by trauma).

Petitioner's brain development was further delayed, because he "turned to alcohol binging and substance abuse" "to cope with his unmet emotional needs." App. 45 (Sultan). While his alcohol use had a "self-medicative component," it also had a profound dilatory effect on his neurological maturation. App. 53 (Garbarino); *see also id.* ("[S]uch a history additionally impairs brain development for adolescents and individuals in their early 20's."). "Alcohol consumption during adolescence and early

twenties has been established . . . to have profound effects on brain structure and function," "to affect the neuropsychological performance," and to "impair[] the growth and integrity of certain brain structures." App. 45 (Sultan).

"As a late teenager and up until his commission of the offense at age 21 and the trial proceedings shortly thereafter, [Petitioner's] 'mental functioning' was no better than that of a child." App. 42 (Sultan). At the time of the offense, Petitioner "was still years away" from having a fully mature and developed brain. App. 53 (Garbarino).

I. Prior Proceedings and *Hurst* Litigation

Petitioner was convicted of murder and related crimes in a Florida court in 1994. The trial evidence and history of the earlier proceedings are described in the opinions of the Florida Supreme Court. *See Branch v. State*, 685 So. 2d 1250 (Fla. 1996); *Branch v. State*, 952 So. 2d 470 (Fla. 2006); *Branch v. State*, 130 So. 3d 691 (Fla. 2013); *Branch v. State*, 147 So. 3d 521 (Fla. 2014); *Branch v. State*, SC15-1869, 2016 WL 4182823 (Fla. Aug. 8, 2016).

In June 2016, Petitioner filed a motion for state post-conviction relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016). In 2017, the state post-conviction court denied relief based on the Florida Supreme Court's partial non-retroactivity formula for *Hurst* errors. On January 19, 2018, while Petitioner's appeal was pending in the Florida Supreme Court, Florida Governor Rick Scott signed a death warrant scheduling Petitioner's execution for February 22, 2018, at 6:00 p.m. Three days later,

the Florida Supreme Court affirmed the denial of *Hurst* relief. *Branch v. State*, No. SC17-1509, 2018 WL 495024 (Fla. Jan. 22, 2018).

On February 12, 2018, Petitioner filed in this Court a petition for a writ of certiorari (No. 17-7758) and an application for a stay of execution pending the disposition of the petition (No. 17A865). The certiorari proceeding seeks review of the Florida Supreme Court's *Hurst* retroactivity formula. Respected former Florida Justices and Judges filed a supporting amicus brief on February 15, 2018.

II. Current Proceedings

On January 29, 2018, Petitioner filed a motion for post-conviction relief and an application for stay of execution in the state trial court. Petitioner argued, among other things, that his death sentence should be prohibited under the Eighth Amendment because, consistent with the current medical consensus that brain development continues into late adolescence, and given factors specific to Petitioner's particular brain development, he was cognitively comparable to a juvenile under the age of eighteen at the time of the offense. App. 146. Petitioner submitted a detailed evidentiary proffer with his motion, including reports from respected mental health practitioners. App. 25, 48.

Respondent did not contest Petitioner's evidentiary submission about the scientific consensus or its applicability to his case. However, the state court did not allow a hearing. App. 18.

Petitioner appealed, seeking a stay and an opportunity to present his proof. The Florida Supreme Court denied a stay of execution and did not afford Petitioner

the opportunity to present his proof. The Court's opinion was issued on February 15, 2018. *Branch v. State*, Nos. SC18-190, SC18-218, 2018 WL 897079, at *3-5 (Fla. Jan. 15, 2018); App. 2.

REASONS FOR GRANTING THE WRIT

A. This Court Should Exercise Jurisdiction

This Court has jurisdiction to grant a writ of certiorari here. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court held that when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-41. Here, although the Florida Supreme Court's decision includes a state-law procedural bar discussion, the decision rests primarily on the Florida Supreme Court's view of federal constitutional law, or at least is interwoven with federal law. *See* App. 8-12; *Branch*, 2018 WL 897079 at *3-5.

The Florida Supreme Court made this clear in the first two sentences of its analysis where it stated that its view of this Court's Eighth Amendment decision in *Roper v. Simmons*, 543 U.S. 551 (2005), was the actual basis for the denial of relief:

> Branch next contends that the circuit court erred when it summarily denied his claim that he is ineligible for the death penalty. However, the Supreme Court in *Roper* designated eighteen as the critical age for determining death eligibility.

App. 8; *Branch*, 2018 WL 897079 at *3. The Florida Supreme Court also concluded its analysis by emphasizing its view that relief was foreclosed by its reading of *Roper*

and that its decision in Petitioner's case *would be different* if this Court were to refine its Eighth Amendment jurisprudence:

> Finally, the United States Supreme Court has continued to identify eighteen as the critical age for purposes of Eighth Amendment jurisprudence. *See Miller v. Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012) (prohibiting mandatory sentences of life without parole for homicide offenders who committed their crimes before the age of eighteen); *Graham v. Florida*, 560 U.S. 48, 74-75, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010) (prohibiting sentences of life without parole for nonhomicide offenders who committed their crimes before the age of eighteen). Therefore, unless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended, we will continue to adhere to *Roper*.

App. 12-13; *Branch*, 2018 WL 897079 at *5.

Accordingly, while the Florida Supreme Court also made references to state-law procedural bar considerations, *see*. App. 9-11; *Branch*, 2018 WL 897079 at *3-5, "the adequacy and independence of [the] state law ground is not clear from the face of the opinion." *Long*, 463 U.S. at 1041. The Florida Supreme Court's repeated references to the merits of Petitioner's federal claim, citing *Roper* and other constitutional decisions of this Court, make it unclear whether the state-law procedural default ruling would be adequate to support the judgment if this Court ruled in Petitioner's favor as a matter of federal law. *See Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985). There are clear indications in the Florida Supreme Court's decision that the state court would afford Petitioner relief if it did not feel bound by its view of this Court's current Eighth Amendment jurisprudence. *See, e.g.*, App. 12-13; *Branch*, 2018 WL 897079 at *5 (explaining that the Florida Supreme Court "will continue to adhere to *Roper*" unless this Court expands the protections of *Roper*). In

sum, the Florida Supreme Court declined to permit a hearing because of its understanding of this Court's Eighth Amendment precedent.[3]

"The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction." *Caldwell v. Mississippi*, 472 U.S. 320 (1988). Here, the Florida Supreme Court's decision does not prevent this Court from granting a writ of certiorari and deciding the question presented by this petition. This Court has jurisdiction.

B. This Court Should Consider Whether the Age Cutoff Established in *Roper v. Simmons* is Consistent with the Modern Scientific Consensus Regarding Late Adolescent Brain Development, Especially in Light of *Hall v. Florida* and *Moore v. Texas* Which Recognized that Accepted Scientific Standards Should Prevail Over Bright-Line Tests When Applying the Eighth Amendment

Before he is put to death, Petitioner should be allowed a hearing at which he can present proof that his execution would violate the Eighth Amendment. His case-specific proffer and the evidence about today's medical consensus—which were unchallenged by Respondent below—demonstrate that, at age twenty-one, Petitioner lacked the mental development and moral culpability to justify capital punishment.

> Mr. Branch clearly fits the brain development pattern recognized by current science. In his late teens and early 20's, he is described as immature, impulsive, often not functional, unable to recognize cause and effect, emotionally labile, acting out, lacking an appropriate

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[3] This same approach is found in other decisions of the Florida Supreme Court articulating its view of the merits of *Roper* arguments while referencing state procedural law. This further highlights that state law procedural considerations would be inapplicable if this Court were to refine its Eighth Amendment jurisprudence. *See, e.g.*, *Davis v. State*, 142 So. 3d 867 (Fla. 2014); *Carroll v. State*, 114 So. 3d 883 (Fla. 2013); *Barwick v. State*, 88 So. 3d 85 (Fla. 2011); *Morton v. State*, 995 So. 2d 233 (Fla. 2008); *Farina v. State*, 937 So. 2d 612 (Fla. 2006).

> understanding of legal proceedings and their consequences, and lacking in self-control. As his history demonstrates, at the time of the offense and trial, his functioning was still that of a child. Later in life and currently, he is thoughtful, mature, considerate of others, and taking steps to assist himself in the legal process.
>
> Current science teaches that individuals in their early 20's should not be treated in the same way as "adult" offenders when it comes to capital punishment.

App. 52 (Garbarino).

> Eric Branch was 21 years old at the time of the offense. In and of itself, his chronological age places him squarely within the grouping of people characterized as having not-yet fully developed or "matured" brain structures. . . . [H]is brain structures were still developing and not yet formed at the time of the offense.
>
> * * * *
>
> The now-recognized maturation pattern is even more apparent in the context of the Eric Branch I evaluated in December, 2017, and the descriptions about him today. This Eric Branch is thoughtful, remorseful for his earlier behavior, interested in learning, and mature. Consistent with the new professional consensus, his brain functions have matured as compared to Eric Branch at age 21.

App. 41-42 (Sultan).

Petitioner's individualized evidence regarding the limited development of his brain at the time of the offense has not been addressed at a hearing. Petitioner has had no opportunity to show that *Roper*'s age-eighteen cutoff does not account for the current medical and scientific consensus that brain development is not completed by age eighteen, and that Petitioner's particular development at age twenty-one was insufficient to justify capital punishment. At the time of the offense, Petitioner did not function as an adult with sufficient moral culpability for capital punishment.

Based on findings from the medical and scientific community, this Court held in *Roper* that it is cruel and unusual punishment to impose death sentences on juveniles under eighteen. Given the knowledge about the human brain maturation process then available, this Court's cutoff at age eighteen made sense at that time. However, as Dr. Laurence Steinberg and Dr. Elizabeth Scott, leading researchers in the field, have explained, at the time of this Court's decision in *Roper*, researchers understood "[y]oung adults between the ages of eighteen and twenty-one [to] constitute a less well-defined category." *See* Elizabeth S. Scott, Richard J. Bonnie, & Laurence Steinberg, *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 643 (2016) (hereinafter "*Young Adulthood*"). While the beginnings of the idea previously existed that "psychological and neurobiological development that characterizes adolescence continues into the midtwenties, [] the research [had] not yet produced a robust understanding of maturation in young adults age eighteen to twenty-one." *Id.* at 653. After *Roper*, mental health professionals turned their attention to older adolescents and found that many of the same traits possessed by juveniles under eighteen—traits that make them ineligible for the death penalty—also apply to older adolescents in their late teens and early twenties.

In the thirteen years since *Roper*, three major changes have altered the justification for a strict age-eighteen cutoff: (1) scientific research has developed to explain the effects of brain maturation, or the lack thereof, on the behavioral and decision-making abilities of late adolescents in their late teens and early twenties; (2)

recent changes in the treatment of older adolescents in the criminal justice system reflect a more informed understanding of late adolescents and the differences between late adolescents and adults with fully-matured brains; and (3) this Court decided *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), which illuminated the interaction between law and science and sought to reduce the "unacceptable risk" that death sentences are imposed on those who lack the requisite culpability. *See Hall*, 134 S. Ct. at 1990. *Hall* and *Moore* support Petitioner's argument for a new judicial understanding of brain underdevelopment in late adolescent youths. And *Hall* and *Moore* support Petitioner's arguments for an individualized assessment.

Medical science today understands that *Roper*'s strict age-eighteen cutoff is insufficient to ensure that those who lack the requisite culpability—specifically, youths in their late teens and early twenties whose still-developing brains cause behavior and decisions analogous to juveniles under eighteen—are not sentenced to death. This Court should permit youths within the current medically-recognized late adolescence category to present evidence of brain underdevelopment not simply as mitigation, but rather to demonstrate ineligibility for the death penalty—much like the individualized ineligibility consideration today afforded to those who fall within the standard error of measurement for IQ testing to determine intellectual disability.

Courts have voiced confusion over what to do "when presented with those individuals who are just past the line established [thirteen] years ago in *Roper*, as adopted by *Miller*, but to whom all of the various Eighth Amendment concerns about

protecting juveniles from disproportionate punishment may apply with almost equal force." *Cruz v. United States*, No. 11-CV-787, 2017 WL 3638176, at *8 (D. Conn. Apr. 3, 2017). The Court should clear up this confusion to prevent an unacceptable risk of executing youths who lack the requisite culpability.

1. *Roper* Prohibited the Death Penalty for Juveniles Under Eighteen Because They Differ From Adults in Three Distinct Ways Relevant to Sentencing Determinations, All of Which Apply to Petitioner

The Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002); *see also Enmund v. Florida*, 458 U.S. 782, 788 (1982). "Capital punishment must be limited to those offenders who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

For those reasons, *Roper* excluded juveniles under eighteen from capital sentencing, holding that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Roper*, 543 U.S. at 572-73. This Court's decision sprang from the scientific studies about human brain development available at that time. Those studies showed that the behavioral and decision-making abilities of juveniles were affected in three main areas relevant to criminal sentencing: (1) immaturity and a lack of responsibility leading to greater impetuousness and ill-considered decisions; (2) increased susceptibility to negative influences and peer

pressure and a lesser ability to control their environment; and (3) transitory personality traits making the character of a juvenile less fixed. *Id.* at 569-70; *see also Miller v. Alabama*, 567 U.S. 460, 472 (2012) (observing that the lack of brain development in juveniles causes "transient rashness, proclivity for risk, and inability to assess consequences").

Because of these considerations, imposing death sentences on juveniles failed to accomplish the constitutionally permissible aims of capital punishment: retribution and deterrence. *See*, *e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 520 (2008); *see also Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (noting that a death sentence must serve the "two principal social purposes" of retribution and deterrence).[4] It is not enough to meet just one of these goals, as "[a] punishment might fail the test on either ground." *Kennedy*, 554 U.S. at 441 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

Imposition of the death penalty on juveniles did not meet either purpose. Retribution is unconstitutionally excessive where "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. Because of their immaturity, susceptibility, and transitory personalities, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. Nor does deterrence apply:

> The same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . The likelihood that the teenage offender has made the kind of cost-

[4] Rehabilitation is not an aim of capital punishment.

> benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.

Id. at 571.[5]

Roper therefore approved a constitutional prohibition at age eighteen. But even then, this Court acknowledged that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. In the thirteen years since the Court's decision in *Roper*, the scientific and medical community has greatly expanded the relevant research. The scientific consensus today is that insufficient brain development and the related considerations that led to *Roper* apply to the late adolescence stage as well. As a result, a number of Courts and Legislatures today recognize that late adolescents—like juveniles—need protection and special treatment.

a. Current Research in Adolescent Brain Development Since *Roper* Establishes that Late Adolescents Resemble Juveniles Under Eighteen in Ways Relevant to the Eighth Amendment

Since *Roper*, the science of brain development has progressed significantly. While previous studies focused on the effects of brain development on juveniles under eighteen, researchers increasingly examined what this process means for youths in their late teens and early twenties who also do not yet have fully developed adult brains. This research shows that people in this age group bear a strong resemblance

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[5] This Court reaffirmed protections for juveniles under eighteen in *Graham v. Florida*, 560 U.S. 48, 79 (2010), which precluded life without parole sentences for juvenile offenders who had not committed homicide, and in *Miller*, 567 U.S. at 460, which prohibited mandatory life sentences for juveniles.

to juveniles under eighteen when it comes to their decision-making and behavioral abilities.

Medical science now understands that the primary reason late adolescents resemble juveniles when it comes to decision-making and behavior is that the frontal lobes, "home to key components of the neural circuitry underlying 'executive functions' such as planning, working memory, and impulse control, are among the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life." Sara Johnson, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolesc. Health 216, 216 (2009). The prefrontal lobe and the cerebellum, the regions "involved in emotional control and higher-order cognitive function," are also still developing during late adolescence. Robin Martantz Henig, *Why Are So Many People in their 20s Taking so Long to Grow Up?*, N. Y. Times (Aug. 18, 2010). *See also* App. 50 (Garbarino) ("Adolescent brains are immature—an immaturity that extends into early adulthood. This includes the frontal lobes, which play a crucial role in making good decisions, controlling impulses, focusing attention for planning, and managing emotions. Science now understands that the process of maturation involves three components of brain function . . . . All three are compromised in an individual in his early 20's."); App. 46 (Sultan) ("The myelination process . . . promoting healthy brain functioning and allowing more complex functions . . . continues until well-into the individual's twenties. As these connections are strengthened, the brain becomes better . . . at planning, dealing with emotions, and problem solving. The pre-frontal

cortex is the area of the brain in which executive functions are developed. This region of the brain makes it possible to assess risk, think ahead, set goals, and plan ahead. Significant development of the pre-frontal region of the brain continues until at least the mid-twenties.").

This continued development affects the behavior of late adolescents in the three areas this Court described in *Roper*. First, late adolescents are still immature and impulsive. *See Roper*, 543 U.S. at 569. This is because the prefrontal cortex is one of the last areas of the brain to mature. This part of the brain is "responsible for the complex processing of information, ranging from making judgments, to controlling impulses, foreseeing consequences, and setting goals and plans. An immature prefrontal cortex is thought to be the neurobiological explanation for why [young people] show poor judgment and too often act before they think." Ken C. Winter, *Adolescent Brain Development and Drug Use*, Treatment Research Inst., at 2 (2004) (hereinafter "*Adolescent Brain Development*").

As a consequence, late adolescents engage in more risk-seeking behavior. Research has found that "an immature nucleus accumbens increases the [] tendency to seek out activities that are exciting but require little effort." *Id.*, at 2.

In fact, older adolescents are especially prone to risky behaviors. *See* Alexandra O. Cohen, et. al, *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 Psych. Sci. 549, 549 (2016). Rather than decreasing at age eighteen, the desire to seek risk actually *increases* between the ages of eighteen and twenty-one before starting to taper off later. So "individuals in the

young adult period (*i.e.* ages 18-21)" are even more likely to engage in risky behavior than younger adolescents. *See* M.D. Rudolph, *At Risk of Being Risky: The Relationship between 'Brain Age' under Emotional States and Risk Preference*, 24 Dev. Cognitive Neurosci. 93, 102 (2017). Older adolescents are even more prone than their younger counterparts to "act before they think." *Adolescent Brain Development*, at 2. The National Institute of Medicine reported in 2015 that "young adults (aged eighteen to twenty-four) experience higher rates of morbidity and mortality than either adolescents or older adults from a wide variety of preventable causes, including automobile crashes, physical assaults, gun violence, sexually transmitted diseases, and substance abuse." *Young Adulthood*, at 645-46.

This risk-seeking behavior also supports the second difference between older adolescents and fully matured adults. Multiple studies have found that especially through age twenty-two, adolescents are still motivated by what their peers think of them. In general, people take "more risks, focus[] more on the benefits than the costs of risky behavior, and ma[k]e riskier decisions when in peer groups than alone." Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 589, 625 (2005). But "peer effects on risk taking and risky decision making [are] stronger among adolescents and youths [up to age twenty-two] than adults." *Id.*; *see also* Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions in Psych. Sci. 55, 57 (2007) (hereinafter "*Risk Taking in Adolescence*")

(showing that adolescents, late adolescents, and adults may take similar risks when alone, but that adolescents and late adolescents increased risky behavior in the presence of an audience). The continued susceptibility to peer pressure in adolescents in their late teens and early twenties explains activities such as hazing and binge drinking on college campuses, which are populated by students in this age range.[6]

Finally, personality traits are just as transient in late adolescents as they are in juveniles. Put simply, the personality or character of late adolescents is not yet formed:

> The major developmental tasks of adolescence are to create a stable and secure identity and begin the process of becoming a complete and productive adult. As the understanding of the complex transition from adolescence to adulthood has deepened, there continues to be general consensus about these developmental tasks—coupled with an understanding that they now take longer to achieve. With all these complex tasks to master, researchers theorize that the consolidation of adult status likely occurs not at 18 or 21, but closer to age 30.

Madelyn Freundlich, *The Adolescent Brain: New Research and its Implications for Young People Transitioning from Foster Care*, Jim Casey Youth Opportunities Initiative, at 17 (2011) (footnotes omitted). Because of the brain maturation process, "the process for becoming an adult is an extended one . . . ." *Id.* Immature and impulsive personality traits dissipate as a person lives through his or her twenties. *See, e.g.*, *Risk Taking in Adolescence*, at 57 (discussing that brain maturation "lead[s]

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[6] *See, e.g.*, Brian Borsari, Kate B. Carey, *How the Quality of Peer Relationships Influences College Alcohol Use*, 25 Drug Alcohol Rev. 361, 361 (2006); Erik Ortiz, Bernie Lubell, *Penn State Fraternity Death: Why Did No One Call 911 after Pledge Timothy Piazza got Hurt?*, NBC News (May 9, 2017), *available at* http://www.nbcnews.com/news/us-news/penn-state-fraternity-death-why-did-no-one-call-911-n756951.

to gradual improvements in many aspects of cognitive controls such as response inhibition").

Based on these findings, the scientific community has recognized that older adolescents are similar to their juvenile peers in ways relevant to the criminal justice system. Dr. Laurence Steinberg and Dr. Elizabeth Scott, whose research was extensively relied upon by this Court in *Roper*, *Miller*, and *Graham*, recently concluded that today's "research supports a regime that recognizes young adults as a transitional category between juveniles and older adult offenders." *Young Adulthood*, at 644.

The current scientific findings are especially applicable to Petitioner, as Dr. Sultan described:

> As a late teenager and up until his commission of the offense at age 21 . . . [Petitioner's] thinking and behavior . . . [were] childish, child-like, immature, not in control, unable to grasp consequences, impulsive, thoughtless, lacking social skills, reckless, devoid of practical thinking, and binging on alcohol and other substances without self-modulation. This type of thinking and behavior is consistent with the . . . professional consensus that brain development continues into the twenties and that an individual such as Eric Branch, at age 21, still ha[d] an "undeveloped" brain.

App. 42 (Sultan).

And Dr. Garbarino explained in his report:

> [A]s a twenty-on year old, [Eric Branch] was still years away from the developmental time when brains mature. . . . [H]e was a lost boy, not a functioning adult sufficiently morally culpable for the most severe penalty that American law allows.

App. 53 (Garbarino).

b. Other Changes in the Criminal Justice System Reflect the Understanding that Late Adolescents are Different from Fully Matured Adults

Examples from the American criminal justice system today reflect an understanding that late adolescents are more akin to teenagers than to adults in ways relevant to sentencing and punishment. When considering the excessiveness of a punishment, this Court looks to these types of "objective indicia" that a punishment is becoming disfavored in society. *Roper*, 543 U.S. at 609. We now have an increased understanding that late adolescents are different than adults. There is also a growing disfavor to executing individuals who were in late adolescence at the time of their offense.

On February 5, 2018, the American Bar Association House of Delegates passed a resolution calling for jurisdictions still practicing capital punishment to prohibit death sentences for defendants under the age of twenty-two at the time of their offenses. App. 231. This decision was supported by "a growing medical consensus that key areas of the brain relevant to decision-making and judgment continue to develop into the early twenties." App. 232.

Some rulings have accepted that eighteen is no longer an appropriate cutoff for "adulthood" in the death penalty context. In *Commonwealth v. Bredhold*, a Kentucky circuit court ruled that the death penalty is unconstitutional for defendants under twenty-one. *Commonwealth v. Bredhold*, No. 14-CR-161, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional (Fayette Circuit Court, Aug. 1, 2017) (Scorsone, J.). This decision was based largely on expert testimony explaining that

the lack of brain development in late adolescents affects them in ways similar to juveniles under eighteen. *Id.*; *see also Commonwealth v. Diaz*, No. 15-CR-584-001, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional (Fayette Circuit Court, 7th Div. Sept. 6, 2017) (Scorsone, J.) (same).

Executions of offenders who were late adolescents at the time of their offenses have only occurred in fourteen states since *Roper* was decided. App. 250-55. This number is especially skewed when considering that six of these states only executed one person in this age group, and one state, Mississippi, executed only two. *Id.* For example, Missouri has actively carried out executions, and yet, since *Roper*, only one of twenty-seven executions have involved a prisoner who was under twenty-two at the time of his capital offense. App. 251. This means that executions of older adolescents have mainly been carried out by only eight states. Not including executions in Texas, these states have been responsible for forty-eight of the sixty-six executions in cases of youths under twenty-two.[7] Thus, in a large majority of the country, executions of people who were late adolescents at the time of their offenses have only occurred eighteen times in the thirteen years since this Court decided *Roper*. And thirty-eight jurisdictions, including the United States government, the

[7] Texas is such an outlier that it is often removed from consideration in determining the prevalence of executions for certain categories of people. For example, in *Bredhold*, the Fayette County, Kentucky, Circuit Court excluded data from Texas in finding a national consensus against imposing the death penalty on late adolescents. *See Bredhold*, No. 14-CR-161, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional.

military, and the District of Columbia, have not carried out *any* executions against late adolescents since *Roper*.

Moreover, in determining intellectual disability, one of the prongs is onset during the developmental period. While this was previously thought to be age eighteen, Indiana, Utah, and Maryland have interpreted "onset in the developmental period" for criminal cases as onset prior to age twenty-two. Ind. Code § 35-36-9-2 (2017); Utah Code § 77-15a-102; Md. Code Crim. Law § 2-202 (2010). The "onset during the developmental period" factor also appears in civil commitment and developmental disability determinations in non-death-penalty contexts in Minnesota, New Mexico, Rhode Island, and Wisconsin, all of which have set this requirement at age twenty-two. Minn. Stat. § 253B.02; N.M. Stat. § Stat. § 28-16A-6; N.M. Stat. § 43-1-3; R.I. Gen. Laws § 40.1-1-8.1; Wis. Stat. § 51.62(1).

Other areas of the criminal justice system similarly highlight that eighteen is no longer treated as the line between adolescence and adulthood. In *State v. Norris*, a New Jersey court ordered resentencing for a defendant who was twenty-one at the time of the offense and had received a 75-year sentence for murder and attempted murder. *State v. Norris*, No. A-3008-15T4, 2017 WL 2062145 (N.J. Super Ct. App. Div. May 15, 2017). The court's decision was based in part on "the United States Supreme Court's recognition of 'the mitigating qualities of youth' and the need for courts to consider at sentencing a youthful offender's 'failure to appreciate risks and consequences' as well as other factors often peculiar to young offenders." *Id.* at *5 (quoting *Miller*, 567 U.S. at 476-77). The District Court of Connecticut granted a

hearing to a defendant who was eighteen at the time of his crime to "present evidence, both scientific and societal" to show whether his sentence of life without parole was unconstitutional. *Cruz v. United States*, No. 11-CV-787, 2017 WL 3638176, at *10 (D. Conn. Apr. 3, 2017). The Supreme Court of Washington remanded a case for resentencing after the trial court declined to consider late adolescence as a factor in a non-capital sentencing because "studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *State v. O'Dell*, 358 P.3d 359, 365 (Wash. 2015). The Illinois Court of Appeals has also applied the protections of *Roper* and *Miller* to nineteen-year-old defendants. *See People v. Harris*, 70 N.E. 3d 718 (Ill. App. Ct. 2016); *People v. House*, 72 N.E. 3d 357, 388 (Ill. App. Ct. 2015).

Movement is occurring outside the courts as well. California offers a youth offender parole program for defendants who were younger than twenty-five when they were convicted and sentenced as adults, making such defendants eligible for parole sooner.[8] Several states now offer "young adult court" to delay the age when late adolescents age into adult court. The foundational idea for these courts is the growing body of research that "the prefrontal cortex of the brain—responsible for our

[8] *California: New Hope for Young Offenders—Parole Eased for 18 to 23-Year-Olds Convicted of Serious Crimes* (Oct. 5, 2015), *available at* https://www.hrw.org/news/2015/10/05/california-new-hope-young-offenders; California Legislature, Senate Bill No. 394 (Oct. 12, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB394.

cognitive processing and impulse control—does not fully develop until the early to mid-20s." *See* The Supreme Court of California, County of San Francisco, *Young Adult Court*, http://www.sfsuperiorcourt.org/divisions/collaborative/yac (last visited Feb. 19, 2018). An additional idea in the young adult court setting is that, as older adolescents "are going through this critical developmental phase, many find themselves facing adulthood without supportive family, housing, education, employment and other critical protective factors that can help them navigate this tumultuous period." *Id.* Young adult courts accommodate these differences because the "traditional justice system is not designed to address cases involving these individuals, who are qualitatively different in development, skills, and needs from both children and older adults." *Id.* In California, the young adult court serves people aged eighteen to twenty-five. *Id.* Similarly, the young adult court system in Idaho, recognizes that the "18-24 [year-old] brain is unique" because the prefrontal cortex is "not fully developed," placing defendants in this age range at high risk.[9] Nebraska offers the Douglas County Young Adult Court, "a judicially supervised program that provides a sentencing alternative for youthful offenders up to age 25."[10] And New York's young adult court serves defendants between sixteen and twenty-four in response to "the latest findings on adolescent brain developments."[11]

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[9] Powerpoint on Young Adult Court, Bonneville County, Idaho, https://www.nadcp.org/sites/default/files/2014/CG-12.pdf (last visited Feb. 19, 2018).

[10] Nebraska Douglas County District Court, *Young Adult Court*, https://www.dc4dc.com/young-adult-court (last visited Feb. 19, 2018).

[11] Center for Court Innovation, *Youth Programs*, https://www.courtinnovation.

States are also increasingly opening young adult correctional facilities and units that focus more on rehabilitation and building life resources than punishment. Examples include Connecticut (for eighteen to twenty-five year olds), Maine (for eighteen to twenty-six year olds), and New York (for eighteen to twenty-one year olds).

Internationally, other countries and the United Nations now recognize that adolescents do not become fully culpable adults at age eighteen. *See Roper*, 543 U.S. at 575-76. The trend worldwide is increasingly to treat late adolescents similarly to juveniles under eighteen. For example, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice require that "[e]fforts shall . . . be made to extend the principles embodied in the Rules to young adult offenders" and extend the protections afforded by the Rules to cover proceedings dealing with extended adolescents.[12] European countries have been especially proactive in protecting late adolescents from adult consequences. For example, in Germany, juvenile courts retain control over young adults aged eighteen to twenty-one and have the option of sentencing those defendants under juvenile law. Dunkel Frieder, *Youth Justice in Germany* (2016).

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org/areas-of-focus/youth-programs (last visited Feb. 19, 2018).

[12] "A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult." United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 2.2(a); *available at* http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf.

2. The Opportunity for Record Development is Especially Necessary Here Because of the Consensuses of the Medical Community Regarding the Science of Late Adolescent Brain Development

Given the better scientific understanding of human brain development since *Roper* and society's shifting views of late adolescents, the *Roper* cutoff at eighteen "disregard[s] . . . current medical standards." *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017). In the capital punishment context, consideration of new scientific findings and the consensus of the medical community supplements the judicial understanding of where the punishment is excessive. However, courts can hardly develop that understanding without hearing the evidence. The Court should allow late adolescents, such as Petitioner, to "have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida,* 134 S. Ct. 1986, 2001 (2014).

In *Hall*, the Court addressed the necessity of avoiding the "unacceptable risk" that death sentences could be imposed on those who lacked the culpability for capital punishment. *See Hall*, 134 S. Ct. at 1990. This Court held unconstitutional the bright line rule in Florida that required defendants to present a threshold IQ test score of 70 or below before being permitted to present any additional evidence of intellectual disability. *Id.* at 2001.

Based on the teachings of the scientific community, *Hall* determined that those scoring within the standard error of measurement (plus or minus five points) might also be intellectually disabled, so they should not be precluded the opportunity to present other evidence of intellectual disability. *Id. Hall* relied heavily on the

teachings of the medical community in reaching that conclusion, explaining "it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*." *Id.* at 1993. The Court described the legal community's reliance on medical experts as "unsurprising" and stated "it is proper to consult the medical community's opinions." *Id.* at 1993.

The Court explained that Florida's adherence to a bright line rule was indefensible:

> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own merits, imprecise.

Id. at 1995.

By "disregard[ing] established medical practice," Florida "had violated the Eighth Amendment," *Moore*, 137 S. Ct. at 1049 (describing the ruling in *Hall*). Ultimately, the *Hall* Court found that, because the "death penalty is the gravest sentence our society may impose[,] [p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001.

The Court confirmed the requirement that courts must heed the teachings of the scientific community in *Moore* when it found unconstitutional Texas's practice of using factors that lacked scientific support. *Moore*, 137 S. Ct. at 1052. The Court stated, "Even if the views of medical experts do not dictate a court's intellectual-

disability determination, . . . the determination must be 'informed by the medical community's diagnostic framework.'" *Id.* at 1049 (citing *Hall*, 134 S. Ct. at 2000). The Court further cautioned that, while "being informed by the medical community does not demand adherence to everything stated in the latest medical guide[,] . . . *neither does precedent license disregard of current medical standards*." *Id.* (emphasis added). Once again, this Court "require[d] that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* at 1050; *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (finding it unreasonable to preclude further fact-finding on the defendant's individual history where the defendant had an IQ of 75). As in *Hall*, *Moore* was grounded on the "'unacceptable risk'" that Texas's inconsistency with the current scientific consensus would result in the execution of some intellectually disabled people. *Moore*, 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 1990).

Today's science teaches that the age eighteen cutoff creates an unacceptable risk that the death penalty will be imposed against late adolescents who lack the requisite culpability and who should not be subjected to that most severe punishment. In *Hall*, this Court recognized that "[i]ntellectual disability is a condition, not a number." *Hall*, 134 S. Ct. at 1993. So, too, is adolescence. As the Court wrote three decades ago: "[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." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). In many ways, recent scientific

conclusions regarding the brain development of youths in their late teens and early twenties mirror the deeper understanding society now has in the area of intellectual disability.

Today, those defendants whose IQ scores are slightly higher than the number 70 may demonstrate that they are ineligible for the death penalty based on the rationale of *Hall*. Likewise, late adolescents whose chronological age may be slightly higher than age eighteen fall into an area where the number of their age should not conclusively determine whether the underlying rationale for *Roper's* protections should extend to them.

The Court should afford youths like Petitioner—who are still within the scientifically accepted period of continued brain development—the opportunity to present evidence that they do not have the requisite culpability for a death sentence. While this Court has taken steps to protect juveniles under eighteen, late adolescents who are similarly in need of protection remain overlooked.[13] Because the "death penalty is the gravest sentence our society may impose," defendants in this category "must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001.

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[13] The opportunity to present "mitigating evidence" at a penalty phase is not enough. As with juveniles under eighteen, "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the [adolescent] offender's objective immaturity, vulnerability, lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 573. As in *Hall*, *Moore*, and *Brumfield*, late adolescents in their late teens and early twenties should be treated as "falling within the clinically established range for [brain]-functioning deficits" due to their underdeveloped brains. *Moore*, 137 S. Ct. at 1050.

3. Petitioner's Case Exemplifies the Need for an Individualized Approach

Petitioner was twenty-one at the time of the offense. While most, if not all, youths lack fully developed brains at age twenty-one, Petitioner's individual characteristics and life history delayed his brain development even further.

Petitioner presented case-specific expert reports about his particular brain underdevelopment, personal history, and limited functioning. He included a case-specific proffer concerning the risk factors that further delayed his brain maturation and development—a traumatic childhood history of physical and sexual abuse, deprivation, instability, and adolescent self-medication with alcohol.

As Dr. Garbarino, explained in his report, "Beyond the general issues affecting *all* youth, there are the special circumstances of Eric Branch's life involving issues that impeded his movement from adolescence into adulthood. Trauma and family dysfunction are among these issues." App. 52-53 (Garbarino). Petitioner developed a substance abuse condition when he was a preteen, which further delayed his brain development. Dr. Sultan indicated in her report, "The normal maturational process of the brain is disrupted by the introduction of alcohol and other substances. The normal maturational process of the brain is also disrupted by trauma. Both factors are apparent in the personal history of Eric Branch." App. 46 (Sultan). Thus, while twenty-one-year-olds are generally unlikely to have fully developed brains, Petitioner was at special risk for further delayed development.

Petitioner also proffered specific evidence that, as an adolescent and late adolescent, he regularly exhibited immature and impulsive behavior, including temper tantrums characteristic of children years younger than him, exhibited an inability to cope with perceived losses, and engaged in risky behaviors to impress peers and attract attention. Both Dr. Sultan and Dr. Garbarino confirmed that these characteristics indicate brain underdevelopment. App. 42 (Sultan); App. 52 (Garbarino at 4).

Contrasting—and therefore confirming—Petitioner's brain underdevelopment at the age of twenty-one, Dr. Sultan reported that today, "This Eric Branch is thoughtful, remorseful for his earlier behavior, interested in learning, and mature. . . . [H]is brain functions have matured as compared to Eric Branch at age 21." App. 42 (Sultan).

CONCLUSION

The failure to recognize that late adolescents are more like juveniles than they are like adults for purposes of a capital sentence disregards the reality described by the scientific community today. This Court should review whether Petitioner, a late adolescent at the time of the offense, should be afforded the opportunity to demonstrate that his death sentence creates an "unacceptable risk" that a youth who is not sufficiently morally culpable may be executed in violation of the Eighth Amendment. The Court should grant a writ of certiorari to address the important question Petitioner has presented, and should stay Petitioner's execution pending resolution of this question.

Respectfully submitted,

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