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

PETITIONER'S APPENDIX

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

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EXHIBIT 1

Supreme Court of Florida

No. SC18-190

ERIC SCOTT BRANCH,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC18-218

ERIC SCOTT BRANCH,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[February 15, 2018]

PER CURIAM.

Eric Scott Branch, a prisoner under sentence of death with an active death warrant, appeals a circuit court order summarily denying his second successive motion for postconviction relief filed pursuant to Florida Rule of Criminal

Procedure 3.851 and petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the following reasons, we affirm the circuit court's denial of the motion and deny the habeas petition.

FACTS AND RELEVANT PROCEDURAL HISTORY

Branch was convicted of first-degree murder, sexual battery, and grand theft in connection with the killing of Susan Morris. *Branch v. State* (*Branch I*), 685 So. 2d 1250 (Fla. 1996), *cert. denied*, 520 U.S. 1218 (1997). We described the facts of the murder on direct appeal as follows:

> Eric Branch was wanted by police in Indiana and because the car he was driving, a Pontiac, could be traced to him, he decided to steal a car from the campus of the University of West Florida [(UWF)] in Pensacola. When Susan Morris, a young college student, approached her car after attending an evening class [on] January 11, 1993, Branch accosted her and stole her red Toyota. Morris's nude body was found later in nearby woods; she had been beaten, stomped, sexually assaulted and strangled. She bore numerous bruises and lacerations, both eyes were swollen shut, and a wooden stick was broken off in her vagina.

Id. at 1251-52. The jury recommended a sentence of death by a vote of ten to two, and the trial court followed that recommendation. *Id.* at 1252. The trial court found the existence of three aggravating factors[1] and four mitigating

1. The murder was committed during a sexual battery; Branch had been convicted of a prior violent felony in the State of Indiana; and the murder was especially heinous, atrocious, or cruel. *Branch I*, 685 So. 2d at 1252 n.1.

circumstances.[2] *Id.* at 1252. On direct appeal, we affirmed Branch's convictions and sentences. *Id.* at 1253. In 2006, we affirmed the circuit court's denial of Branch's initial motion for postconviction relief and denied his initial petition for writ of habeas corpus. *Branch v. State* (*Branch II*), 952 So. 2d 470, 473 (Fla. 2006).

Branch subsequently filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida. *Branch v. McDonough* (*Branch III*), 779 F. Supp. 2d 1309 (N.D. Fla. 2010). The federal district court denied the petition, but issued a limited certificate of appealability. *Id.* at 1330. The United States Court of Appeals for the Eleventh Circuit affirmed the judgment denying federal habeas corpus relief. *Branch v. Sec'y, Fla. Dep't of Corr.* (*Branch IV*), 638 F.3d 1353, 1356 (11th Cir. 2011).

In 2016, we affirmed the circuit court's denial of Branch's motion for postconviction DNA testing filed pursuant to Florida Rule of Criminal Procedure 3.853 and section 925.11, Florida Statutes (2015). *Branch v. State* (*Branch V*), No. SC15-1869, 2016 WL 4182823 (Fla. Aug. 8, 2016). On January 22, 2018, we affirmed the circuit court's denial of Branch's first successive motion for

2. Branch had an unstable childhood; Branch possessed positive personality traits; Branch behaved acceptably during trial; and Branch was remorseful. *Id.* at n.2.

postconviction relief. *Branch v. State* (*Branch VI*), No. SC17-1509, 2018 WL 495024 (Fla. Jan. 22, 2018).

On January 19, 2018, Governor Rick Scott signed a death warrant for Branch and scheduled his execution for February 22, 2018. On January 29, 2018, Branch filed his second successive motion for postconviction relief, raising two claims. First, Branch contended that because he was twenty-one years old at the time of the murder,[3] executing him would violate the Eighth Amendment to the United States Constitution based upon *Roper v. Simmons*, 543 U.S. 551 (2005). In *Roper*, the United States Supreme Court held that executing individuals who were under the age of eighteen at the time of their crimes is prohibited by the Eighth and Fourteenth Amendments. *Id.* at 578-79. Branch asserted (1) there is an emerging consensus in the medical community that the brain continues to develop through the mid-twenties, such that young adults are cognitively comparable to juveniles, and this consensus constitutes newly discovered evidence; (2) a national consensus has developed that individuals who were in their late teens and early twenties at the time of their crimes should not be executed; and (3) the criminal laws of other states and international law generally reflect that offenders who were in their late teens and early twenties at the time of their crimes are treated differently than older

3. Branch turned twenty-two less than one month after the murder.

offenders. Branch additionally contended that the physical, emotional, and sexual trauma he suffered during his childhood and young adulthood, coupled with substance abuse, further impaired and delayed his brain development. Branch's second claim was that the length of time he has spent on death row constitutes cruel and unusual punishment under the Eighth Amendment.

On February 1, 2018, the circuit court denied Branch's motion without an evidentiary hearing and denied Branch's application for stay of execution. This appeal follows. Branch also filed with this Court a motion for stay of execution and a successive petition for writ of habeas corpus, challenging the prior violent felony aggravating factor found by the trial court.

ANALYSIS

Public Records Requests

Branch first challenges the circuit court's denial of his requests for public records pursuant to Florida Rule of Criminal Procedure 3.852. We have explained:

> [The] denial of public records requests are reviewed under the abuse of discretion standard. *See Dennis v. State*, 109 So. 3d 680, 698 (Fla. 2012); *Diaz v. State*, 945 So. 2d 1136, 1149 (Fla. 2006). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (quoting *White v. State*, 817 So. 2d 799, 806 (2002)). The Court has long acknowledged that the public records procedure under Florida Rule of Criminal Procedure 3.852 "is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief." *Valle* [*v. State*, 70 So. 3d 530, 549

(Fla. 2011)] (quoting *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002) (quoting *Glock v. Moore*, 776 So. 2d 243, 253 (Fla. 2001))).

Muhammad v. State, 132 So. 3d 176, 200 (Fla. 2013). A defendant "bears the burden of demonstrating that the records sought relate to a colorable claim for postconviction relief." *Chavez v. State*, 132 So. 3d 826, 829 (Fla. 2014) (citing *Mann v. State*, 112 So. 3d 1158, 1163 (Fla. 2013)).

Branch initially sought extensive records from multiple entities, but later narrowed the requests to records relating to the expiration dates of the drugs the Florida Department of Corrections (DOC) plans to use during his execution and records relating to the autopsy of Patrick Charles Hannon, the last inmate to be executed under Florida's current lethal injection protocol. We have previously held that these types of requests are unlikely to lead to a colorable claim for postconviction relief. *See, e.g.*, *Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017); *Chavez*, 132 So. 3d at 830; *Muhammad*, 132 So. 3d at 203, 206. Specifically, with respect to Branch's assertion that the DOC's supply of execution drugs may be expired, this Court has stated that it will presume "the DOC will act in accordance with its protocol and carry out its duties properly. This same presumption would extend to presume that *the DOC will obtain viable versions of the drugs it intends to use and confirm before use that the drugs are still viable, as the protocol*

requires." *Muhammad*, 132 So. 3d at 206 (emphasis added) (citation omitted).[4] Similarly, we have explained that autopsy records are not likely to lead to a colorable claim because they "would not establish when the inmates became unconscious or whether they experienced pain during their executions." *Chavez*, 132 So. 3d at 830. Therefore, the circuit court did not abuse its discretion when it denied these requests, and we reject this claim.

Eligibility for the Death Penalty

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, stating:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.* By the same token, some under 18 have already attained a level of maturity some adults will never reach. . . . [H]owever, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. *It is, we conclude, the age at which the line for death eligibility ought to rest.*

4. The current DOC lethal injection protocol provides that "[a] designated execution team member will purchase, and at all times ensure a sufficient supply of, the chemicals to be used in the lethal injection process. *The designated team member will ensure that the lethal chemicals have not reached or surpassed their expiration dates.*" Fla. Dep't of Corr., *Execution by Lethal Injection Procedures* 4 (2017), http://www.dc.state.fl.us/oth/deathrow/lethal-injection-procedures-as-of_01-04-17.pdf (emphasis added).

543 U.S. at 574 (emphasis added). Branch argues for an expansion of *Roper* on the basis that newly discovered evidence—in the form of scientific research with respect to development of the human brain, as well as the evolution of state and international law—mandates that individuals who committed murder in their late teens and early twenties be treated like juveniles.[5] The circuit court properly denied this claim without an evidentiary hearing.

First, this issue is procedurally barred. The trial court's order sentencing Branch to death found that Branch's age was not a mitigating circumstance:

> The defendant was twenty-one years of age at the time of this offense. There was testimony from the defendant's brother and grandfather that he was not particularly mature for his age, and that he frequently requested the assistance of relatives, primarily his grandfather, in making important decisions. The defendant did not, however, appear to be mentally deficient in any way. He assisted his counsel throughout trial, and testified at trial with great specificity and detail. The defendant's age at the time of the crime is not a mitigating factor.

5. Branch further relies upon American Bar Association Resolution 111 which "urges each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense." ABA House of Delegates Resolution 111 (adopted Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf. The resolution is based on the same considerations as those presented by Branch in these proceedings. *See, e.g.*, A.B.A. Death Penalty Due Process Rev. Project & Sec. Civ. Rts. & Soc. Just., *Report to the House of Delegates* 3 (2018) ("The newly-understood similarities between juvenile and late adolescent brains, as well as the evolution of death penalty law and relevant standards under the Eighth Amendment lead to the clear conclusion that individuals in late adolescence should be exempted from capital punishment.").

On direct appeal, Branch did not challenge the trial court's rejection of age as a mitigating circumstance. Furthermore, the Supreme Court decided *Roper* on March 1, 2005. Branch filed the habeas petition in *Branch II* on August 31, 2005, and he did not assert that he was ineligible for execution pursuant to *Roper*. Accordingly, this claim is waived as it could have been raised previously.

Second, we have rejected similar claims on the basis that scientific research with respect to brain development does not qualify as newly discovered evidence. For example, in *Morton v. State*, 995 So. 2d 233, 245 (Fla. 2008), the defendant claimed that a 2004 brain mapping study established that sections of the human brain are not fully developed until the age of twenty-five. He argued this constituted newly discovered evidence which required a reweighing of his age—nineteen-and-a-half years old at the time of the murder—as a mitigating circumstance. *Id.* In rejecting this claim, we stated:

> We have previously rejected recognizing "new research studies" as newly discovered evidence if based on previously available data. *See Schwab* [*v. State,* 969 So. 2d 318, 325 (Fla. 2007)] (citing *Diaz v. State*, 945 So. 2d 1136, 1144 (Fla. 2006) (concluding doctor's letter addressing lethal injection research was not newly discovered evidence because conclusions in letter were based on old data)). Although this 2004 brain mapping study had not yet been published at the time of Morton's trials, Morton or his counsel could have discovered similar research at that time that stated that the human brain was not fully developed until early adulthood. *See* Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 Psychol. Pub. Pol'y & L. 115, 120 (2007) ("In the past few decades . . . neuroscientists have discovered that two key developmental processes, myelination . . . and pruning of neural

> connections, continue to take place during adolescence and well into adulthood . . . . [B]rain regions responsible for basic life processes and sensory perception tend to mature fastest, whereas the regions responsible for behavioral inhibition and control, risk assessment, decision making, and emotion maturing take longer (Yakovlev & Lecours, 1967)."). Therefore, the 2004 study would not constitute newly discovered evidence and the trial court correctly denied this claim without an evidentiary hearing.

Id. at 245-46 (some alterations in original). We further rejected on the merits Morton's claim that he was entitled to relief pursuant to *Roper*:

> *Roper* has no application here where the facts are undisputed that Morton's chronological age was above nineteen at the time he committed the crimes. Because it is impossible for Morton to demonstrate that he falls within the ages of exemption, his claim is facially insufficient and it was proper for the court to deny Morton a hearing on this claim.

Id. at 245.

Similarly, in *Davis v. State*, 142 So. 3d 867 (Fla. 2014), the defendant—who was under an active death warrant—contended that he was not eligible for the death penalty because, despite his chronological age of twenty-five at the time of the murder, he was the "functional equivalent of a child." *Id.* at 870. The defendant relied upon "allegedly newly discovered evidence regarding the effects of alcoholism and sexual abuse on brain development in children, and . . . *Roper*." *Id.* at 874. This Court concluded that the evidence presented by the defendant was not newly discovered and, even if it was, the claim would still fail on the merits:

> The studies cited by Davis, addressing the effects of alcoholism and sexual abuse on brain development, do not constitute newly

> discovered evidence. This Court has previously stated that it "has not recognized 'new opinions' or 'new research studies' as newly discovered evidence." *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007). The articles that Davis relies upon fall squarely within this subject area and therefore do not constitute newly discovered evidence. *See Farina v. State*, 992 So. 2d 819 (Fla. 2008) (table decision) (holding that a "study on brain mapping is not newly discovered evidence"); *Schwab*, 969 So. 2d at 325 (concluding that "two recent scientific articles regarding brain anatomy and sexual offense" did not constitute newly discovered evidence).
>
> Further, as explained above, even if these recently published articles were considered newly discovered evidence, Davis still fails to put forth a cognizable claim. The United States Supreme Court's decision in *Roper* prohibits the execution of those individuals "who were under the age of 18 when their crimes were committed." 543 U.S. at 578, 125 S. Ct. 1183. In interpreting the Supreme Court's decision, this Court has previously stated that "*Roper* only prohibits the execution of those defendants whose *chronological* age is below eighteen." *Hill* [*v. State*, 921 So. 2d 579, 584 (Fla. 2006)]. Therefore, because Davis was over the age of eighteen when he committed murder, *Roper* does not apply, and his claim is without merit.

Id. at 875-76.

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 (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 (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*.

Accordingly, Branch is eligible for execution because he was not under the age of eighteen at the time he murdered Morris, and the circuit court properly denied this claim without an evidentiary hearing.

Length of Time on Death Row

Next, Branch contends that the length of time he has spent on death row—almost twenty-four years—amounts to cruel and unusual punishment under the Eighth Amendment. We rejected a similar claim in *Correll v. State*, 184 So. 3d 478 (Fla. 2015), where the inmate had been on death row for over twenty-nine years:

> [T]his Court has repeatedly rejected such challenges. *See, e.g.*, *Pardo v. State*, 108 So. 3d 558, 569 (Fla. 2012) (twenty-four years); *Johnston v. State*, 27 So. 3d 11, 27 (Fla. 2010) (almost twenty-five years); *Tompkins v. State*, 994 So. 2d 1072, 1085 (Fla. 2008) (twenty-three years); *Booker v. State*, 969 So. 2d 186, 200 (Fla. 2007) (almost thirty years). Further, executions of inmates who have been on death row as long as, or longer than, Correll have been permitted. *See, e.g.*, *Ferguson v. State*, 101 So. 3d 362, 366 (Fla. 2012) (more than thirty years); *Waterhouse v. State*, 82 So. 3d 84, 87 (Fla. 2012) (more than thirty-one years); *Valle v. State*, 70 So. 3d 530, 552 (Fla. 2011) (thirty-three years).

Id. at 486. We decline to recede from our longstanding precedent, and we affirm the denial of this claim.

PETITION FOR WRIT OF HABEAS CORPUS

Branch has repeatedly challenged the validity of the prior violent felony aggravating factor, which was based upon his Indiana conviction for the crime of sexual battery. In his habeas petition, Branch again challenges this aggravating factor. In brief, he argues that his Indiana conviction for sexual battery was not a violent felony under Florida law, the trial court should not have instructed the jury that sexual battery is a crime of violence, and the trial court improperly relied on the Indiana conviction to establish the prior violent felony aggravating factor. These claims should have been or were raised on direct appeal and are, therefore, procedurally barred. *See Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992) ("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been, should have been, or were raised on direct appeal."); *see also id.* ("Using different grounds to reargue the same issue is also improper.").

Moreover, we concluded in *Branch II* that even if the Indiana conviction did not qualify as a prior violent felony, any error was harmless:

> Here, the trial court found two other significant aggravators: the murder was committed in the course of a sexual battery and was especially heinous, atrocious, or cruel. The trial court determined that the mitigating evidence was marginal. Moreover, contrary to Branch's assertions, the mitigating evidence presented at the evidentiary hearing adds little more to what was previously presented.

952 So. 2d at 482. We have previously stated that the heinous, atrocious, or cruel aggravating factor is "qualitatively among the weightiest aggravating

circumstances." *Kaczmar v. State*, 228 So. 3d 1, 15 (Fla. 2017). With respect to this aggravating factor, the trial court found:

> The victim in this case was attacked in a parking lot at [UWF] following an evening class. She was carried or dragged from the parking lot to a remote wooded area. Her clothes were removed and she was both beaten and strangled, in addition to being sexually battered. She sustained multiple bruises and abrasions of the face and head. There were also abrasions and contusions corresponding to the sock which was tied around her neck. Injuries to the internal portions of her neck include fractures of the larynx and hyoid bone. The medical examiner stated that these internal injuries were commonly seen either from a manual compression of the neck or from an injury in which the assailant stamps on the victim's neck with his foot while the victim, in a supine position, has her head and face against a firm surface such as the earth. The medical examiner testified that the victim had injuries to her forearms and hands which were characterized as defensive in nature. He testified that such injuries are commonly seen in victims who are receiving a beating, and who attempt to ward off the blows by raising their hands and arms up to the face. The medical examiner testified he could not be certain whether death was caused by the multiple blows to the head or by strangulation. . . . The medical examiner testified that out of more than three thousand autopsies which he has performed, this one will stand out in his mind as a result of the brutality of the injuries.
>
> . . . .
>
> . . . [I]t is clear that the injuries inflicted on the victim which led to her death were committed with the intent to inflict extreme pain.

Because Branch's habeas claims are both procedurally barred and without merit, he is not entitled to relief.

CONCLUSION

Based on the foregoing, we affirm the circuit court's denial of Branch's second successive postconviction motion and deny his successive petition for writ

of habeas corpus. Because Branch is not entitled to relief, we deny his motion for stay of execution. No oral argument is necessary, and no rehearing will be entertained by this Court. The mandate shall issue immediately.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

An Appeal from the Circuit Court in and for Escambia County,
Edward P. Nickinson, III, Judge - Case No. 171993CF000870XXXAXX
And an Original Proceeding – Habeas Corpus

Robert S. Friedman, Capital Collateral Regional Counsel, Stacy Biggart and Kathleen Pafford, Assistant Capital Collateral Regional Counsel, Northern Region, Tallahassee, Florida; Billy H. Nolas, Chief, and Kimberly Sharkey, Attorney, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee, Florida,

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for Appellee/Respondent

EXHIBIT 2

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CAPITAL CASE
DEATH WARRANT SIGNED- EXECUTION SET FOR FEBRUARY 22, 2018, AT 6:00 P.M.

v.

ERIC SCOTT BRANCH,

Defendant.

Case No.: 1993 CF 000870 A
Div.: A
/ S. Ct. No.: SC83805

ORDER DENYING APPLICATION FOR STAY OF EXECUTION AND MOTION TO VACATE JUDGMENT AND SENTENCE

THIS MATTER came before the Court upon Defendant's "Application for Stay of Execution and Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend," as well as exhibits thereto,[1] filed January 29, 2018, and brought pursuant to Florida Rule of Criminal Procedure 3.851, and the State's Answer to Successive Rule 3.851 Motion for Postconviction Relief, filed January 30, 2018. In his motion, Defendant raises two claims for relief. On January 30, 2018, a *Huff* hearing was held to determine whether there was nay need for an evidentiary hearing.[2] The Court heard extensive argument as to the claims raised in Defendant's motion. After determining there was no need for an evidentiary hearing, the Court also inquired of the parties and determined there would be no additional argument on the law. Having reviewed the motion and exhibits, the State's response, the record, and case law, and having heard and carefully considered argument of counsel, the Court finds as follows:

[1] An updated Declaration of S. Douglas Knox was filed January 31, 2018.
[2] Present at the hearing were Assistant State Attorney John Molchan; Assistant Capital Collateral Regional Counsel Stacy Biggart and Kathleen Pafford; and Assistant Federal Public Defenders Billy Nolas and Kimberly Sharkey. Attending by telephone were Assistant Attorneys General Charmaine Millsaps and Lisa Hopkins.

PROCEDURAL HISTORY

On May 3, 1994, Defendant was sentenced to death for the January 1993 first-degree murder of Susan Morris after a jury recommendation of 10 to two in favor of death. Defendant's conviction and sentence were affirmed on direct appeal, and the facts of his case are recited in the opinion. *See Branch v. State*, 685 So. 2d 1250 (Fla. 1996). Defendant's conviction and death sentence became final on May 12, 1997, when the United States Supreme Court denied certiorari review in the direct appeal. *Branch v. Florida*, 520 U.S. 1218, 117 S.Ct. 1709, 137 L.E.2d 833 (1997).

On May 7, 1998, Defendant filed a rule 3.850 motion and amended motions on April 1, 2003, and October 10, 2003. After an evidentiary hearing, Defendant was denied relief by the order of March 4, 2005. He filed motions for postconviction DNA testing on April 17, 2014, and July 30, 2015, which were denied without hearing by the orders of July 2, 2015, and August 17, 2015, respectively. He filed a successive motion for postconviction relief on June 30, 2016, and an amended motion on April 3, 2017, raising claims under *Hurst v. Florida,* —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which were denied by the order of July 12, 2017. On January 19, 2018, Governor Scott signed a warrant scheduling Defendant's execution for Thursday, February 22, 2018, at 6:00 p.m.

CLAIM 1

Defendant claims his sentence is precluded by the Eighth Amendment because there is emerging consensus that brain development continues into the mid-twenties, rendering people in their early twenties, such as Defendant, cognitively comparable to juveniles under the age of 18.

He alleges he was 21 years of age at the time of the offense, and the emerging medical science in support of his claim was not available during his prior litigation. Defendant argues this emerging consensus is newly discovered evidence.

In support of his motion, Defendant relies in large part upon *Roper v. Simmons*, 543 U.S. 551, 567 (2005), and also references *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In *Roper*, the United States Supreme Court held the Eighth Amendment prohibits the death penalty for juveniles under the age of 18. *Atkins* prohibits the execution of intellectually disabled people.

Defendant does not claim he is intellectually disabled or the equivalent thereof. Moreover, extension of *Atkins* to a mental condition or illness that is not intellectual disability has been repeatedly rejected by the Florida Supreme Court. *See Frances v. State*, 143 So. 3d 340, 358 (Fla. 2014); *Carroll v. State*, 114 So. 3d 883, 887 (Fla. 2013); *Simmons v. State*, 105 So. 3d 475, 510-511 (Fla. 2012); *Schoenwetter v. State*, 46 So. 3d 535, 563 (Fla. 2010); *Henyard v. State*, 992 So. 2d 120, 130 (Fla. 2008). Therefore, *Atkins* does not apply to Defendant's claim.

Defendant argues he is the cognitive equivalent of a juvenile, so that the Eighth Amendment principle of *Roper* should apply to him. *Roper* establishes a bright line rule that the age of 18 is the age at which the individual is eligible for the death penalty. *See* 543 U.S. at 574. Extension of *Roper* to those over 17 has also been repeatedly rejected by the Florida Supreme Court. *See Davis v. State*, 142 So. 3d 867, 876 (Fla. 2014); *Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006). For example, in *Davis*, the defendant, who was 25 years old at the time of the murder, relied on allegedly new evidence regarding the effects of alcoholism and sexual abuse on brain development in children and the decision in *Roper* to claim his execution was unconstitutional. *See* 142 So. 3d at 874. The defendant contended he "'was the functional equivalent of a child' because he 'likely had the mind of a

juvenile' as opposed to his actual chronological age." *Id.* The Florida Supreme Court found because the defendant was over the age of 18 at the time of the murder, *Roper* did not apply. *Id.* at 876.

This Court must construe the prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court. *See Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015). In light of the decision in *Roper*, this Court declines to propose a modification of the bright line of *Roper* based on psychological evidence.

Furthermore, Defendant also argues that emerging science showing brain development is incomplete and continues into the mid-twenties qualifies as newly discovered evidence. This argument also fails. His exhibits include recent studies and articles from 2010 through 2017, which in turn reference reports and sources from previous years. New opinions and new research studies have not been recognized as newly discovered evidence. *See* 142 So. 3d at 875. *See also Henry v. State*, 125 So. 3d 745, 751 (Fla. 2013) (finding a revised definition of addiction was the culmination of several decades of advancement in neuroscience and was thus not newly discovered evidence); *Morton v. State*, 995 So. 2d 233, 245 (Fla. 2008) (evidence from a 2004 brain mapping study showing the brain is not fully developed until age 25 was based on previously available data and was not newly discovered evidence). The emerging science alleged and referenced by Defendant explains information already known and does not qualify as newly discovered evidence.

The Court also notes the idea that the brain is not fully formed as a young adult has been known for some time. In *Roper*, it was recognized "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." 543 U.S. at 574. Studies from 2004 showing the human brain development is not complete until the age of 25 have been cited in

previous case law, including challenges to the death penalty. *See Gall v. United States*, 552 U.S. 38, 57–58 (2007); *Lebron v. State*, 135 So. 3d 1040, 1067 (Fla. 2014); 995 So. 2d at 245; *Farina v. State*, 992 So. 2d 819 (Fla. 2008). Defendant could have brought this claim in the years prior to the signing of his death warrant. *See Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001) (denying a claim that had been known for a number of years based on reported cases and noting "any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence"). Nonetheless, regardless of the alleged newness of Defendant's evidence, his claim fails under *Roper*.

CLAIM 2

Defendant claims the needless suffering and uncertainty he has experienced during his time on death row is in violation of the Eighth Amendment prohibition against cruel and unusual punishment. The Florida Supreme Court has repeatedly rejected such claims made by inmates who have been on death row longer than Defendant. *See Lambrix v. State*, 217 So. 3d 977, 988 (Fla. 2017); *Muhammad v. State*, 132 So. 3d 176, 206 (Fla. 2013); *Carroll v. State*, 114 So. 3d 883, 889 (Fla. 2013); *Valle v. State*, 70 So. 3d 530, 552 (Fla. 2011). The Eleventh Circuit has also rejected such claims. *See Thompson v. Sec'y for Dept. of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008). There is no United States Supreme Court case holding that a lengthy stay on death row violates the Eighth Amendment. Moreover, Defendant cannot contend his sentence has been illegally prolonged where he has contributed to the lengthy time and delay by filing numerous challenges to his conviction and sentence. *See* 217 So. 3d 988 (other citations omitted). In light of Florida Supreme Court and Eleventh Circuit precedent and the lack of

United States Supreme Court precedent, the Court finds Defendant is not entitled to relief as to this claim.

APPLICATION FOR STAY OF EXECUTION

Defendant requested a stay of execution in order to provide an opportunity for meaningful consideration of his claims and a meaningful evidentiary hearing. In light of the Court's findings above, the Court finds a stay of execution is not warranted. *See Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014).

Accordingly, it is

ORDERED AND ADJUDGED Defendant's "Application for Stay of Execution and Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend" is **DENIED**.

DONE AND ORDERED in Chambers at Pensacola, Escambia County, Florida.

eSigned by CIRCUIT COURT JUDGE E P NICKINSON III
on 02/01/2018 14:45:11 tVr3X7TD

EPN/awg

Service of the Order Denying Defendant's Application for Stay of Execution and Motion to Vacate Judgment and Sentence shall be made by the Clerk upon:

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ERIC SCOTT BRANCH (DC# 313067)
Florida State Prison
7819 N.W. 228th Street
Raiford, Florida 32026-1000

EXHIBIT 3

Northpoint Psychological Consultants, P.A.
504 Northwest Drive
Davidson, North Carolina 28036
704 737-5003
Faye E. Sultan, Ph.D., Director

Psychological Evaluation Summary
Client: Eric Scott Branch
Date of Birth: February 7, 1971
Date of Psychological Evaluation Summary: January 28, 2018

This psychological evaluation of Eric Scott Branch was conducted at the request the Capital Habeas Unit of the Federal Public Defender's Office in Tallahassee, Florida. The request of these attorneys was that this evaluation address:

1) What factors in Eric Branch's life prior to the January 1993 offenses in Escambia County, Florida would have been psychologically and physically significant for him?

2) According to the current social science and mental health understanding, is there any new understanding about the neurological/behavioral consequences of Eric Branch's youth at the time of the offense and/or his traumatizing life factors? How does any new scientific understanding of maturation and brain development impact the case of Eric Branch?

Procedure

A three-hour forensic interview was conducted with Eric Branch in a private setting at the Union Correctional institution in Raiford, Florida on December 14, 2017. In addition to this forensic interview, a large set of records and documents was provided to this examiner for review. Salient records and documents are listed in this report, and constitute additional bases for the professional opinions expressed here. This examiner reserves the right to modify all professional opinions expressed within this report as additional information becomes available. All opinions are stated to a reasonable degree of certainty.

Records and Documents Reviewed

Eric Branch was convicted and sentenced to death for the January 1993 sexual battery, auto theft, and murder of University of West Florida student, Susan Morris, in Escambia County, Florida. Eric was 21 years of age at the time of the offense.

- **Resume of Psychological Evaluation**, dated February 24, 2004, reporting the results of a neuropsychological evaluation conducted with Eric Scott Branch by **Henry L. Dee, Ph.D**. Within this report are Dr. Dee's observations from his review of available records and collateral sources of information regarding Mr. Branch's history and social/intellectual functioning. Of note, the current professional consensus concerning neurocognitive brain development was not available at the time of Dr. Dee's report.

- **Juvenile Diagnostic and Classification Summary. Indiana Boys School.** This set of records for Eric Branch is dated March 28, 1988. It was noted here that Eric Branch first come to the attention of the Juvenile Court System in July 1985, when he was placed on one-year formal probation for criminal trespass. A charge of theft was referred in August 1986, which resulted in a six-month informal adjustment. On November 23, 1987 Eric Branch was charged with theft, forgery, and with being a runaway, resulting in a six-month informal adjustment. This set of records indicated that Eric was living with his paternal grandparents in Rockport, Indiana at the time of the November 1987 criminal charge, and that his biological father remained his legal guardian.

  It was reported within this set of records that Eric Branch had lived with these grandparents from age four to age seven or eight, and then had lived in the home of his mother until the summer of 1986. Eric Branch then reportedly returned to his grandparents' home, and had some contact with his father, Kerry Neal Branch. Kerry Neal Branch lived in a separate home on the same property. Kerry Neal Branch was reported to be a physically abusive alcoholic who had a prior criminal record. Eric reported within this set of records that he continued to have contact with his mother who resided with her husband, Douglas McMurtry, in Lynnville, Indiana. He was enrolled in the 10th grade at South Spencer High School at the time this summary was prepared.

Mr. Tobin Rice, Behavioral Clinician in the Intake Evaluation Unit and Hugh R. Hanlin, Ph.D., Senior Psychologist rendered their opinions: "*There is a history of marital instability and multiple parental figures. Multiple living situations probably contributed to the weak and inconsistent discipline and his poor response to authority...His faulty judgment and impulse control [are] likely to make him an easy target for manipulative peers. During times of stress and pressure underlying feelings of insecurity and emotional immaturity are likely to be more pronounced.*" It was recommended that Eric Branch remain in the Indiana Boys' School, enrolled in a full day school program.

- **Southern Hills Counseling Center, Inc.** clinical treatment records for Eric Branch. His **Initial Assessment Form** was completed on May 29, 1992, approximately seven months prior to the instant offense. Mr. Branch was noted to have been recently released from serving a jail sentence and was referred to this agency for treatment by his paternal grandfather. Eric reported during this assessment that he was confused about life, concerned about staying out of trouble and experiencing indecision about having given up his newborn daughter for adoption. These records indicate that Eric had recently been incarcerated at the Spencer County Jail. His previous educational and legal history was reported within the set of records.

  Mr. Branch endorsed having difficulties with sleep, extreme worrying, fatigue, headaches, depression, and marital/family problems. He acknowledged feeling irritable and having difficulty concentrating, as well as difficulties about past sexual experiences. Mr. Branch reported that he had difficulty expressing his feelings and emotions, that he was sometimes overwhelmed by thoughts and memories, and that he had difficulty managing his emotions. The treating mental health provider listed within this set of records is Mary Beth Borcherding, M.A., Staff Therapist. It also appears within this set of records that Eric Branch also received treatment from this same mental health provider in late 1987 and early 1988.

- Letter from **Philip A. Hesson**, Enrollment Services Manager, of **Indiana's Technical College**, dated August 20, 1992 congratulating Eric Branch on his acceptance into this academic institution. Provided records for this institution indicate that Mr. Branch began his studies, but did not complete the first quarter of attendance.

- **Indiana Elementary School** Records for Eric Scott Branch. This set of academic records, covering the period from August 1976 to May 1979, indicates that Eric Branch earned grades ranging from B's to F's in all academic areas.

- **Indiana High School** Records for Eric Scott Branch. This set of academic records indicates variable academic performance for Mr. Branch throughout his high school career. It appears from this set of records that Eric's school attendance at Indiana High School stopped in March 1989, during his 11th grade year.

- **South Spencer High School Records** for the Fall and Spring semesters of 1986-87 for Eric Scott Branch. Eric attained average to failing grades during this academic year. There are also records provided here for one additional semester of attendance, Fall 1987-88. Mr. Branch received F's in all of his academic subjects during that semester.

- **Penalty phase testimony** from the 1994 criminal trial of Eric Scott Branch included the testimony of pathologist Gary Dean Cumberland. Also contained within the set of records was the testimony of Robert N. Branch, older brother of Eric Branch. Robert Branch testified about the difficulties in his brother's relationship with their stepfather, Doug McMurtry. He testified about the alcoholism of his biological father and about the physical violence between his biological parents.

  The testimony of Alfred M. Branch, grandfather of Eric Branch, was also included here. He testified about instability in Eric Branch's childhood, and about the frequently shifting households in which Mr. Branch was reared throughout his childhood and adolescence. Alfred testified about the immaturity and young age of his grandson's biological parents, about their inability to provide stability or proper care for him. He testified that both biological parents of his grandson consumed alcohol, the father to a much greater extent.

- **Psychological testing by James D. Larson Ph.D.**, Psychological Associates, P. A. on September 30, 1993, indicated that Eric was functioning

in the average range of intellectual ability. Personality testing appeared to indicate a significant degree of suspiciousness and mood instability.

- **Escambia County Jail Infirmary** records for Eric Scott Branch. This set of records includes assessment by the jail mental health personnel about the psychological and psychiatric state of Mr. Branch during the days immediately following his death sentence. Mr. Branch was described as being "*tearful intermittently, pale, introspective, soft-spoken, sad, and distressed*". Also contained within the set of records are notes written by S.K. Zoss, Ph.D. describing Mr. Branch's participation in B6G Group Therapy. These notes cover the period between August 1993 through May of 1994.

- **Declaration of Richard Jay Bickel**, signed January 24, 2018. Mr. Bickel has known the Branch family since he was a small child. He reported that he was the same age as Eric Branch, growing up in the same housing subdivision. He described his knowledge of the treatment Eric had received as a young child and as an adolescent. "*His father was the most despicable person I have ever met in my life. He was a violent alcoholic... I have never seen a child abused as much as Eric was. The abuse was so horrible it made me lose sleep... Neal Branch beat the shit out of everyone in his family. He would beat them in the open. I would sometimes witness these vicious attacks when I was riding my bicycle around the neighborhood. Eric was as young as five when some of these beatings would occur. I witnessed Neal Branch not only punching Eric in the face but picking him up off of the ground and slamming him onto the concrete.*" Mr. Bickel went on to describe the situation he witnessed in 1976, when he and Eric Branch were approximately five years old. "*He ran to my house in the snow barefoot... Covered in blood... Swollen face... He looked like he had been in a boxing match with the prizefighter. He was beat so severely that some of his teeth were loose.*"

  Mr. Bickel stated, "*For years while Eric was very young, I must have seen him with a busted lip about four or five times, one eye black and about 10 times, in both eyes black and about four times... The beatings to his mother and Neal's two next wives were just as brutal.*" Mr. Bickel went on to report that his father had been an Indiana state trooper who arrested Neal Branch at least a dozen times for his violence, but that Eric's grandfather had rescued his son to prevent any true prosecution for these crimes.

Mr. Bickel went on to describe his knowledge that Eric had been a severely neglected child. He reported within his statement that Eric would often come to his home for food, always hungry, and that his own mother would often feed him. He reported that Eric Branch rarely had shoes on his feet, and that he was often filthy.

Summarizing his views on why he began to avoid contact with Mr. Branch as they grew into adolescence, Mr. Bickel stated, "*Eric was very immature and couldn't act his age... He never learned to keep things together. He was not in control of his actions.*"

- **Declaration of Robert A. Greene**, signed January 22, 2018. Mr. Greene reported that he had known Eric Branch and his family for many years, and that he had become close friends with Eric during their high school years. Describing the family circumstances, Mr. Greene stated, "*Despite his intelligence, Eric never stood a chance in life. Eric's father was a real piece of shit. He was a physically abusive alcoholic. Eric's mother for all intents and purposes abandoned him. Eric's grandparents were very nice but completely ill-equipped to take care of him. Their lack of discipline, rules and consequences proved to be disastrous for him. Eric received no structure, routine, direction-or guidance from anyone.*"

  Mr. Greene recalled being warned by his own father to stay away from Eric's father. He recalled being very "*close*" to Eric's cousin, Alex, and hearing from Alex about the abuse that Eric suffered at the hands of his father. Mr. Greene also recalled that Eric would comment to him about his dad being in a rage. "*This was code for being drunk and violent.*"

  Robert Greene reported that he had earned an M.A. degree in Psychology, spending 10 years as a high school educator and coach. "*... Eric craved the structure he never received. Instead he continuously cycled through a series of abandonment... The abandonment of his parents and lack of structure and Eric's life largely played into his personality. Eric had the pathological need to be accepted and liked by all... Never seem to grasp the concept of consequences, physical or legal... Made many immature impetuous decisions... Was hyperactive.*"

- **Declaration of Douglas McMurtry**, signed January 24, 2018. Mr. McMurtry was the stepfather of Eric Branch. He married Eric's mother when Eric was approximately nine years of age, beginning the third grade.

Mr. McMurtry made the following observations regarding his stepson, "*Eric was very immature. He could never just do what he was told... Would often throw tantrums. He couldn't handle things. He would go into rages when he was told no. I recall Eric kicking over tables, slamming doors, destroying his room, and even destroying his brother Robert's stuff just because he was told no. He had trouble controlling his impulses and just couldn't do it. He saw things and acted like a child much younger than his age.*" Mr. McMurtry also described the ready availability of alcohol to both Eric and his brother, Robert, throughout their childhoods and adolescence.

- **Declaration of Brian S. Melton**, signed January 23, 2018. Mr. Melton was an age peer of Eric Branch. They lived within the same community, attending South Spencer high school together. Mr. Melton reported that he and Eric Branch were good friends in high school until approximately age 16. He reported that his parents were friends of Eric's grandparents.

  Mr. Melton described his knowledge of Eric Branch's family, and the circumstances in which he was reared. "*Eric's grandparents were very prominent members of the community. His grandfather made and lost fortunes a couple of times... Eric's mother was completely absent from his life. His father was in prison out of state. He had no love or support from either of his parents... His grandparents were well intentioned but provided Eric with no discipline or supervision. From the time he was fourteen Eric was allowed to do whatever he wanted. There never seem to be any consequences for his actions.*"

  Mr. Melton described many incidents of reckless, impulsive, and dangerous behavior of Eric Branch during his adolescence, categorizing Mr. Branch's behavior and attitude as "*immature*".

  Of particular interest for the purposes of this evaluation is this description by Mr. Melton: of a situation that occurred when the boys were approximately 15 years old. "*When we were approximately fifteen years old, Eric and I went to visit my sister at Indiana State University. We went to a fraternity party and Eric got absolutely smashed drunk. After vomiting in the bathroom he became overwhelmed by emotion and broke down crying... Eric told some of the fraternity brothers about the physical and emotional abuse he suffered at the hands of his father. Some of the fraternity brothers were so disturbed and shocked by the abuse Eric reported that they notify*

the authorities in our hometown. By the time we got back to town, social services were at Eric's house." Mr. Melton went on to describe a situation, perhaps at the same party, where Eric Branch was either pushed or fell down a flight of stairs while in a wheeled desk chair. He described Eric Branch as being "*...motionless at the bottom of the stairs for quite a while.*"

- **Declaration of Jeffrey L. O'Brien**, signed January 23, 2018. Mr. O'Brien reported in his statements that he and Mr. Branch had spent a great deal of time together between the ages of fourteen and eighteen, although they attended different high schools. He reported that both he and Eric Branch had no adult supervision during their adolescence, and that he, in fact, had his own apartment in Evansville, Indiana, during their high school years, in which he and Mr. Branch often stayed. "*Eric and I were able to do anything we wanted whenever we wanted.*"

  Mr. O'Brien described his recollections about Eric Branch's childhood and adolescent family and living circumstances. "*Eric was living with his grandparents. It was actually more like he boarded with them. There was no emotional support. It was like, here is a bed and here is a fridge, now take care of yourself... Even at home Eric was alone.*" Mr. O'Brien went on to describe the alcoholism of Eric's father. "*Eric's father was a full blown alcoholic. He never held a job. Eric's grandparents were enablers. They supported Eric's father's alcoholism by providing him money to continually drink.*" Mr. O'Brien described his understanding of the abuse and neglect suffered by Eric Branch. "*The physical and mental abuse that Eric suffered at the hands of his father were widely known.*"

  Mr. O'Brien's description of Eric Branch's alcohol and substance abuse is: "*From the time I met Eric, we drank as much is possible, basically daily. I saw Eric drink to the point of blacking out numerous times. I witnessed Eric drink cases of beer and bottles of whiskey. We would drink in the woods, at his grandfather's mobile home manufacturing business, at clubs, or wherever we could find... Eric and I would go off on benders that lasted for 2 to 3 days at a time. We would go on bender after bender. In addition to the mass amounts of alcohol Eric consumed, he also sniffed Rush and inhalant and used LSD....*"

- **Declaration of Barbara Jo Pryor**, signed January 24, 2018. Ms. Pryor is the maternal aunt to Eric Branch. She is the older sister of Eric Branch's mother, Sharon. Ms. Pryor's declaration is filled with details about the

relationship between her sister and Neil Branch, and about the childhood abuse and neglect suffered by Eric Branch.

Ms. Pryor reported that her sister, Sharon, had become pregnant with Eric Branch's older brother, Robert, when she was 14 years old. "*She was not ready for the responsibilities of motherhood... Had no idea how to cook, clean, or even take care of herself... At our house she had absolutely no responsibilities... She was probably drinking when she had both Robert and Eric... She was a drinker and [too] young and dumb to know any better.*"

Ms. Pryor continued, "*My parents allowed Sharon to marry Neil because the Branch family thought it was the right thing to do. My dad thought since Neil's parents were rich people, they knew what was best. When they got married, Neil's parents moved her away from us and onto a property they owned. Sharon was alone in an unfamiliar place.*"

Ms. Pryor described her observations of the behavior of Neil Branch toward her sister, and the child abuse and neglect suffered by the children in the home during their early childhoods. "*Neal was a violent drunk... I would often get calls from my sister hysterically crying. Neal would go on benders for a day or two at a time and come home and beat her. I got a phone call like this from her every week or so...Neal beat and kicked her so badly once that she lost a kidney. She was lucky that he didn't kill her. Eric and his brother had to live with this violence.*"

Ms. Pryor went on to describe Eric Branch and his brother as having been "*neglected terribly.*" She reported that she had observed that the children were often filthy, running around in diapers, living in a filthy home. She recalled one specific incident in which she came into the home and found 18-month-old Eric in a sink full of water, his brother running around the house in a diaper, and her sister "*passed out in the bed.*"

- **Declaration of Leora Ann Nosko-Passmore**, signed January 22, 2018. Ms. Nosko-Passmore had an intimate relationship with Eric Branch for approximately five years, beginning at approximately age fourteen. Ms. Nosko-Passmore became pregnant with Eric Branch's child when she was fifteen years old. This child was given for adoption, and is currently 25 years old.

Ms. Nosko-Passmore recalled aspects of the chaotic and abusive childhood and adolescence which Eric Branch endured. "*He told me many times of the pain and hurt he felt by not being loved by his family, not fitting in, and not being accepted. You could feel the abandonment... Eric's mother was an alcoholic. She was drunk more often than she was sober... She favored his brother Robert over Eric... Eric was the black sheep. This deeply hurt Eric.*" Ms. Nosko-Passmore recalled that Eric Branch lived in the home of her mother, with her, for approximately one year during high school. She recalled that Mr. Branch found it impossible to accept the love and kindness that her mother offered to him.

Ms. Nosko-Passmore went on to describe the violence and physical abuse suffered by Mr. Branch perpetrated by his father. "*Eric told me about the intense violence and beatings he was subjected to while in his father's presence. Neal was a severe alcoholic. Other than beating him up, Neal had nothing to do with Eric.*"

Ms. Nosko-Passmore provided, within her statement, numerous examples of Eric Branch's emotional immaturity, impulsivity, and inability to control his emotions. She reported that he was reckless, had no fear of physical danger or consequences to him, and that he was unable to cope with negative emotional states. She reported, for example, that his response to her many attempts to end their relationship was to threaten suicide, swallow sleeping pills, and cut his wrists. She viewed these behaviors as typical of Eric's inability to cope with, or control, his emotional life.

Leora Nosko-Passmore recalled the sexual assault experienced by Eric Branch during his late adolescence. "*Eric told me he was raped by multiple men while being held down. He went to very dark places after this.*" She recalled that he was incarcerated at a facility called RDC at the time of the sexual assault, and that he was approximately 18 or 19 years old. (This examiner believes that RDC refers to the Reception Diagnostic Center of the Indiana Department of Corrections.) This incident occurred in 1989 or 1990. "*Eric's experience at RDC really changed him. Prior to this incarceration, Eric was impulsive and made stupid decisions, but I had never seen the rage in Eric like he had after getting out of prison. This rage rendered Eric even less able to deal with his emotions... After the rape and being released from prison, Eric's alcohol consumption increased dramatically... When Eric drank, he would usually drink large quantities. It*

was no longer social. He was drinking to medicate. The increased alcohol within fuel his rages."

- **Declaration of David Alexander Branch**, signed January 27, 2018. Alex Branch is a first cousin of Eric Branch. He grew up with Eric. Alex Branch said about his cousin, "*Eric always had it very rough. From the beginning he was doomed. He had the worst upbringing... Eric's dad was a raging, violent, alcoholic... Eric had trouble with self-control, but my grandparents did not give Eric any consequences for his actions. This contributed to Eric's immaturity and inability to develop an understanding of the world. Eric needed direction... Given Eric's familial relationships, he felt he was all alone. He felt and acted like he had been abandoned. Eric's attention-seeking behavior, his need to be accepted, and his need to be popular were all things he did to fill a hole in his life... He wouldn't listen. He would just make bad decision after bad decision like this. He didn't get it. He couldn't think things through. As he got older, his immaturity and poor decision making continued. He got particularly reckless... And Eric started drinking heavily, which we all knew he did to deal with his problems. Eric did not have an off switch. As kids and teenagers, we all engaged in some risky behaviors, but Eric did not know when to pull back. He was especially immature... He had trouble realizing the consequences of his actions before he would do something. He could not think things through... Eric lived with me in Panama City Beach for three or four months prior to his arrest. I could tell that he had not grown up at all.*"

- **Declaration of Robert Neal Branch**, signed January 27, 2018. Robert Branch is Eric Branch's older brother. Mr. Branch said the following about growing up with his brother, "*My father was physically abusive toward Eric and me. I don't remember a time when he was not abusive... He even did this when we were small kids, like three, four, five, and six years old. We were whipped in a manner far beyond what any child would ever deserve. It was straight up abuse, and it happened all the time. As we got older the abuse got worse, especially for Eric. He never had the sense to stay clear of my father. My father was a street fighter. He would do anything to inflict pain. He would beat and hit Eric with whatever he could get his hands on.*" Mr. Branch also discussed how their stepfather, Doug, would not beat them but would work them to death. "*Eric did not take well to Doug. He couldn't handle the work. The two of them could never get along. Eric was too stupid and immature to just do what Doug said.*" According to Mr. Branch, "*Eric had very low self-esteem... He truly in his heart believed he was less loved. I*

think this had a lot to do with his attention-seeking behavior." He described how Eric got overwhelmed by his emotions and how Eric "*started drinking when he was twelve or thirteen... We would drunk until we passed out."* Within a couple of years, he said, *"Eric's drinking had become self-medicating. He was using alcohol to find a space that he was comfortable in. It became his only way of coping. Eric was very immature and impulsive. He never planned ahead or thought things through. He did not know where to draw the line... Eric was fueled by adrenaline. Nothing was ever too fast or too dangerous... I'm positive that Eric has had countless concussions. Between the beatings he took from my father and the accidents he's been in, there is no telling how many head injuries he has suffered...Eric did not take anything seriously. He was the height of immaturity."*

Collateral Interview with Leora Ann Nosko-Passmore

A telephone interview was conducted by this examiner with Leora Ann Nosko-Passmore on January 25, 2018. Ms. Nosko-Passmore reviewed and confirmed the details and factual accounts about Eric Branch's family she had provided within her January 22, 2018 Declaration. Ms. Nosko-Passmore indicated that in recent years, during her occasional visits to Union Correctional Institution, she had been able to confront Mr. Branch face-to-face about his inappropriate behavior and attitude toward her during his periods of intoxication. She reported that Eric is mature today and assumes complete responsibility for his actions and attitudes.

Collateral Interview with Alex Branch

A telephone interview was conducted by this examiner with Mr. Alex Branch on January 26, 2018. Alex is the child of Eric Branch's father's sister, his paternal first cousin. Alex described his relationship with Eric Branch as being "*like a brother*", stating that he had been emotionally close to both Eric and his brother, Robert, during their childhood and adolescent years. Alex reported that Eric had been living with him in Panama City, Florida at the time of the instant offense. Alex Branch had been attending community college at that time, and he reported that he had invited his cousin to join him in Florida. Eric had recently been released from a jail term he had served in Indiana. "*I thought he could start a new life.*"

Alex Branch reported that he was aware of the frequent drunken rages of his uncle, Eric Branch's father. He reported his awareness that Eric was subjected to brutal beatings and violent assaults from his father throughout his childhood and adolescence. He was aware that his grandparents were unable or unwilling to provide the structure and stability that Eric Branch needed, that they provided shelter only, and that Eric was largely left to rear himself. Mr. Branch reported that he was aware that his cousin had developed a drinking problem during their childhoods, and that this abuse of alcohol had worsened during adolescence. It is apparent that at age 21 Eric was immature and child-like.

Collateral Interview with Robert Branch

Robert Branch, older brother of Eric Branch, was interviewed by this examiner by telephone on January 26, 2018.

Robert reported that the father he and Eric shared was a violent alcoholic who was "*never a father figure*". He described Neal Branch as a self-centered man who looked out for only his own needs, unable to behave in a nurturing or supportive manner toward his sons. The only physical touch he could remember from his father was violence. He recalled many such episodes of physical brutality from his father towards his mother, his brother and himself. He recalled a specific incident during which his father punched his grandfather in the face and stole $5000 from him.

Robert Branch recalled the period after his mother fled from the father's home, leaving the boys to be cared for by this violent alcoholic. He recalled running to his grandparents' home frequently for shelter and food. He recalled frequently attempting to escape the brutality of his father. Mr. Branch expressed deep emotional pain while discussing this period of violence and abuse.

It was the view of Robert Branch that his paternal grandfather had never forced his father to take responsibility for any of his actions, "*enabling*" an on-going pattern of irresponsibility and violence on the part of his father. He noted that his grandfather's "*enabling*" behavior continued with his brother, Eric, who had not learned to become responsible for his own actions or to develop a sense of maturity.

Robert Branch described moving back into his mother's home with his brother, Eric. His mother had married a man named Douglas McMurtry. He recalled that his stepfather was "very strict", having the boys do strenuous physical chores "*for hours*" as punishment for any misbehavior. Mr. Branch recalled that the family was quite poor, that the children participated in the free lunch program at school and that the family received food stamps. He recalled that the heat was not always "on" in their trailer, and that this was a startling economic transition from the "*rich*" material life the boys had known with their paternal grandparents.

Robert Branch described his younger brother as "*impulsive*", "*nearly fearless*", "*fueled by adrenaline*". Again, it is apparent that Eric exhibited child-like immature behavior and thinking. Robert also reported that he was aware that Eric was drinking large quantities of alcohol on a routine basis from the time he was a teenager. "*Eric would drink to the point of being drunk... His drinking became self-medicating...It became his only way coping.*"

Robert Branch reported that he remained with his mother and step-father after Eric was sent back to his father's home. Eric was approximately fourteen years old when he was "*dropped off back there*" after a family outing. According to Robert Branch, Eric was not aware that he was being sent back to his paternal family until the moment it occurred. Robert reported that his mother was unhappy and disagreed about Eric leaving, but that his stepfather insisted. It was the view of Robert that his younger brother was unable to adapt to the rules and structure of his stepfather, and that his self-destructive behaviors escalated in that environment. Robert joined the United States Army after his graduation from high school.

Forensic Interview with Eric Scott Branch

A three and one half hour forensic interview was conducted with Eric Scott Branch at the Union Correctional Institution in Raiford, Florida on December 14, 2017. Mr. Branch was cooperative and polite throughout the interview. He was observed to be of average intellectual ability, able to conduct a logical and articulate conversation, exhibiting an appropriate range of affect during discussion of emotionally difficult topics. Mr. Branch evidenced an adequate general fund of knowledge, and he demonstrated adequate attention, concentration, and expressive language ability. Mr. Branch was a generally accurate historian, attempting to answer all questions posed to him.

Eric Branch described his current life as an inmate on the Florida Death Row. He reported that he had spent much of the past twenty-two years, the length of his incarceration since receiving a death sentence, by reading "*about one hundred books per years...in most genres*" and by "*generally educating myself about life and the world.*" He reported that he corresponded regularly with family members and friends, and that he now believed he had matured enough emotionally to appreciate the people in his life.

Mr. Branch demonstrated good understanding about his current legal circumstances, and about the possibility that he could face execution. He is remorseful. He stated that he alone was responsible for his current circumstances, and described his growing recognition within the past ten years that his "*toxic relationship with alcohol*" and the chaos, abuse, and lack of structure during the time of his adolescence/young adulthood had negatively impacted his behavior during those years. He looks back on himself as childish.

Mr. Branch recalled and described the circumstances of his childhood and adolescence. His recollection closely matched the facts/circumstances of his life as they were reported by other sources described within this report, and they will not be repeated here. Mr. Branch acknowledged that he had always been very afraid of the violent nature and actions of his biological father. He reported that both of his paternal grandparents were very afraid of their son, and that he was aware that the parents of his some of his friends had warned their children to stay away from him.

Mr. Branch's recalled that he had abused alcohol, even large quantities of alcohol in "a *binge*". He acknowledged periodic abuse of other substances, such as LSD, cocaine, and "*bathtub crank*", but stated that alcohol had always held the most influence over him and his behavior. He was too young to recognize the consequences of what he was consuming and stated, "*Alcohol poisoned me.*"

Eric Branch reported that he was shifted from the home of his mother to the home of his paternal grandparents on more than one occasion during his childhood. He acknowledged that he was beaten and terrorized by his father on many occasions during the years he spent at his grandparents' home. His father reportedly lived in a house on the same property owned by his grandparents. His father would come into the grandparents' home whenever he pleased, wreaking havoc, causing great violence and fear for all. Eric acknowledged many occasions of physical and verbal abuse that his grandparents were either unwilling or unable to prevent. It was his view that his grandparents were frightened to intervene.

Eric Branch reviewed his juvenile and adult legal history prior to the instant offense. He acknowledged that he had been brutally sexually assaulted by several young men while serving a sentence in the first adult prison in which he had been incarcerated. Eric reported that he was approximately 18 or 19 years old at the time of this assault. He became observably emotionally distraught at the mention of this subject.

Eric Branch reported that he had earned a two-year paralegal certificate while he has been serving his time on death row, indicating that for a period of time Pell grants were available to prisoners. He considered this educational achievement to be significant, indicating that he considered this to be the very first time he had utilized his intrinsic intellectual ability for productive purpose. Eric expressed deep disappointment that he had not as a young person achieved academically.

Eric recalled himself "*...trying to figure out why I kept getting into trouble when I drank. I knew it messed up my relationship with Leora. I kept getting drunk. I ruined it. She was the love of my life.*" He recalled feeling helpless and out of control. It is clear that in his late teens and early twenties he exhibited emotional disarray and was not functioning with any degree of maturity.

Conclusions

The mental health professions, including psychology, psychiatry, the neuro-cognitive disciplines, and related social science disciplines, have expanded their research and professional understanding of human brain functions. This is apparent in our understanding of areas such as intellectual disability, mental illness, cerebral dysfunction, substance abuse, and adolescent behavior, brain development and psychology. Within this latter category, the professional consensus today is that there are distinct aspects to human brain development such that adolescent brain formation continues into the period of one's 20's. In other words, the neuroscience of brain development informs that the human brain is not appropriately "formed" or mature until an individual reaches their mid-20's.

This new mental health professional consensus was not available during previous proceedings in the case of Eric Branch. This new mental health professional consensus has real consequences in the case of Eric Branch.

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. In other words, his brain structures were still developing and not yet formed at the time of the offense.

The new consensus in the mental health professions is very much apparent in Eric Branch's history. As a late teenager and up until his commission of the offense at age 21 and the trial proceedings shortly thereafter, his "mental functioning" was no better than that of a child. All of the lay and expert information about his functioning is consistent in its describing him as lacking mature adaptive functioning. His thinking and behavior are described as 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 new mental health professional consensus that brain development continues into the twenties and that an individual such as Eric Branch, at age 21, still has an "undeveloped" brain.

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.

Eric spent his childhood and adolescence suffering brutal abuse and neglect. This included paternal threats, beatings, and mistreatment in a dysfunctional family setting, intermittent with neglect, abandonment and being a witness to extensive family violence. Later, he suffered brutal sexual assault while incarcerated during developmental years. Overall, his life lacked structure and was abusive.

The current mental health professional consensus is that suffering such dysfunction and trauma has an additive affect that impedes, and delays, brain development to a greater extent. This diminishing effect is even further compounded by Eric's adolescent and early twenties history of alcohol abuse, binging, and substance abuse.

I will provide a more detailed description of this history of dysfunction and alcohol/substance abuse as it places Eric's condition in context. In other words, this examiner is of the opinion that the new consensus concerning human brain development as it applies to individuals in their twenties should be considered in the specific context of Eric Branch's personal history. Eric and his older brother,

Robert, were born to mid-teenage parents who married and went to live on the father's family property in rural Indiana. Neither parent was prepared to undertake the complex tasks and responsibilities of being self-supporting and of child-rearing. There is considerable evidence that both of these teenage parents were alcoholics, and that the young boys were without supervision, adequate food, or adequate clothing. In addition to the profound neglect experienced by these two young boys, their father, Kerry Neal Branch, was a violent alcoholic who beat and tortured his wife, Sharon, and his sons. Sharon abandoned the marital home when Eric Branch was approximately three years old, leaving her two young sons with their abusive father and his parents.

The violence and terror perpetrated by this man toward his family was known to people in the surrounding community and to local law enforcement. Attempts by local law enforcement to intervene were met with excuses and resistance of the paternal grandfather, Alfred Branch. Alfred Branch was considered to be a wealthy businessman within his community, and he held significant influence over the local police. This pattern of denial and interference with needed consequences prevented the two boys or their mother from gaining safety, exposing them over and over to an abusive and terrifying home life. Once their mother abandoned them, the boys had only the option of running to their grandparents' home, or to their neighbors for safety and food. Eric was observed by neighbors to be running barefoot, bleeding from his face and head, and swollen, always hungry.

Eric Branch's mother eventually re-married. Eric and Robert Branch returned to the care of their mother and this new stepfather when Eric was approximately nine years of age. Doug McMurtry was a rigid, over-controlling stepfather who was unable to offer a constructive degree of structure and nurturing to Eric Branch. By age nine Eric was unable to respond in a positive manner to this new household, growing increasingly rebellious and disobedient. Eric Branch became the neglected child who was "*passed around*" between an alcoholic mother/strict stepfather and his paternal grandparents' home, a place he was offered no structure or discipline of any kind, and where he was routinely abused by his drunk and violent father.

Eric Branch never experienced a true sense of safety or security. He was unable to form secure early attachment with an adult that would have provided the foundation for better emotional development. This early attachment is the essential foundation for emotional regulation, the ability for self-soothing, the development of object constancy as a construct, the ability to experience trust in others, and the development of the concept of self. Children who are reared in unpredictable, violent, and dysfunctional home environments often have psychiatric and

neurological deficiencies. These neuro-behavioral early factors are known to produce long-term psychological damage to children and adolescents. Mr. Branch was forced to cope in a world of unpredictable violence, a circumstance which would have caused significant traumatic response in any child.

It is also important to note that Mr. Branch was likely to have sustained a number of significant closed head injuries and concussions during his childhood and adolescence. These have been reported by various collateral witnesses during the course of this evaluation. There have been reports of numerous blows to the head perpetrated by Eric Branch's father. Eric Branch was observed by a teenage friend to have fallen down a flight of stairs while sitting in a chair, and then remaining motionless for a long period of time at the bottom of the stairs.

Another key source of trauma for Eric Branch is the rape experienced while serving a sentence when he was approximately eighteen/nineteen years old. Eric behaved quite differently following his release after this sexual assault. Ms. Nosko-Passmore reported to this examiner that Eric Branch was "*filled with rage*" and drinking excessively.

There is an additional indication of adolescent sexual abuse found within the above described records, from the psychological evaluation report produced by Dr. Dee. Dr. Dee cited the report of Eric Branch's probation officer, Marilee Ruark. Eric Branch was fourteen years old at the time of this report. Dr. Dee quoted Ms. Ruark as stating "*...he suffered sexual, physical, and emotional abuse, as well as a dysfunctional family dynamic.*" According to the best available research, approximately 20% of inmates in men's institutions are sexually abused at some point during their incarceration. The long-term emotional impact of sexual abuse in detention often includes post-traumatic stress disorder and rape trauma syndrome, unresolved anger, drug addiction, and other self-defeating behaviors.

There has been much research in the neurological/psychiatric/social science fields during the past thirty years to examine the long-term consequences of chronic trauma. Eric Branch was exposed to chronic trauma within his home and within his community. Traumas, and the resulting fear produced by such situations, are now understood to undermine the development of a child's brain. The brain adjusts to patterned-repetitive experiences that are understood through the senses. Trauma impacts brain areas like the amygdala (involved in emotion management) and the hippocampus (involved in memory and memory consolidation). If trauma occurs repeatedly and for a prolonged time, as it did for Eric Branch, it impedes brain development even further.

Mental Health research demonstrates that, simultaneously, Mr. Branch's hippocampus would have shrunken in relative volume within his brain as it was developing, having negative effects on his capacity for memory consolidation. The hippocampus plays a role from early life with the storage of narrative "stories" - memories in the brain. The traumatized individual often evidences a shrunken hippocampus. This storage role is crucial in a child's learning process. Traumatized individuals can be severely debilitated by negative memories.

The amygdala acts as a "switching station", sending incoming information from our environment to the cortex of the brain. Here information is processed and made sense of, allowing us to address and process life events. "Is this situation safe or dangerous?" The amygdala of traumatized people will be overly sensitive, resulting in extreme alertness. Individuals like Mr. Branch may appear to be aggressive, as they may be overly sensitive to perceived threats, or at the same time withdrawn, due to a fear of being close to other people.

Mr. Branch, like other adults with chronic trauma, demonstrated difficulty with the formation and maintenance of intimate relationships. He developed inappropriate ways to deal with the people in his life. He had trouble expressing his emotional needs, and he was distrustful of others to the extreme. In order to cope with his unmet emotional needs, Eric Branch turned to alcohol binging and substance abuse.

Alcohol consumption during adolescence and early twenties has been established in the medical literature to have profound effects on brain structure and function. Drinking during adolescence and early twenties has been shown to affect the neuropsychological performance (e.g. memory functions) of young people and impairs the growth and integrity of certain brain structures. Furthermore, alcohol consumption during adolescence may alter measures of brain functioning, such as blood flow in certain brain regions and electrical brain activities. The brain continues to develop throughout adolescence and into young adulthood (one's twenties), and insults to the brain during this period could have an impact on long-term brain function. Consistent with this understanding, animal studies have demonstrated that alcohol exposure during adolescence and young adulthood can significantly interfere with an animal's normal brain development and function.

Adolescence and the early twenties are uniquely important in neurodevelopment. Medical research has demonstrated that adolescent substance abusers show abnormalities on multiple measures of brain functioning which is linked to changes

in cognitive ability, decision-making, and the regulation of emotions. Abnormalities have been seen in brain structure volume, white matter quality, and activation to cognitive tasks. Alcohol and substance abuse during this critical period of neurological development interrupts the natural course of brain maturation and the key processes of brain development. For an individual in adolescence and his early twenties, it further impedes development of the not-as-yet fully developed human brain.

Today it is established in the medical and scientific literature that brain development does not reach "full maturity" until approximately the period of mid-twenties. Synaptic pruning, the process by which brain synapses are selectively "pruned" or eliminated continues until this time, allowing for more efficient later brain functioning. The myelination process - the development of the substance which provides insulation for the nerve fibers – continues as well. This allows a mature individual to effectively transmit signals, promoting healthy brain functioning and allowing more complex functions. This process continues until well-into the individual's twenties. Also continuing until approximately mid-twenties is the increasing connectivity between regions of the brain. As these connections are strengthened, the brain becomes better able to transmit information between regions and 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. Complex planning, the ability to focus on one thing while ignoring distractions, decision-making, impulse control, logical thinking, risk management, organized thinking, and short-term memory are all functions of the pre-frontal cortex.

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.

It is the professional opinion of this examiner, stated to a reasonable degree of certainty, that the cognitive and emotional development of Eric Branch, was significantly impaired and delayed by the above-described factors, and most particularly his yet undeveloped brain at the time of the offense, when he was twenty-one years old. The new professional mental health consensus about the

developing human brain in the case of a twenty-one-year-old, such as Eric Branch, was not available to the experts who assessed this case in the past. This is Eric Branch's counsel's first opportunity to highlight this new consensus and its relevance to this case.

Faye E. Sultan, Ph.D., Director
Northpoint Psychological Consultants, P.A.
NC Practicing Psychologist #1067

EXHIBIT 4

James Garbarino, Ph.D.

Consulting in Child and Adolescent Development
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Chicago IL 60660

RE: Eric Branch DOB: 2/7/71

As requested by counsel, I am offering my analysis of why the case of Eric Branch justifies a better understanding of whether it is inappropriate to impose the death penalty on extended adolescents given the new and current scientific understanding in the mental health professions. The age of 18 years is used in the decisions in Roper v. Simmons, decided in 2005, in the matter of the death penalty; and Miller v. Alabama in the matter of mandatory Life Without Parole sentences, decided in 2012. However, our science now recognizes that the cut-off of 18 years is arbitrary, and not in accord with the current understanding of the scientific community. I note at the onset that the current scientific understanding of adolescent brain development was not available during earlier proceedings in Eric Branch's case. In the Miller decision, the court described a set of principles that justified treating adolescents under 18 as a special class when it comes to severe sentencing:

1. **Immaturity, impetuosity, less capacity to consider future consequences, and related characteristics that impair juveniles' ability to make decisions.**

2. **A family and home environment from which a child cannot extricate himself or herself.**

3. **The circumstances of the offense, and the role the youth played in those circumstances.**

4. **Impaired legal competency that puts juveniles at a disadvantage in dealing with police or participating meaningfully in legal proceedings.**

5. **The youth's potential for rehabilitation.**

The age of 18 as a "bright line" is not in accord with the current findings of research in developmental science. This research reveals that human brain maturation is ordinarily not complete until the mid-20's, approximately age 26. This new understanding is especially significant to a case such as the case of Eric Branch, who was 21 at the time of the offense, demonstrably impulsive and immature, and suffered an abusive developmental history.

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: "gray matter"- the outer layer of the brain, "white matter connections" - the brain cells serving as the "wiring" between neurons, and activity in the chemicals or "neurotransmitters" that execute messages within the brain. All three are compromised in an individual in his early 20's. Measures

of brain function and structure employing sophisticated technology support this new scientific recognition.

Of special relevance in understanding properly the behavior and thinking of individuals such as Eric Branch is the fact that social conditions and experience affect the development of "white matter." This speaks to the double whammy experienced by youths such as Eric Branch who are involved in violent crime: they suffer from both the general limitations of unformed brains *and* the disadvantaged functioning that arises from their adverse childhood experiences. What is more, the hormonal conditions of such youths contribute to impaired brain function (relative to adults) in matters of assessing and taking risks, emotional intensity, and dealing with peers (including social rejection). All of these considerations underlie the current scientific recognition that extended adolescents (people in their early 20's) are a special class. The process of brain maturation is not complete in any person until he/she reaches their mid 20's.

This understanding is especially apt in an individual who suffered a deprived childhood, such as Eric Branch. 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." In the case of Eric Branch, his social history indicates he is just such an individual - growing up with much adversity, including psychological adversity such as experiences of parental rejection, and physical maltreatment (including physical traumas which may have resulted in insults to his brain). An earlier evaluation conducted by Dr. Henry Dee highlights that Mr. Branch had psychological problems, but the science of brain development had not progressed to the point where

these problems could be recognized for what they were: developmental brain immaturity.

This all supports generally and particularly in the case of Eric Branch for an extension of the developmental principles recognized in both Roper and Miller to extended adolescents that surely includes individuals in their early 20's. By way of example, Legislation passed in California to amend the penal code (sections 3051 and 4801) in 2015, requires that parole boards apply the *Miller* principles up to age twenty-three. An individual such as Eric Branch should not be considered eligible for imposition of the death penalty, given his age of 21 and developmental history. In fact, many witnesses have now provided Declarations highlighting that 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 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.

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.

Having reviewed materials concerning Eric Branch, it is clear to me that given the trauma and social deprivation that he experienced growing up and his immature development, traumatized, impulsive, and socially inexperienced. But more than that, as a twenty one-year-old, he was still years away from the developmental time when brains mature.

Mr. Branch's history is also significant for his adolescent and extended adolescent history of alcohol and substance abuse. While such consumption by a traumatized person like Mr. Branch has a self-medicative component, its significance for my assessment is that such a history additionally impairs brain development for adolescents and individuals in their early 20's.

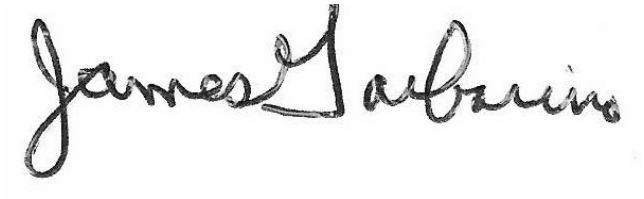
The social history of Eric Branch is replete with examples of childhood adversity and trauma, including both physical and psychological maltreatment. More than one individual who knew him and his family growing up say of Eric, that he "never had a chance." He experienced abuse at the hands of his father. He experienced rejection by his mother. He had little structure. These factors further diminished his already immature, undeveloped brain. To my mind he was a lost boy, not a functioning adult sufficiently morally culpable for the most severe penalty that American law allows.

Professional Background and Credentials:

I am a developmental psychologist who is a member and Fellow of the American Psychological Association. From 1989-1990, I served as president of the Association's Division on Child, Youth and Family Services. I am currently Maude C. Clarke Professor of Psychology at Loyola University Chicago. Prior to this I served as Elizabeth Lee Vincent Professor of Human Development at Cornell University in Ithaca, New York and from 1985 to 1994, as President of the Erikson Institute for Advanced Study in Child Development in Chicago, a graduate school and research center.

I am the author of over 100 scholarly articles and book chapters dealing with family, child, and adolescent development issues, with an emphasis on violence and trauma, and I am the author or editor of 23 books including Listening to Killers: Lessons Learned from My 20 Years as a Psychological Expert Witness in Murder Cases (2015), Lost Boys: Why Our Sons Turn Violent and How We Can Save Them. (1999), Children and the Dark Side of Human Experience (2008), See Jane Hit: Why Girls Are Becoming More Violent and What We Can Do About It (2006), And Words Can Hurt Forever: How to Protect Adolescents from Bullying, Harassment and Emotional Violence (2003), What Children Can Tell Us (1989), The Psychologically Battered Child (1986), Children in Danger: Coping with the Consequences of Community Violence (1992), No Place To Be A Child: Growing Up in a War Zone (1991), Raising Children in a Socially Toxic Environment (1995), Adolescent Development: An Ecological Perspective. (1985), and for children Let's Talk About Living in a World With Violence (1993).

My work with children and youth experiencing severe violence has included communities across the United States and war zones across five continents. I was the first recipient of the C. Henry Kempe Award from the National Conference on Child Abuse and Neglect. In 1989, I received the American Psychological Association's Award for Distinguished Professional Contributions to Public Service, and in 1995, the Dale Richmond Award from the American Academy of Pediatrics, specifically honoring my work in the field of community violence and trauma. I have served as a consultant to a wide range of organizations, including the American Medical Association, the National Committee to Prevent Child Abuse, and the FBI. I have received awards for my empirical research, including in 1992, from the Society for Psychological Study of Social Issues. I have been qualified as an expert in judicial proceedings.



James Garbarino, Ph.D.
Date: January 28, 2018

EXHIBIT 5

No. SC18-190

IN THE

Supreme Court of Florida

ERIC SCOTT BRANCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION AND A HEARING ON HIS PREVIOUSLY UNAVAILABLE CONSTITUTIONAL CLAIM

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APPLICATION FOR STAY OF EXECUTION

Eric Branch's execution is scheduled for 6:00 p.m. on February 22, 2018. This is an appeal of the First Judicial Circuit in and for Escambia County's final order denying his Application for Stay of Execution and Successive Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend.

We urge that the Court stay this execution to consider the new scientific consensus demonstrating the execution of Eric Branch would violate the Eighth Amendment, and to direct that a hearing be conducted to meaningfully address this Eighth Amendment claim. The evidence upon which Appellant relies could not be ascertained by due diligence, as it was unavailable in prior proceedings. *See* Fla. R. Crim. P. 3.851(d)(2). As the evidence has only now become available, its presentation in this "successive" proceeding does not constitute an abuse of process. *See* Fla. R. Crim. P. 3.851(e)(2).

The new scientific consensus about brain development as it relates to someone like Appellant, who was twenty-one years old at the time of the offense, is so significant that just three days ago the American Bar Association's House of Delegates passed a resolution calling on American jurisdictions that still have capital punishment to prohibit its imposition against those who were twenty-one years of age or younger at the time of the offense. *See* Rawles, L., *Ban Death Penalty for*

Those 21 or Younger, ABA House Says, ABA Journal (Feb. 5, 2018). A stay of execution to allow for untruncated consideration and a hearing is appropriate.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

Appellant filed a motion for oral argument yesterday, renewed hereby, explaining that oral argument is appropriate because this appeal presents an important issue of first impression: whether a hearing should be conducted on the new consensus in the scientific community that people twenty-one-years-old and younger are comparable to juveniles under eighteen for the purpose of prohibiting their execution under the Eighth Amendment's prohibition against cruel and unusual punishment. Appellant respectfully renews his request for oral argument pursuant to Fla. R. App. P. 9.320.

STATEMENT OF THE CASE[1]

I. Trial and Appeals

Appellant was convicted of first degree murder, sexual battery, and auto theft on March 10, 1994. The jury recommended death by a vote of 10-2. The trial court

[1] References to the record on appeal from the under-warrant postconviction proceeding are made with the letters "SPCR" followed by the page number(s). References to the record on appeal from Appellant's initial postconviction proceeding are made with the letters "PCR" followed by the page number(s). References to the record on appeal from the original trial are made with the letters "TR" followed by the page number(s). Appellant is referred to as "Appellant" or "Mr. Branch," and Appellee is referred to as "Appellee" or the "State."

sentenced Appellant to death, and this Court affirmed on direct appeal. *Branch v. State*, 685 So. 2d 1250 (Fla. 1996).

Appellant filed a Rule 3.850 motion on May 7, 1998, and amended motions on April 1, 2003, and October 10, 2003. The Circuit Court denied relief. On appeal, this Court affirmed and also denied his petition for writ of habeas corpus. *Branch v. State*, 952 So. 2d 470 (Fla. 2006). On March 28, 2007, Appellant filed a federal habeas petition in the Northern District of Florida. The petition was denied, and the Eleventh Circuit affirmed. *Branch v. Sec'y*, 638 F. 3d 1353 (2011).

On April 17, 2014, and July 30, 2015, Appellant filed motions under Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes (2015), for postconviction DNA testing. The motions were denied on July 2, 2015, and August 17, 2015. This Court affirmed on August 8, 2016. *Branch v. State*, No. SC15-1869.

In June 2016, Appellant filed a successive Rule 3.851 motion with an amendment on April 3, 2017, seeking relief in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). The trial court denied the motion. This Court affirmed on January 22, 2018, three days after Governor Rick Scott signed Appellant's death warrant. *Branch v. Florida*, SC17-1509 (Jan. 22, 2018). On February 6, 2018, this Court denied Appellant's motion for a stay pending certiorari review in the United States Supreme Court.

II. Death Warrant Litigation

On January 29, 2018, Appellant filed an application for stay of execution and 3.851 motion, raising two claims for relief. (SPCR. 237-310). He presented a detailed proffer showing that his death sentence should be precluded by the Eighth Amendment because of the emerging scientific consensus on the effects of brain development that continues into the mid-twenties and renders people in their early-twenties, such as Appellant, cognitively indistinguishable from juveniles under the age of eighteen and especially where, as here, other factors further delayed brain development. Appellant also presented a second claim that the needless suffering and uncertainty he has experienced during his time on death row—exacerbated by prolonged stretches of time when he was without meaningful counsel—violates the Eighth Amendment's prohibition against cruel and unusual punishment. (SPCR. 303). The State's response argued that relief should be denied because Appellant had not asserted he was intellectually disabled or under eighteen at the time of the offense, and that the second claim did not necessitate relief. (SPCR. 1101-02)

A. The *Huff* Hearing

At the January 30, 2018, hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993), the *State did not dispute Appellant's proffer*. (SPCR. 1093). The proffer included undisputed evidence concerning Appellant's traumatic life history and, crucially, a new scientific consensus detailed in the reports of Dr. Faye Sultan and

Dr. James Garbarino that "[t]here is a new mental health professional consensus" regarding the consequences of "brain development [that] continues into the 20's." (SPCR. 1094 (Dr. Sultan)). This new scientific consensus "was not available during the previous proceedings in the case of Eric Branch." (SPCR. 334). The "science of brain development had not progressed to the point where [Mr. Branch's] problems could be recognized for what they were: developmental brain immaturity." (SPCR. 344 (Dr. Garbarino)). And prior counsel Doug Knox confirmed that the proffer of a new scientific consensus on brain development "was not available previously and that [he] would have raised it had it been available." (SPCR. 1095).

Regarding Claim 2, Appellant explained that the claim was not ripe for review until the Governor issued Appellant's death warrant. (SPCR. 1099).

The State sought a summary denial on the basis of a "conformity clause" argument.[2] (SPCR 1099-1100). The State did not contest Appellant's actual proffer but asserted that *Roper* claims are "limited to minors." (SPCR. 1101-02).

As to Claim 2, the State argued that Appellant's twenty-four years on death row were not cruel and unusual punishment. (SPCR. 1104-05). The State argued this claim as a "quantitative" years on death row claim and did not address Appellant's qualitative argument about his decades-long fight for legal representation.

[2] The conformity clause of the Florida Constitution is discussed later in this brief.

Appellant's counsel then pressed the point that "expert opinions from qualified experts" that were "not contradicted by the State," highlight there is a new scientific consensus. (SPCR. 1107). Appellant also countered the State's "conformity clause" argument, pointing out that United States Supreme Court precedent holds that courts should not ignore a scientific consensus when evaluating an Eighth Amendment claim and citing to *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), as authority. (SPCR. 1107-08). Appellant urged that conformity with that established Eighth Amendment law is appropriate. (SPCR. 1096-97).

The Circuit Court acknowledged that "the State does not seem to be contradicting" Appellant's proffer of a new scientific consensus, but it was hesitant. (SPCR. 1101-11). Appellant explained at length that the recent developments in the research on adolescent brains were not previously available. (SPCR. 1112-17). Counsel stated, "The science, as Dr. Sultan and Dr. Garbarino explained, is available today. And the reality of it is, as a presiding judge, you don't have a contradictory presentation from the parties on the science itself." (SPCR. 1116).

The Circuit Court concluded by indicating that, because it had the unrefuted expert reports and lay witness affidavits, an evidentiary hearing was unnecessary for the court to prepare an order. (SPCR. 1123).

B. The Order

The court denied the application for stay of execution and motion to vacate judgment and sentence on February 1, 2018. (SPCR. 1123-38). It did not directly address Appellant's previously unavailable scientific consensus argument but, citing to *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015), wrote "[t]his court must construe the prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court," and it "declines to propose a modification of the bright line of *Roper* based on psychological evidence." (SPCR. 1135).

Then, without permitting a hearing and notwithstanding the unrebutted nature of Appellant's proffer, the court relied on its own belief about the new science and wrote, "[t]he emerging science . . . does not qualify as newly discovered evidence." *Id*. The court cited cases that did not involve the new scientific consensus about brain development . (SPCR. 1136). The court stated its belief that Appellant "could have brought this claim in the years prior to the signing of his death warrant." *Id.* But the court did not provide Appellant the opportunity to explain why the earlier studies were inapplicable to Appellant's claim, to rebut the court's inaccurate belief about the science, or to establish that the science was not previously available and that Appellant has presented a valid claim. Ironically, just four days *after* the court's ruling, the American Bar Association issued a resolution further highlighting that the court was wrong in its belief that the science was not new.

The court denied Claim 2 based on previous rulings rejecting claims addressing the length of time a prisoner was on death row. (SPCR. 1136). The court did not mention the qualitative aspect of the evidence Appellant presented on this claim.

The court denied all of Appellant's public records requests relating to the execution process and execution drugs used in Florida. This aspect of the court's ruling is discussed in Argument 3.

SUMMARY OF ARGUMENT

ARGUMENT I: This appeal involves an important issue of first impression. Appellant has presented a new consensus in the scientific community, founded on expert evaluations that the State did not rebut below and other unrebutted supporting evidence, establishing that people in their late teens and early twenties are comparable to juveniles for the purpose of barring their execution under the Eighth Amendment's prohibition against cruel and unusual punishments. Appellant also presented the applicable United States Supreme Court precedent, known to this Court, establishing that a reviewing court may not ignore the relevant scientific consensus when evaluating an Eighth Amendment issue in a capital case. Accordingly, Appellant, who was twenty-one years old at the time of the offense, sought a hearing to present evidence that he is ineligible for the death penalty because of his specific, limited brain development. Highlighting that this consensus

was not available in prior proceedings, just three days ago the American Bar Association's House of Delegates passed a resolution calling on all jurisdictions that still use capital punishment to prohibit its imposition against people twenty-one years of age or younger.

Appellant's claim *does not* depend on the research used to support the United States Supreme Court's holding in *Roper*. That research addressed people under age 18. Instead, Appellant has presented evidence, including reports from respected mental health practitioners, of a newly-emerged scientific consensus regarding the the effect of limited brain development on people twenty-one and younger, such as Appellant. It shows now what could not be shown previously: that because brain development is not complete until the mid-twenties, there are pronounced effects on the behavior of people in their late teens and early twenties. In fact, even as of 2016, brain development research had been so focused on adolescents under eighteen that most studies were not even looking at adolescents older than eighteen; instead, people over eighteen were often lumped in with other adults as old as fifty. This new scientific consensus is especially applicable here because Appellant suffered years of childhood trauma and has a significant history of adolescent substance abuse, two major factors that delay brain development even more. The proffer was not contested by the State in the Circuit Court. Nevertheless, the Circuit Court did not proceed to a hearing.

A central question Appellant now presents to this Court is whether the Eighth Amendment understanding of United States Supreme Court decisions such as *Hall v. Florida* and *Moore v. Texas* will be followed in this case. This Eighth Amendment precedent counsels that the consensus of the science community should not be ignored when a court determines whether a defendant is ineligible for a death sentence. This Eighth Amendment law was overlooked by the Circuit Court, but it demonstrates that this Court would be acting in "conformity" with the Eighth Amendment by permitting a hearing at which Mr. Branch may present proof that the science is new and that it prohibits the death penalty here.

The Circuit Court committed an additional error in its treatment of Mr. Branch's claim. It relied on its own undisclosed belief about the prior availability of brain development research without giving Mr. Branch the opportunity to rebut that belief. It is highly likely that the court conflated the older science about pre-eighteen brain development with the new, more particularized science on how the delayed maturation process affects people through their early twenties. The Circuit Court then declined to hold an evidentiary hearing, depriving Mr. Branch the opportunity to present evidence of the new scientific consensus and its application here, and so also deprived Mr. Branch of the opportunity to rebut the Circuit Court's inaccurate belief about the new science. A stay and a hearing are appropriate.

ARGUMENT II: Appellant spent a majority of this time on death row making desperate attempts to obtain counsel to assist with his case. The fear and suffering he underwent violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Circuit Court erred in believing this claim, which is based on Appellant's unique circumstances, is foreclosed by prior rulings.

ARGUMENT III: The trial court should have granted Appellant's limited requests for the expiration dates of the drugs that will be used to execute him and the autopsy report for Patrick Hannon.

STANDARD OF REVIEW

When the trial court denies postconviction relief without an evidentiary hearing, this Court accepts Appellant's allegations as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, the Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision regarding whether to grant an evidentiary hearing depends upon the actual material before the court, not the court's innate belief about the evidence, and the ruling as to whether a hearing is appropriate is subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM, BASED UPON A NEW SCIENTIFIC CONSENSUS, THAT DUE TO APPELLANT'S LIMITED BRAIN DEVELOPMENT WHEN HE COMMITTED THE CRIME AT AGE 21, HIS EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS

This claim should be addressed after a proper hearing. Contrary to the Circuit Court's belief, the science upon which the claim is based did not exist earlier. The claim therefore "could not have been ascertained by the exercise of due diligence" and is not procedurally barred. *See* Fla. R. Crim. P. 3.851(d)(2)(A). Since the scientific consensus upon which the claim is founded is new, submitting the claim in this "successive" posture case is not an "abuse of process." *See* Fla. R. Crim. P. 3.851(e)(2).

The State did not contest Appellant's evidentiary proffer. However, the Circuit Court relied upon its own preconceived beliefs about the science supporting Appellant's claim, but did not give Appellant the chance to present evidence countering those beliefs. The Circuit Court's core misapprehension—i.e., that the new science supporting Appellant's claims is not new—brings us to this appeal.

Appellant was twenty-one years old at the time of the offense. While the United States Supreme Court has prohibited capital punishment for juveniles under the age of eighteen in *Roper v. Simmons*, 543 U.S. 551 (2005), the evolving standards of decency *today* counsel that extended adolescents—young people in their late

teens and early twenties—also do not have the requisite culpability to be sentenced to death. Today's newly developed science in the area of adolescent brain development shows that extended adolescents are more comparable to their younger counterparts than they are to people with matured adult brains. While practically all twenty-one year olds bear these characteristics, Mr. Branch had even more profound cognitive delays due to his traumatic childhood and history of adolescent alcohol and substance abuse.

The fact that the scientific consensus has only now become available was confirmed last Monday, February 5, 2018, by the American Bar Association, whose House of Delegates issued a resolution calling on jurisdictions that have capital punishment to prohibit its imposition in cases of people aged twenty-one and younger *because of the new science*.

"In reviewing a trial court's summary denial of postconviction relief, this Court must accept the [appellant]'s allegations as true to the extent they are not conclusively refuted by the record." *Tomkins v. State*, 994 So. 2d 1072 (Fla. 2008). Mr. Branch's allegations are not refuted by the record. In fact, the only substantial, competent evidence before the Circuit Court was the uncontested factual proffer submitted by Mr. Branch. That evidence was not contradicted by the State, as the Circuit Court itself acknowledged at the hearing. (SPCR. 1110). This Court should remand for a hearing in light of Mr. Branch's uncontested proffer. *Cf. Jones v. State*,

709 So. 2d 512, 533 (Fla. 1998) ("[T]he record contains no competent substantial evidence to support its summary dismissal of the testimony. The trial court's order denying relief thus is defective.").

A. This Court has the authority to grant this constitutional relief under the "conformity clause" of Article I, Section 17, of the Florida Constitution

The Circuit Court viewed its authority to assess Mr. Branch's claim under the United States Constitution as curtailed. (SPCR. 1135) ("This Court must construe the prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court. . . . In light of the decision in *Roper*, this Court declines to propose a modification of the bright line of *Roper* based on psychological evidence."). The Circuit Court's perspective was off the mark.

First, Florida courts have the authority to interpret and apply the United States Constitution. For two centuries, this has been a bedrock principle of the American judicial system.

> [I]t is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. . . . From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment.

Martin v. Hunter's Lessee, 14 U.S. 304, 34-41 (1816) (citing U.S. Const. art. VI). The Federal Constitution "would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue" if state courts lacked jurisdiction to interpret the federal constitution. *Id.* at 342.

> [T]he constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend.

Id. See also Danforth v. Minnesota, 552 U.S. 264, 280 (2008) (indicating that states may expand constitutional protections "as long as they do not infringe on federal constitutional guarantees").

Second, the "conformity clause" of the Florida Constitution provides: "The prohibition against cruel or unusual punishment . . . shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided by the Eighth Amendment to the United States Constitution." Fla. Const. art. 1, sec. 17. In this context, the Circuit Court should have, and this Court now should, rule in conformity with the United States Supreme Court's Eighth Amendment decisions. Those decisions teach that the consensus of the scientific community should inform a court's determination of whether an individual sentenced to death should not be subjected to capital punishment. This Court is well aware of those scientific-consensus decisions, as one directly affected Florida's previous limited understanding of the scientific consensus in cases of intellectual disability. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *see also Moore v. Texas*, 137 S. Ct. 1039 (2017) (addressing the significance of a

scientific consensus to the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (highlighting that scientific consensus about pre-eighteen brain development informed the Court's Eighth Amendment decision).

While the United States Supreme Court has not yet addressed the question whether *Roper*'s prohibition on the execution of juveniles who were under age eighteen at the time of the offense should be expanded to include individuals, like Mr. Branch, who were twenty-one years old or younger at the time of the offense, "conformity with decisions of the United States Supreme Court" means that this Court should consider the new science. And while *Roper* sets the minimum standards, or constitutional "floor," this Court has long recognized its authority to provide defendants greater-than-minimum protections in conformity with Eighth Amendment precedent.

Most recently, the Court reaffirmed that it could grant "greater" relief under the Eighth Amendment, where the United States Supreme Court had not directly addressed the issue at hand. In *Hurst v. State*, 202 So. 3d 40, 59-60 (Fla. 2016), the Court held that, despite the United States Supreme Court's decision to address only the Sixth Amendment implications of Florida's prior capital sentencing scheme, this Court was empowered to rule that the scheme violated the Eighth Amendment and

accordingly to grant more expansive relief.[3] *Id.* at 50; *see also id.* at 74 (Pariente, J., concurring) (explaining that, because the United States Supreme Court had not addressed the relevant Eighth Amendment question, the Florida Supreme Court could properly consider and decide the matter itself). So too here, the United States Supreme Court has not ruled on the new scientific consensus regarding brain development in young people such as Appellant. The evidence did not exist when *Roper* was decided thirteen years ago and, therefore, was not presented to, or rejected by, the United States Supreme Court in *Roper*. This Court should act "in conformity with" the United States Supreme Court's rulings and allow a hearing in light of the new scientific consensus.

Roper v. Simmons, 543 U.S. 551 (2005), prohibited imposition of the death penalty on juveniles under eighteen. This was because the science available at that time distinguished juveniles under eighteen from adults in three key ways relevant to criminal justice policy: (1) a lack of maturity and lesser sense of responsibility, leading to increased risk-taking; (2) susceptibility to negative influences, including peer pressure; and (3) the transient nature of juveniles' personality traits. *Id.* at 569-70.

[3] This Court also provided "greater" protection in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (holding the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), retroactive before the United States Supreme Court so held).

Mr. Branch's claim *does not* depend on the research used to support the United States Supreme Court's holding in *Roper*. That research addressed people under age 18. Instead, Mr. Branch presented evidence, including reports from respected mental health practitioners, of a newly-emerged scientific consensus regarding the brain development of young people in their late teens and early twenties. The new scientific consensus establishes the effect of limited brain development on people twenty-one and younger, such as Appellant. It shows now what could not be shown previously: that because brain development is not complete until the mid-twenties, there are pronounced effects on the behavior of people in their late teens and early twenties. This new consensus applies to twenty-one-year-old Eric Branch. And it is especially applicable here because Mr. Branch suffered years of childhood trauma and has a history of adolescent substance abuse, two major factors that delay brain development even more. The proffer was not contested by the State in the Circuit Court.

Part of the reason the scientific consensus was not previously available is that, until recently, researchers understood "[y]oung adults between the ages of eighteen and twenty-one [to] constitute a less well-defined category that has only recently received even informal acknowledgement." *See* Scott, Elizabeth S., Bonnie, Richard J., & Steinberg, Laurence, *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 643 (Nov.

2016). 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. Brain development research had been so focused on adolescents under eighteen that most studies were not systematically looking at adolescents older than eighteen; instead, they were often lumped in with other adults as old as fifty. *Id.* at 651. Thus, even as of 2016, "the developmental research suggesting that young adults are not fully mature [was] in an early stage." *Id.* at 643. It is only recently that science turned its attention to older adolescents and provided a newly-formed consensus 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.

Accordingly, the "conformity clause" question Mr. Branch presents to this Court is whether this Court should conform to United States Supreme Court Eighth Amendment decisions holding that the consensus of the scientific community should not be ignored in cases assessing whether a defendant is ineligible for a death sentence.

In accord (or conformity) with the United States Supreme Court Eighth Amendment jurisprudence, this Court may allow a hearing on the new science and

its effect on the question of whether the Eighth Amendment also protects from execution young people like Mr. Branch who were the cognitive equivalent of juveniles at the time of their offense.

B. To support his claim, Appellant presented the Circuit Court with a factual proffer based on lay witness declarations about his life history and expert opinions on the new scientific consensus about adolescent brain development, none of which was disputed by the State

Mr. Branch submitted a detailed factual proffer that included reports from Dr. Faye E. Sultan and Dr. James E. Garbarino as well as declarations from family members, friends, and former attorneys.[4] None of this evidence was contested by the State.

1. The undisputed life history proffer

Eric Branch's undisputed proffer established that he was born to teenaged parents who did not know how to care for themselves, let alone their children, and neglected their young sons. The home where Eric spent his childhood was deplorable and chaotic. Eric and his brother were terribly neglected. Eric's father, Neal Branch, beat his wife, even when she was pregnant, and beat the children, including slamming Eric down into concrete when he was still a toddler. Eric suffered

[4] For Mr. Branch's full life history as submitted to the court below, with citations to the relevant affidavits, see Appellant's R. 3.851 motion (SPCR. 237-310) and accompanying expert reports. (SPCR. 319-48).

extensive abuse and trauma. Eric's mother later left her sons with Neal's parents, but the boys ultimately were sent back to live with their abusive father.

Eric's mother remarried. Eric was able to move back in with her. However, his new stepfather used hard labor as discipline. Eric had difficulty adjusting. He could not control his emotions and allowed them to overwhelm him, much like a younger child. He threw tantrums, and would kick, scream, punch walls, and break things, even when he was far too old to be doing so. Starting in seventh grade, Eric self-medicated with alcohol, drinking whenever he got the chance.

Desperate for some kind of attention, Eric started getting increasingly reckless and getting into trouble. Eventually, Eric's stepfather tired of having him around and took Eric back to live with his abusive father. Eric's mother and brother said nothing, which Eric saw as an act of abandonment.

By the time Eric was a teenager, he felt rejected by his family. He continued to drink heavily, daily if possible. He had no emotional support and became even more desperate for attention and acceptance from his peers. Eric was immature and reckless. He played "chicken" while driving cars and started breaking into buildings. He drove a motorcycle at 150, and even 185, miles per hour. He did not always make it through his exploits unscathed. At the age of sixteen, he was riding on the back of his uncle's motorcycle when he fell off and hit his head. Eric was unconscious for several minutes.

As a teenager, Eric continued to suffer extraordinary violence from his father, Neal. On one occasion, Neal beat Eric and pulled out a clump of his hair. He also broke a lamp over Eric's head.

Eric's immaturity also extended into his teenage years. He acted like a small child when things did not go his way. He would get upset easily and could not accept perceived losses. He had difficulty controlling his emotions in other ways too. He would laugh at inappropriate times. He was referred for therapy at Southern Hills Counseling Center where the clinician noted he "appear[ed] immature and resistant to assuming responsibility."

Eric ended up in prison in Indiana. Small for his age, he was gang raped by a group of men. Ultimately, he left Indiana for Panama City Beach where his cousin was attending college. When Eric arrived in Florida, he was an immature, child-like boy who struggled to grasp reality and was plagued by a drinking problem. At trial, he did not appreciate how much trouble he was in. People who observed him could tell that he did not understand the gravity of the situation.

2. The undisputed expert opinions

In support of his claim, Mr. Branch submitted reports from two knowledgeable experts: Dr. Faye Sultan and Dr. James Garbarino. (SPCR. 319-40; 342-48). Dr. Sultan explained that there is a "new mental health professional consensus that brain development continues into the twenties." (SPCR. 335). Dr.

Garbarino also noted, "our science now recognizes that the cut-off of 18 years is arbitrary, and not in accord with the current understanding of the scientific community." (SPCR. 342).

> *Today it is established in the medical and scientific literature that brain development does not reach "full maturity" until approximately the period of mid-twenties.* Synaptic pruning, the process by which brain synapses are selectively "pruned" or eliminated continues until this time, allowing for more efficient later brain functioning. The myelination process – the development of the substance which provides insulation for the nerve fibers – continues as well. This allows a mature individual to effectively transmit signals, promoting healthy brain functioning and allowing more complex functions. *This process continues until well into the individual's twenties. Also continuing until approximately mid-twenties is the increasing connectivity between regions of the brain.*

(SPCR. 339) (emphasis added). The new science teaches that development of "the pre-frontal cortex area of the brain" continues "until at least the mid-twenties." (SPCR. 287). This is the region of the brain where "executive functions are developed," meaning that executive functioning skills—the skills necessary to "assess risk, think ahead, set goals, and plan ahead" and "[c]omplex planning, the ability to focus on one thing while ignoring distractions, decision-making, impulse control, logical thinking, risk management, organized thinking"—are not fully developed until a person's mid-twenties." *Id.*

Dr. Sultan indicated, "[T]his new mental health professional consensus was not available during previous proceedings in the case of Eric Branch." (SPCR. 334). Similarly, Dr. Garbarino indicated, "the new professional mental health consensus

about the developing human brain in the case of a twenty-one-year-old, such as Eric Branch, was not available to the experts who assessed this case in the past." And former counsel S. Douglas Knox stated in his affidavit:

> Had this new scientific understanding in the mental health professions been available to me during the time I represented Eric, I certainly would have used it. I would have litigated . . . that he should not be executed due to the lack of moral culpability related to his immature level of functioning.

(SPCR. 1129).

Further, in regard to Mr. Branch specifically, his brain development was also delayed by the abuse and neglect he suffered, the instability of his home life, and his substance abuse.

> Eric Branch was exposed to chronic trauma within his home and within his community. Traumas, and the resulting fear produced by such situations, are now understood to undermine the development of a child's brain. The brain adjusts to patterned-repetitive experiences that are understood through the senses. Trauma impacts brain areas like the amygdala (involved in emotion management) and the hippocampus (involved in memory and memory consolidation).

Id. Dr. Sultan concluded—based on her assessment of Mr. Branch and on the new scientific information—that "Mr. Branch, at age 21, still had an 'underdeveloped brain.'" (SPCR. 335).

> In order to cope with his unmet emotional needs, Eric Branch turned to alcohol binging and substance abuse.

* * * *

> Medical research has demonstrated that adolescent substance abusers show abnormalities on multiple measures of brain functioning which is linked to changes in cognitive ability, decision-making, and the regulation of emotions. Abnormalities have been seen in brain structure volume, white matter quality, and activation to cognitive tasks.

(SPCR. 338-39). "Deficits in executive functioning, specifically in the areas of abstract reasoning ability and problem-solving ability have also been linked directly to adolescent substance abuse." Because of this, "[t]he normal maturational process of the brain is disrupted by the introduction of alcohol and other substances." (SPCR. 339). *See also* (SPCR. 346) ("While such consumption by a traumatized person like Mr. Branch has a self-medicative component, its significance . . . is that such a history additionally impairs brain development for adolescents and individuals in their early 20's.").

At the time of the offense, Mr. Branch was a youth who had suffered a lifetime of trauma (including abuse, neglect, and rape) and years of adolescent substance abuse. Today's science teaches us that the specific effects of his limited brain development at twenty-one years old put him in the same category as those under eighteen. This science was not available when the Court decided *Roper*. From an Eighth Amendment perspective, the now available science teaches that his brain development was not complete, and this distinguishes him from adults in the three key ways *Roper* identified as relevant to criminal justice policy: (1) a lack of maturity and an undeveloped sense of responsibility, which often results in poor

decision-making and increased risk-taking; (2) greater vulnerability and susceptibility; and (3) transitory personality traits and unfixed character. *Roper*, 543 U.S. at 569-70. As summarized by Dr. Garbarino, "An individual such as Eric Branch should not be considered eligible for imposition of the death penalty, given his age of 21 and developmental history." (SPCR. 345).

The State presented no expert or other evidence to rebut this proffer.

C. The Eighth Amendment prohibits the death penalty against this twenty-one-year-old offender with an undeveloped brain

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). A punishment's proportionality is determined by the evolving standards of decency, since "the 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) (citing *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, J., dissenting)). The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).[6]

[6] "[E]volving standards of decency" necessarily evolve, and what may have been acceptable to the courts and society at large historically may not prove

The concern over cruel and unusual punishment is even more significant when a person's life is at stake. In capital cases, "the Court has been particularly sensitive to ensure that every safeguard is observed," because "[t]here is no question that death as a punishment is unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Under the Eighth Amendment, a death sentence "is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Id.* at 183. *See also Kennedy*, 554 U.S. at 441 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

When assessing the proportionality of a death sentence under the Eighth Amendment, "the Court [also] insists upon confining the instances in which the punishment can be imposed." *Id.* at 420. The result has been that the death penalty is only proportionate when used for "'a narrow category of the most serious crimes' and on those whose extreme culpability makes them '*the most deserving of execution*.'" *Id.* (quoting *Roper*, 543 U.S. at 568) (emphasis added); *see also Roper*,

acceptable later in time. *Compare Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding constitutional the execution of intellectually disabled people), *with Atkins*, 536 U.S. at 319 (prohibiting the execution of intellectually disabled people); *compare Stanford v. Kentucky*, 492 U.S. 361, (1989) (holding constitutional the execution of offenders under eighteen years), *with Roper*, 436 U.S. at 560 (prohibiting the execution of offenders under eighteen years).

543 U.S. at 568 (recognizing that the death penalty should be reserved for "the worst of the worst").

Since "the imposition of death by public authority is so profoundly different from all other penalties, . . . an individualized decision is essential in capital cases." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Moreover, because of "the resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment," Eighth Amendment jurisdiction requires court to "insist upon confining the instances in which capital punishment may be imposed." *Kennedy*, 554 U.S. at 440.

There are times, then, when a death sentence is unconstitutionally excessive. To evaluate excessive imposition, courts first must look to "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, 543 U.S. at 563. To make this assessment, courts generally consider "the historical development of the punishment at issue, legislative judgments, international opinion, and sentencing decisions juries have made . . . ." *Enmund*, 458 U.S. at 788. After the objective indicia, courts consider proportionality in light of the "standards elaborated by controlling precedents" and an "understanding and interpretation of the Eighth Amendment's text, meaning, and purpose." *Kennedy*, 554 U.S. at 421. This second step is the more dominant factor. *Enmund*, 458 U.S. at 797. Under this test, the United States Supreme Court has found

the death penalty unconstitutionally excessive when used against those who have not committed homicide, *see Kennedy*, 554 U.S. at 421; *Enmund*, 458 U.S. at 801; *Coker*, 433 U.S. at 59; those with intellectual disabilities, *see Atkins*, 536 U.S. at 321; and juveniles under eighteen, *see Roper*, 543 U.S. at 578. Such decisions are made in light of the underlying principles of narrowing the death penalty's use, and making sure that only those viewed as having the highest culpability face execution.

As part of this evolving standards assessment, courts must consider the consensus of the medical community and scientific data in determining where to draw the moral culpability line. For example, in *Hall*, the Court relied heavily on the standards of the scientific community:

> Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Hall, 134 S. Ct. at 1993. In *Hall*, the Court ruled that the brightline test then used by Florida that precluded anyone with an I.Q. score of over seventy from presenting evidence of intellectual disability ignored the medical consensus that an I.Q. score is not dispositive of a person's intellectual capacity. The Court wrote:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's [brightline cutoff] contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The

> States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Id. at 2001. To act in conformity with Eighth Amendment jurisprudence, a court may not ignore the relevant scientific consensus. *Id.*

Evolving standards of decency no longer allow for the imposition of death sentences on people twenty-one years of age and younger. The United States Supreme Court prohibited the death sentence for juveniles under eighteen in *Roper*. That case was an adjustment to the evolving standards of decency, as the Court overruled its 1989 decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), allowing for the imposition of death sentences on sixteen and seventeen-year-olds. The studies available at the time of *Roper* assessed brain development on youths younger than eighteen. Science had not at that time reached a consensus on youths in later adolescence and early twenties.

Today, the effects of brain development in youth twenty-one and under has reached the point of scientific consensus. The medical community has now overwhelmingly determined that adolescents in their late teens and early twenties are more comparable to their younger peers than they are to adults in their late-twenties or older with developed brains. For the same reasons *Roper* extended the categorical bar to all adolescents under eighteen, conformity with Eighth Amendment standards now counsels this Court to apply the constitutional protection

to youths twenty-one and under, and especially for those who, like Mr. Branch, have other factors further delaying their development.

Based on this new medical consensus, on February 5, 2018, the American Bar Association passed a resolution specifically addressing that, under evolving standards of decency, people who were twenty-one and younger at the time of their capital offense should not be executed. The ABA explained:

> "In light of this evolution of both the scientific and legal understanding surrounding young criminal defendants and broader changes to the death penalty landscape, it is now time for the ABA to revise its dated position and support the exclusion of individuals who were 21 years old or younger at the time of their crime."

Rawles, L., *Ban Death Penalty for Those 21 or Younger, ABA House Says*, ABA Journal (Feb. 5, 2018).

1. There is now a consensus in the medical community that the brain development that continues through the mid-twenties affects adolescents in their late teens and early twenties in ways similar to the effects on juveniles under eighteen, meaning that adolescents in their late teens and early twenties are no more culpable for their crimes than their younger counterparts

In *Roper*, the Court explained, "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." *Roper*, 543 U.S. at 572-73. Relying on scientific studies about brain development up to age eighteen, the Court observed: "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the

worst offenders." *Id.* at 569. This understanding included three concepts: (1) "[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;" (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) "that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 569-70 (citation, internal quotations omitted). "These differences render suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 570.

Today's scientific consensus teaches that these same three concepts apply to youth in late adolescence and early twenties. Since the Court's decision in *Roper*, scientific and social-science research has revealed that, like sixteen and seventeen-year-olds, people in their late teens and early twenties do not have fully developed brains, are immature, and are vulnerable to peer pressure and risk-taking behavior. "The age of 18 as a 'bright line' is not in accord with the current findings of research in developmental science. This research reveals that human brain maturation is ordinarily not complete until the mid-20's . . . . This [is a] new understanding . . . ." (SPCR. 343).

In *Roper*, the first category of traits cited by the Supreme Court as grounds for treating juveniles differently than adults includes immaturity, irresponsibility, and

impulsivity. *Roper*, 543 U.S. at 569. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). Dr. Sultan explained:

> 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. Complex planning, the ability to focus on one thing while ignoring distractions, decision-making, impulse control, logical thinking, risk management, organized thinking, and short-term memory are all functions of the pre-frontal cortex.

(SPCR. 339). Similarly, Dr. Garbarino explained:

> 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: "gray matter" – the outer layer of the brain, "white matter connections" – the brain cells serving as the "wiring" between neurons, and activity in the chemicals or "neurotransmitters" that execute messages within the brain. *All three are compromised in an individual in his early 20's.*

(SPCR. 343) (emphasis added).

Roper recognized that, as a consequence of their immature brains, teens seek risk. Research has shown that "individuals in the young adult period (i.e. ages 18-21)" are at a greater risk to engage in risky behavior than younger adolescents, which indicates "that this period of development is an important transition." Rudolph, M., *At Risk of Being Risky: The Relationship between 'Brain Age' under Emotional*

States and Risk Preference, Dev. Cognitive Neurosci. 24:93-106 at 102 (2017). Current science demonstrates that the prefrontal cortex, crucial to executive functioning—which encompasses a broad array of abilities such as impulse control, risk management, and decision making—continues to develop until "at least the mid-twenties." (SPCR. 339).

The second category of traits cited by the *Roper* court as grounds for treating juveniles differently than adults includes vulnerability and susceptibility. *Roper*, 543 U.S. at 569. "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570. Science now teaches that the vulnerabilities of twenty-one year olds are analogous.

> [T]he hormonal conditions of such youths contribute to impaired brain function (relative to adults) in matters of assessing and taking risks, emotional intensity, and dealing with peers (including social rejection). All of these considerations underlie the current scientific recognition that extended adolescents (people in their early 20's) are a special class.

(SPCR. 344).

The third category of traits cited by the *Roper* court as grounds for treating juveniles differently than adults includes transitory personality and unfixed character. *Roper*, 543 U.S. 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. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

Today's scientific consensus is that this reasoning applies with equal force to those in their early twenties.

> 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 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.

(SPCR. 345).

"The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall*, 134 S. Ct. at 1992 (quoting *Weems v. United States*, 217 U.S. 349 (1910)). In *Hall*, the Court stated, "It is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of I.Q. scores to determine how the scores relate to the holding of *Atkins*." *Hall*, 134 S. Ct. at 1993. And in *Miller v. Alabama*, the Court discussed that the decisions in *Roper* and *Graham v. Florida*, 560 U.S. 48 (2010), "rested not only on common sense . . . but on science and social science . . .

and 'developments in psychology and brain science.'" *Miller*, 567 U.S. at 471. Similarly, it is appropriate for this Court to consider the new scientific consensus to assess the Eighth Amendment's application to a twenty-one year old, like Appellant.

Today we know there is no meaningful difference between Appellant and a defendant under eighteen. Both have brains that have not yet fully developed. Both are prone to immaturity, recklessness, and impulsivity; are still in the neurological development phase; and have transitory personality traits as they search for a stable, authentic identity.

2. Other objective indicia demonstrate that society as a whole is treating youths aged twenty-one and under differently than adults

In addition to the emerging consensus of the medical and scientific community, state and local governments, juries, and international governments are increasingly treating youths in their late teens and early twenties in ways similar to younger juveniles. And on February 5, 2018, the American Bar Association's House of Delegates adopted a resolution recommending that jurisdictions that still impose the death penalty do not impose it on any offender twenty-one years of age or younger at the time of the offense.

a. An emerging national consensus reflects that individuals in Appellant's age group should not be executed

There is an emerging national legal consensus that older adolescents should be treated more similarly to juveniles under eighteen. In assessing the existence of

national consensus on an issue, the United States Supreme Court has examined laws enacted by the various state legislatures and the decisions of sentencing juries, appellate courts, and governors about whether to execute defendants who belong to a particular category of individuals. *See Roper*, 543 U.S. at 563-65; *see also Atkins*, 536 U.S. at 313-17.

Here, there is a trend supporting the idea that youths aged twenty-one and under should not be subjected to the death penalty. First, they would not be executed for any offense in twenty-three states, the District of Columbia, and the five United States territories, because the death penalty has been abolished in these jurisdictions. *Facts about the Death Penalty*, Death Penalty Information Center (2018). The governors of four states have imposed moratoria on executions: Pennsylvania, Oregon, Washington, and Colorado. In *Hall*, the Court characterized states with moratoria as being on the defendant's "side of the ledger" in the national consensus equation. *Hall*, 134 S. Ct. at 1997.

Second, the Court should consider actual practice in states that allow a punishment but do not actually impose it. *Graham*, 560 U.S. at 67 (citations omitted). Seven states that theoretically authorize the death penalty for extended adolescents over eighteen actually highlight a trend against using eighteen as the cut-

off. [7] These states have not executed young offenders in the last fifteen years: Kansas, New Hampshire, Montana, Wyoming, Utah, Idaho, and Kentucky. Six of these states have not imposed death sentences in cases of youth twenty-one and under in the last twenty years: New Hampshire, Montana, Wyoming, Utah, Idaho, and Kentucky.

Similarly, states have gone beyond the age eighteen cutoff in decreasing the number of executions for those who were younger at the time of their crimes. Even in the remaining states with the death penalty as an authorized punishment for offenders twenty-one years of age and younger, executions occur in a minority of the states. Since 2007, for example, only twelve states have actually executed offenders who were twenty-one or younger at the time of their offenses.[8] Since 2011, that number has dropped to nine states.

b. State and federal laws reflect the consensus that youth in Appellant's age group are categorically less mature and less responsible than older people whose brains have reached full maturity

[7] The most recent example is Kentucky where, in two recent cases, a Circuit Court ruled the death penalty unconstitutional for those under twenty-one years of age. *See* Vandiver, B., *Trial Delayed, Death Penalty under Review*, University of Kentucky, Kentucky Kernel (Oct. 20, 2017), http://www.kykernel.com/news/trial-delayed-death-penalty-under-review/article.

[8] These states are Texas, Virginia, Oklahoma, Florida, Delaware, Mississippi, Alabama, Ohio, Georgia, South Carolina, Indiana, and South Dakota.

The United States Supreme Court has considered state statutes imposing minimum age requirements to buttress its conclusion that the death penalty was a prohibited punishment for juvenile offenders. *Roper*, 543 U.S. at 569. In the capital sentencing context, youth is a mitigating factor in almost all death penalty states. Since capital punishment is prohibited for those under eighteen, the youth mitigating factor plainly supports a national consensus that considers defendants in their late teens and early twenties differently than adults.[9]

Three death penalty states have interpreted "onset in the developmental period," for purposes of an intellectual disability assessment in the capital punishment context, as onset prior to age twenty-two: Indiana, Utah, and Maryland.

[9] *See* Alabama, Ala. Code § 13A-5-51(7); Arizona, Ariz. Rev. Stat. § 13751(5); Arkansas, Ark. Code. Ann. § 5-4-605(4); California, Cal. Penal Code § 190.3 (i); Colorado, Colo. Rev. Stat. Ann. § 18-1.3.1201(a); Florida, Fla. Stat. Ann. § 921.141 (g); Kansas, Kan. Stat. Ann. § 21-6625(7); Kentucky, Ky. Rev. Stat. Ann. & 532.025(8); Louisiana, La. C.Cr. P. art. 905.5(f); Mississippi, Miss. Code Ann. § 99-19-101(g); Missouri, Mo. Ann. Stat. § 565.032(7); Nebraska, Neb. Rev. Stat. Ann. § 29-2523(d); Nevada, Nev. Rev. Stat. Ann. §200.035(6); New Hampshire, N.H. Rev. Stat. Ann. § 630:5(d); North Carolina, N.C. Gen. Stat. Ann. § 15A-2000(7); Ohio, Ohio Rev. Code Ann. §(4); Pennsylvania, 42 Pa. Stat. § 9711(4); South Carolina, S.C. Code Ann. § 16-3-20(7); Tennessee, Tenn. Code Ann. § 39-13-204(7); Utah, Utah Code Ann. § 76-3-207(e); Virginia, Va. Code Ann. § 19.2-264.4(v); Washington, Wash. Rev. Code Ann. § 10.95.070(7); Wyoming, Wyo. Stat. Ann. § 6-2-102(vii).

Two more states include this factor for defendants who are under the age of eighteen, but as that is now a complete bar to a death sentence, presumably they consider evidence of youth for those over the age of eighteen as well. *See* Indiana, Ind. Code Ann. § 35-50-2-9(6); Montana, Mont. Code Ann. § 46-18-304(g).

Ind. Code § 35-36-9-2 (2017); Utah Code § 77-15a-102; Md. Code, Crim. Law § 2-202 (2010).

Civil commitment statutes addressing "onset in the developmental period" in four non-death penalty states also use age twenty-two as the developmental age for onset purposes: Minnesota, New Mexico, Rhode Island, and Wisconsin. Minn. Stat. § 253B.02; N.M. Stat § 28-16A-6; N.M. Stat § 43-1-3; R.I. Gen. Laws § 40.1-1-8.1; Wis. Stat. § 51.01(5)(a), § 51.62(1).

In the criminal justice system more generally, there are many examples of courts and legislatures recognizing that people in their early to mid-twenties are not full-fledged adults. For example, Nebraska, California, Idaho, and New York all offer Young Adult Court, for youthful offenders aged eighteen to twenty-four or twenty-five, depending on the state. States are increasingly opening young adult correctional facilities to focus more on rehabilitation and building life resources. They have done this in Connecticut (for eighteen to twenty-five year olds), Maine (for eighteen to twenty-six year olds), and New York (with a unit at Rikers Island that specifically houses eighteen to twenty-one year olds).

Outside of the criminal justice system, the federal Affordable Care Act uses age twenty-six as the cut off age for youths covered by a parent's health insurance plan, and rental car companies impose extra "young driver" fees on renters under age twenty-four.

c. There is little penological purpose for imposition of the death penalty on youth in Appellant's age group

Death sentences imposed on extended adolescents like Appellant have little or no penological purpose. They do not meet any of the three principal rationales of punishment: "rehabilitation, deterrence, and retribution." *Kennedy*, 554 U.S. at 420. "Rehabilitation, it is evident, is not an applicable rationale for the death penalty." *Hall*, 134 S. Ct. at 1992-93 (citation omitted). As for the rationale of deterrence, "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles." *Roper*, 543 U.S. at 571. "The same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* And "[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. Today we know that this same understanding about deterrence and retribution must apply to a youth such as Appellant.

Youth aged twenty-one and younger have the same impulsivity as youths eighteen and under. They act rashly, without reflection and full consideration of the consequences of their actions. They do not grow out of this behavior until their brains have fully formed. Science now shows that like sixteen and seventeen year olds, they

lack the self-regulation and executive functioning to appreciate the death penalty as a deterrent.

This is especially true here, where Mr. Branch also suffered delays to his brain development because of his childhood trauma and adolescent substance abuse. Given the findings of the medical community and its most recent consensus on brain development in older adolescents, the Court should afford Mr. Branch the opportunity to present evidence that he is constitutionally ineligible for execution.

D. The Circuit Court erred in its treatment of Appellant's claim

1. The court erred in failing to hold an evidentiary hearing where it still had questions about the undisputed evidence

During the January 30, 2018, *Huff* hearing, the Circuit Court said, "I ask the first [question] in—with some trepidation because it is, as you say, an issue that the State does not seem to be contradicting. I'm not sure that I understand this recent consensus." (SPCR. 1110-11). Appellant's counsel noted:

> Now, we have known for a long time that abusing children is a bad thing, and we've known for a long time that kids drinking and doing illegal substances is a bad thing for kids. What is now available and crystallized is that national consensus, that the two experts have proffered to the Court, that there are specific effects on the brain, that there are specific brain chemical and brain synaptic activity that applies to someone who's 19, 20, 21, 22, and the experts have provided that in their reports.

(SPCR. 1113-14). The undisputed expert reports also addressed the court's question:

> The mental health professions, including psychology, psychiatry, the neurocognitive disciplines, and related social science disciplines, have

> expanded their research and professional understanding of human brain functions. . . . [T]he professional consensus today is that there are distinct aspects to human brain development such that adolescent brain formation continues into the period of one's 20's.

(SPCR. 334 (Dr. Sultan)).

> The age of 18 as a 'bright line' is not in accord with the current findings of research in developmental science. . . . This new understanding is especially significant to a case such as the case of Eric Branch, who was 21 at the time of the offense, demonstrably impulsive and immature, and suffered an abusive developmental history.

(SPCR. 343 (Dr. Garbarino)). *None of this was disputed by the State*.

The Circuit Court, if unwilling to accept Appellant's proffer based on the pleadings, should have held a hearing in light of the proffer and expert opinions that the medical community has come to a consensus on human brain development that was not available at earlier stages of this case. Instead, the Circuit Court complained that, given the warrant, it did not have time to go into all of this, stating, "I don't have, you know, three months to let people get ready for hearings on this consensus . . . and both sides prepare for whether there really is a consensus and how it ought to be applied. I'm asked to do this on the fly." (SPCR. 1112).

Expediency is no justification for the court's actions. The need for full and fair evidentiary resolution is especially acute in a capital case. *See Swafford v. State*, 679 So. 2d 736, 740-41 (Fla. 1996) (Harding, J., concurring in decision granting stay and remanding for a hearing, stating that "[w]hile finality is important in all legal proceedings, its importance must be tempered by the finality of the death penalty");

see also Jones v. State, 678 So. 2d 309, 310 (Fla. 1996) (staying execution and remanding for an evidentiary hearing to determine whether some of the evidence proffered was not previously available).

And the court had already scheduled tentative hearing dates for February 1 and 2, 2018, (SPCR. 155), so any hesitancy of the Circuit Court could have been addressed at a hearing.

2. The Circuit Court erred in relying on its own undisclosed beliefs rather than the undisputed factual proffer

Rather than holding a hearing, the Circuit Court erroneously relied on undisclosed information that Appellant did not have an opportunity to confront or explain over the undisputed factual proffer. The Circuit Court's actions deprived Mr. Branch of due process and a full, fair, and reliable hearing in a proceeding where a human life is at stake.

The competent, substantial evidence in this record all supports Appellant's claim. Mr. Branch submitted reports from two qualified mental health experts who spoke to a "new mental health professional consensus" regarding the brain development of a twenty-one year old like Mr. Branch and explained that evidence of the "new professional mental health consensus" was not available previously. (SPCR. 334-35); (SPCR. 342). The State did not challenge the factual proffer and did not contest the findings of Drs. Sultan and Garbarino. The Circuit Court acknowledged that the State did not contradict Mr. Branch's factual proffer. (SPCR.

1110). However, the court did not embrace the unchallenged proffer because of a belief the court obtained outside of the proceedings at hand.

When a court relies on information that is unknown to the defendant and the defendant has no opportunity to question that information, "[t]he risk that some of the information . . . may be erroneous, or may be misinterpreted, by the . . . judge, is manifest." *Gardner v. Florida*, 430 U.S. 349, 359 (1977). Here, the court swept aside the uncontested reports of Drs. Sultan and Garbarino, ruling that "[t]he emerging science alleged and referenced by Defendant explains information already known and does not qualify as newly discovered evidence." (SPCR. 1135). To reach that conclusion, the court must have relied upon some personal belief about the science, although the court did not elaborate in its order. But the court did not allow a hearing at which Mr. Branch could address or contest that belief.

It appears the court conflated previously known information about brain development in eighteen year olds and information that substance abuse is bad for the human brain with the new scientific findings about the specific brain development of young people in their late teens and early twenties. Had the court allowed a hearing, its misunderstandings could have been addressed.

The Circuit Court's actions erroneously deprived Mr. Branch of an opportunity to confront the evidence upon which the court relied. As the United States Supreme Court has explained:

> [T]he judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred . . . and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.

In re Murchison, 349 U.S. 133, 138 (1955). *Cf. Goldberg v. Kelly*, 397 U.S. 254, 266-72 (1970) (holding that procedural due process requires timely and adequate notice, the opportunity to confront adverse witnesses, and the opportunity to present evidence in rebuttal); *Grannis v. Ordean*, 234 U.S. 385 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). And as explained in *Gardner*, "[D]ebate between adversaries is often essential to the truth-seeking function of trials [and] requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Gardner*, 430 U.S. at 360.

If a court intends to "use any information not presented in open court as a factual basis" for a ruling, the court must "afford the defendant an opportunity to rebut it." *Porter v. State*, 400 So. 2d 5, 7 (Fla. 1981). *See also Marcelin v. Denny's Rest.*, 648 So. 2d 834, 835 (Fla. DCA 1995) (reversing where the judge's opinion relied on personal out-of-court observations of a party);

> There is no doubt that in evaluating the evidence, the [judge] should confine its considerations to the facts in evidence as weighed and interpreted in the light of common knowledge. [Judges] must not act on special or independent facts which were not received in evidence.

Edelstein v. Roskin, 356 So. 2d 38, 39 (Fla. DCA 1978) (holding that judges "must not act on special or independent facts which were not received in evidence"); *Snook v. Firestone Tire & Rubber Co.*, 485 So.2d 496 (Fla. DCA 1986) ("In reaching a verdict, [the fact-finder] must not act on special or independent facts which were not received in evidence."); *Krawczuk v. State*, 92 So. 3d 195, 202 (Fla. 2012) (explaining that judges are "strongly discourage[d]" from researching factual matters before them as "[t]here is no reason apparent" for a judge to rely upon the results of personal research "outside of open court").

Mr. Branch was not allowed a hearing to address, with evidence, the belief about relevant science on which the Circuit Court relied. He was denied the chance to test the accuracy, reliability, and applicability of the undisclosed information apparently considered by the Circuit Court. "[F]acts independent of the evidentiary record should not have been considered" by the trial court, and "remand for a new merits hearing is necessary." *Marcelin*, 648 So. 2d at 835.

3. Had Mr. Branch been afforded an opportunity to rebut the Circuit Court's undisclosed belief, he would have presented evidence that the medical community has only recently come to a relevant consensus on brain development, including the effect of the still-forming brain on those in their late teens and early twenties

Contrary to the Circuit Court's untested belief, a consensus by the medical community on certain topics in adolescent brain development, including the effect of the still-forming brain on those in their late teens and early twenties, and the effect

of childhood trauma and substance abuse on adolescent brain development, has only recently formed.

In *Roper*, the United States Supreme Court relied heavily on neuroscience research on adolescent brain development to find that juveniles under eighteen differ from adults in three ways. *Roper*, 543 U.S. at 569. While the Court relied on several neuroscience studies, its conclusions were based extensively on the works of Laurence Steinberg and Elizabeth S. Scott. In November 2016, Steinberg and Scott, along with another author, published an article on recent findings regarding the brain development of what they termed "young adults," those aged eighteen to twenty-one. *See* Scott, E., Bonnie, R., & Steinberg, L., *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (Nov. 2016).

The article explained that since the time of *Roper*, "developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority. Recently, researchers have found that eighteen- to twenty-one-year old adults are more like younger adolescents than older adults in their impulsivity under conditions of emotional arousal." *Id.*

While it may have been known when the Supreme Court decided *Roper* that brain development continued into the twenties, the *consequences* of that delayed

development were still unknown until recently. In their 2016 article, Scott and Steinberg stated, "[U]ntil recently, no compelling scientific argument existed for treating young adults differently than their older counterparts." *Id.* at 643. Rather, "[y]oung adults between the ages of eighteen and twenty-one constitute a less well-defined category that has only recently received even informal acknowledgement." *Id*. at 644. Thus, even as of 2016, the "*developmental research suggesting that young adults are not fully mature [was] in an early stage*." *Id.* at 643 (emphasis added). While it had been "clear that the 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 (emphasis added).

The focus of the earlier science was on juveniles *under* eighteen. As Steinberg and Scott explained, the prior studies, including those relied upon by the Supreme Court in *Roper*, compared the group then viewed as adolescents—those under eighteen—to adults. There were "very few studies [that] systematically examined age differences in brain development among individuals older than eighteen." *Id.* at 651. Most of those studies compared adolescents to "'adult[s],' with the latter group composed of people who may be as young as nineteen or as old as fifty." *Id.* When the adult group covered "data from such a wide age range, it [was] impossible to draw specific inferences about potential differences between young adults and their

older counterparts." *Id.* As a result, young adults like Appellant were lumped in with older adults and believed to be more mature than their under-eighteen counterparts.

This is evidenced by the medical data used in *Graham v. Florida*, 560 U.S. 48 (2010), the case that prohibited life imprisonment without the possibility of parole for juveniles under eighteen who were convicted of non-homicide offenses. *Id.* at 82. In an amicus brief for the State of Florida, the Criminal Justice Legal Foundation pointed out that crime rates actually spike around age eighteen and then only decrease gradually until the mid-twenties, when crime rates more noticeably taper off. *See* Brief for the Criminal Justice Legal Foundation as Amicus Curiae, at 15-17, *Graham v. Florida*, 560 U.S. 48 (2010). So while it may have been common knowledge as of 2010 that older adolescents in their late teens and early twenties were still engaging in risky and at times illegal behavior at higher rates than older adults, *there was no explanation for why*.

The reason for this also aligns with Scott, Bonner, and Steinberg's 2016 article addressing the research on young adults. The Center for Constitutional Jurisprudence, in another amicus brief for the State of Florida in *Graham*, pointed out that the science explaining brain development relied upon by the American Medical Association and the American Academy of Child and Adolescent Psychiatry was "developing" and that it "could not yet provide a reliable basis" for fully understanding adolescent brain development. *See* Brief for The Center for

Constitutional Jurisprudence as Amicus Curiae, at 2, *Graham v. Florida*, 560 U.S. 48 (2010); *see also Young Adulthood*, at 648 (explaining that in the past there had been too few studies on young adult brain development, and so the "extant research [was] suggestive but inconclusive").

After *Graham*, the scientific community began to engage in more targeted research to answer the questions about the effects of incomplete brain development on young people in their early twenties and late teens. Scott and Steinberg, to start filling in the holes of what happens in an older adolescent's still-developing brain, joined a team of researchers to examine decision-making in eighteen to twenty year olds. The early research began to show impairment in that age range (eighteen to twenty-one) when under both brief and prolonged negative emotional situations. *See* Cohen, Alexandra O. et.al, *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 Psych. Sci. 4, at 549 (May 2016). Following that research, the group explained that "extension of this work [examining the brains of juveniles under eighteen] to young adults, who show diminished cognitive control relative to slightly older adults in negative emotional situations, may have implications for legal policy." *Id.* at 560.

Other neuroscientific and psychological studies confirm this recent shift in science's understanding of older adolescent brain development. For example, there has been an "increasing array of typical child and adolescent behavioral processes

that have been examined in relationship to brain maturation and genetic factors." Barasso-Catanzaro, C.; Eslinger, P., *Neurobiological Bases of Executive Function and Social-Emotional Development: Typical and Atypical Brain Changes*, Interdisciplinary J. of Applied Family Studies, at 108 (February 2016). In 2013, the National Academy of Science's Institute of Medicine convened a task force to look into the "health, safety, and well-being of young adults" aged eighteen to twenty-six. *See* Bonnie, R., et al., Inst. of Med. & Nat'l Res. Council, *Investing in the Health and Well-Being of Young Adults*, at xv (2015). By that fall, the Committee formed a group to conduct a study to "address the needs of young adults and guide policy makers and other stakeholders in meeting those needs." *Id.* A key reason for this task force was that young adults "are too rarely treated as a distinct population in policy, program design and research. Instead, they are often grouped with adolescents or, more often, with all adults." *Id.* at 1. As part of that study, the Committee broke down the level of risk-taking among young adults and noted that research as of 2015 was beginning to recognize 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 data makes sense when considering Mr. Branch's life history and some of the activities he engaged in, *see*, *supra*, Argument I(B)(1),

but only now is there an explanation of *why* he was participating in these dangerous activities, seemingly without thought of the consequences.

It is not just brain development in older adolescents that has been clarified since *Roper* and *Graham* but also the effect that childhood trauma and adolescent substance abuse have on this development, namely that it can cause specifically identified delays in brain maturation. It was reported only in December of 2016 that studies began to show that heavy alcohol use in teenagers causes abnormal development of the brain's gray matter. *See* Kennedy, M., *Heavy Teenage Drinking Linked to Abnormal Brain Development*, Reuters Health Medical News (Dec. 2, 2016). As counsel explained at the *Huff* hearing, while it was generally known that alcohol is bad for adolescent brains, it was not known exactly why, and, more importantly, it was not known how that tied to behavior. (SPCR. 1115).

The same is true for recent developments in the science of trauma and brain development. The Center on the Developing Child at Harvard stated that, as of 2016, researchers began to understand the effect of social class on health and learning outcomes but that "neuroscience [was just then linking] environment, behavior, and brain activity." *See* Hayasaki, E., *This is Your Brain on Poor*, Newsweek (Sept. 2, 2016). Mary Helen Immordino-Yang, a neuroscientist at the University of Southern California's Brain and Creativity Lab who has been conducting exactly that research on stressful childhood environments and brain development, explained that, as of

2016, "the scientific revolution is only beginning." *Id.* She said, "We're *starting* to get an appreciation of the richness of the social story—the social stress . . . that is really driving these kinds of effects and shaping brain development and biological development . . . ." *Id.* (emphasis added).

On a more pragmatic level, it is also only recently that the criminal justice system has started taking these recent developments into account. It was only on August 1, 2017, that a court ruled that *Roper* should extend to anyone over the age of eighteen. *See Kentucky v. Bredhold*, Fayette Circ. Ct. No. 14-CR-161 (Aug. 1, 2017). Many of the Young Adult Court (YAC) programs referenced in Mr. Branch's successive 3.851 motion were only recently opened. For example, the California YAC program started in summer 2015;[10] and the New York YAC only started in the spring of 2016.[11]

Young adult correctional facilities and units are even more recent. For example, Connecticut's young adult unit opened in January 2017. Massachusetts's young adult wing is scheduled to open this month, and South Carolina is the next state working to open one.[12]

[10] http://www.sfsuperiorcourt.org/divisions/collaborative/yac

[11] http://www.brooklynda.org/young-adult-bureau/

[12] https://www.vera.org/newsroom/press-releases/groundbreaking-young-adult-initiative-to-expand-to-prisons-in-south-carolina

And it was just this week (on February 5, 2018) that the ABA passed a resolution encouraging jurisdictions with the death penalty to ban the execution of individuals who were younger than twenty-two at the time of the offense. *See* Rawles, L., *Ban Death Penalty for Those 21 or Younger, ABA House Says*, ABA Journal (Feb. 5, 2018). Just as it takes time for a consensus to form once new research is discovered, it also takes time for that consensus to reach the criminal justice and legal community.

Finally, the Circuit Court's belief that Mr. Branch waited until he had a warrant to bring this claim is erroneous. As explained in Dr. Sultan's report, she evaluated Mr. Branch on December 14, 2017, more than a month before Governor Scott signed Mr. Branch's warrant. (SPCR. 332). Contact had also been made with several of Mr. Branch's family members and with Dr. Garbarino before the warrant was signed. Undersigned counsel was in the process of developing this claim and had every intent of filing it in the very near future. The warrant merely imposed an official and much tighter schedule than was previously expected. Had Mr. Branch brought this claim in the last "five or six or seven years"—as the Circuit Court implied he should have—there would have been nothing but a few preliminary studies to support some aspects of the claim, and almost no research at all into others. As counsel stated at the *Huff* hearing: "You don't wake up one morning and [] open

your closet and . . . there's a scientific consensus. . . . Scientific consensus takes a while to develop." (SPCR 1116).

If Drs. Steinberg and Scott, the leading authorities on this issue, could not have previously explained what effect an undeveloped brain has on older adolescents in their late teens and early twenties, it is unthinkable that Mr. Branch could have provided such an explanation at earlier stages of this litigation. It is the culmination of inquiry regarding the neurological and behavioral consequences for older adolescents who have not yet reached their mid-twenties, as well as the new information about trauma and adolescent substance abuse and developing brains, that allowed Mr. Branch to raise such a claim at this point in time. Science has only just recently reached a consensus on these issues.

4. The court erred in concluding, without a hearing, that the relevant evidence was not newly-discovered

Given the recent nature of the scientific conclusions upon which Mr. Branch relies, the Circuit Court erred in its belief that this evidence was not newly-discovered. Appellant's claim that his execution would violate the Eighth Amendment due to his cognitive underdevelopment at the time of the crime satisfies the procedural requirements of Fla. R. Crim. P. 3.851(d)(2), (e)(2). This new scientific consensus, discussed by Dr. Sultan (SPCR. 319-40) and Dr. Garbarino (SPCR. 342-48), is a valid basis for this claim to be considered on its merits at a hearing. As prior counsel Douglas Knox also affirmed, this claim could not have

been raised before. (SPCR. 1129) ("This science did not exist at the time I represented Eric or beforehand. . . . Had this new scientific understanding in the mental health professions been available to me during the time I represented Eric, I certainly would have used it.").

Florida courts have long understood, and recently affirmed, that emerging science can constitute newly discovered evidence for purposes of postconviction litigation. *See, e.g.*, *Duncan v. State*, No. 2D16-2625, 2017 WL 1422648, at *2 (Fla. 2d DCA Apr. 21, 2017) ("[W]e disagree with the postconviction court's conclusion that scientific evidence in the form of articles and studies cannot constitute newly discovered evidence."); *Clark v. State*, 995 So. 2d 1112, 1113 (Fla. 2d DCA 2008) (holding that new scientific evidence could be considered newly discovered evidence); *Zamarippa v. State*, 100 So. 3d 746, 747 (Fla. 2d DCA 2012) (reversing and remanding for an evidentiary hearing because a scientific organization's new report . . . could constitute newly discovered evidence); *Murphy v. State*, 24 So. 3d 1220, 1222 (Fla. 2d DCA 2009) (same).

This Court has also held that new scientific evaluations relating to evidence presented in a defendant's prior litigation can qualify as newly-discovered evidence. For example, mental health evaluations conducted years after trial can produce newly-discovered evidence. *See State v. Sireci*, 502 So. 2d 1221 (Fla. 1987). Scientific advances also give rise to "newly discovered evidence claims predicated

upon new testing methods or technologies that did not exist at the time of the trial, but are used to test evidence produced at the original trial." *Wyatt v. State,* 71 So. 3d 86, 100 (Fla. 2011); *see also Preston v. State*, 970 So. 2d 789, 798 (Fla. 2007) (holding new DNA testing of pubic hair constituted newly discovered evidence); *Hildwin v. State*, 951 So. 2d 784, 788-89 (Fla. 2006) (holding new DNA testing of semen and saliva was newly discovered evidence).

To the extent Florida has not yet grappled with the specific question whether the emerging scientific consensus, establishing that individuals in their late teens and early twenties are no more cognitively developed than individuals in their mid-to-late teens, is newly-discovered evidence for purposes of successive postconviction litigation, this Court should allow a hearing so that the issue can be reliably resolved. Given Appellant's evidence regarding the emerging scientific consensus on juvenile brain development and its effect on the propriety of this death sentence, a hearing should be conducted to address whether his execution should be prohibited under the Eighth Amendment.

The State and Circuit Court's reliance on *Carroll v. State*, 114 So. 3d 883, 886-87 (Fla. 2013), was misplaced. This Court found Carroll's *Atkins* claim to be procedurally barred, because *Atkins* was decided in 2002, and Carroll did not raise an *Atkins* claim in the successive postconviction motion he filed in 2003. *Id*. at 886-87. In the instant case, the State contended that Appellant's claim based on the

emerging scientific consensus on juvenile brain development is barred, because *Roper* was decided in March 2005, and Appellant filed his state habeas in this Court in August 2005 without raising a *Roper* claim. (SPCR. 1102). This ignores that Appellant's claim is based on a new scientific consensus that did not exist in 2005.

In fact, none of the cases cited by the State in the Circuit Court addressed the new scientific consensus. For example, the State claimed this Court rejected a similar claim in *Davis v. State*, 142 So. 3d 867, 874-76 (Fla. 2014). *Davis* involved a twenty-five-year-old defendant who generally argued that based on the effects of alcohol and sexual abuse on brain development in children, he was the "functional equivalent of a child" and had "the mind of a juvenile." As counsel for the State acknowledged at the *Huff* hearing, the *Davis* petitioner did not proffer a "case-specific" study to the court. (SPCR. 1118-19). In contrast, Mr. Branch comes to this Court with case-specific studies addressing the effects of the now scientific consensus on his case. More significantly, *Davis* pre-dates the current consensus. In *Davis*, this Court neither spoke about a consensus nor rejected a consensus in the scientific community.

Other than *Davis*, the State cited cases where this Court rejected general arguments citing *Roper* for defendants over the age of eighteen at the time of the offense or younger than eighteen at the time of a crime used as an aggravator, *see Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011) (relying on expert conclusion of brain

damage even though it was not the type of brain damage that "causes . . . behavioral problems"); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (denying *Roper* relief to a defendant who was twenty-three at the time of the offense and did not provide case-specific scientific conclusions or new research); *Melton v. State*, 949 So. 2d 994, 1020 (Fla. 2006) (declining to find that pre-eighteen offenses should not count as aggravators); *England v. State*, 940 So. 2d 389, 406-07 (Fla. 2006) (same); *Lowe v. State*, 2 So. 3d 21, 46 (Fla. 2008) (same), and decisions of this Court rejecting generalized assertions that mental illness, brain damage, and borderline intellectual disability alone should bar an execution. *See McCoy v. State*, 132 So. 3d 756, 775 (Fla. 2013); *Johnston v. State*, 27 So. 3d 11, 27 (Fla. 2010); *Carroll v. State*, 114 So. 3d 883, 887 (Fla. 2013); *Johnson v. Stephens*, 617 Fed. Appx. 293, 303 (5th Cir. 2015). All of these cases are irrelevant here.

In short, the bulk of cases the State cited pre-date *Hall* and thus could not present the same claim as Appellant: that he is entitled to individualized review of his evidence that he is ineligible for the death penalty as demonstrated by the new scientific consensus. Appellant's claim is not a generalized assertion that *Roper* should extend to him; his claim is that, under the Eighth Amendment, this Court should consider the new scientific consensus and allow a hearing where the evidence can be duly considered.

In addition, the Circuit Court listed cases not used by the State to say that Appellant had not presented newly discovered evidence. (SPCR. 1135-36). However, the use of these cases demonstrates that the court fundamentally misunderstood the new science at issue in Appellant's proffer: rather than defeating Appellant's claim, these cases further highlight the court's conflation of what the prior studies showed about brain development and its timing as opposed to what the newer studies show about the effects of delayed brain maturation process.

For example, the Circuit Court wrote, "Studies from 2004 showing the human brain development is not complete until the age of 25 have been cited in previous case law." *Id. Gall* v. United States, 552 U.S. 38, 57-58 (2007), and *Morton v. State*, 995 So. 2d 233, 245 (Fla. 2008)—the cases cited by the Circuit Court—said there was some indication that the brain continues to evolve into the mid-twenties. But as Appellant proffered below and explains in this brief, *the earlier studies referenced in these cases did not address how the maturation process effects youth in their late teens and early twenties*. This new science about the actual maturation process was not available earlier. Leading experts in the field have described the proffered maturation science as new. This is the science now relied upon by the ABA to recommend abolition of capital punishment for youths twenty-one and under.

To the extent that these cases relied on studies delving into the *effects* of a not-yet-developed brain, this research was at the early forefront—just beginning—of the

study of these effects. The beginning of a field of study is not a consensus. So, for example, in *Lebron v. State*, 135 So. 3d 1040 (2014), the court relied on a then recent study explaining that the part of the brain that controls risk-taking is one of the still-developing parts of the brain. The neuroscientific community, once armed with that knowledge, then had to conduct additional studies to determine whether this actually affected impulse control and risk taking in youth up to their mid-twenties. This is exactly what that community did. *See* Scott, E., Bonnie, R., & Steinberg, L., *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (Nov. 2016); Rudolph, M., *At Risk of Being Risky: The Relationship between 'Brain Age' under Emotional States and Risk Preference*, Dev. Cognitive Neurosci. 24:93-106 at 102 (2017). And as with all scientific endeavors, once one study suggested certain results, more research was necessary to confirm the results before a consensus within the mental health community as a whole could be formed.

As discussed throughout this brief, it was only recently that the consensus emerged on the behavioral and decision-making effects lack of brain development in youth in their late teens and early twenties. Had the Circuit Court allowed a hearing, its misperception about the earlier studies could have been addressed and explained. But Mr. Branch was not given the chance to address the court's misperception.

Unlike those cases, Appellant's claim is based on a new scientific consensus regarding the brain development of people in their late teens and early twenties, and includes a case-specific proffer by knowledgeable experts. More importantly, Appellant's claim is based on the mandates of *Hall* and *Moore* to consider the teachings of the medical community just as much as it is based on the principles of *Roper*.

E. Because there is a consensus, the Court should not ignore the medical community's conclusions in considering Mr. Branch's ineligibility for the death penalty

Today there is a consensus in the medical community that (1) the brain does not stop developing until somewhere around the mid-twenties, (2) this late development means that those in their late teens and early twenties still resemble teenagers under eighteen in ways that are relevant to criminal justice policies, and (3) childhood trauma and adolescent substance abuse further delay brain development. The United States Supreme Court has established that in accord with the Eighth Amendment, courts—which are not scientific experts—must rely on the teachings of the medical and scientific community. This is of utmost importance when deciding the constitutionality of a death sentence. *See*, *e.g.*, *Graham*, 560 U.S. at 68 (observing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Roper*, 543 U.S. at 569 (repeatedly citing various neuroscience studies).

The Eighth Amendment mandate to take science into account led to the decision in *Hall v. Florida*, where the Court disapproved jurisprudence that "disregard[ed] established medical practice." *Hall*, 134 S. Ct. at 1995. In the context of intellectual disability, the Court held that it violated the Eighth Amendment to prohibit evidence of intellectual disability once a person scored over 70 on I.Q. testing. The *Hall* court explained:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction *must have a fair opportunity to show that the Constitution prohibits their execution*. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Id. at 2001 (emphasis added). Under this Eighth Amendment jurisprudence, the Court later chastised the Texas Court of Criminal Appeals for "diminish[ing] the force of the medical community's consensus." *Moore v. Texas*, 137 S. Ct. 1039, 1043 (2017). Most recently, the Court ordered a remand in *Wright v. Florida*, 138 S. Ct. 360 (2017), in light of *Moore*, because rejection of the applicable consensus is impermissible.

Here, recent developments in the science of older adolescent brain maturation now demonstrates that there are young people—analogous to people within the 70 to 75 standard error of measurement for intellectual disability—where the bright-line cutoff causes an "unacceptable risk" that death sentences are being imposed

upon those ineligible for such a sentence. *See Hall*, 134 S. Ct. at 1990. Based on the consensus in the medical community that brain development reaches into the mid-twenties, that the lack of development still impacts older adolescents and people in their early twenties in ways relevant to the criminal justice system, and that alcohol and trauma further delay brain development, Mr. Branch can show that he is not eligible for capital punishment. For all intents and purposes, Mr. Branch was not yet an adult at the time of his crime. Because he is "facing that most severe sanction, [he] must have a fair opportunity to show that the Constitution prohibits [his] execution." *Hall*, 134 S. Ct. at 2001. A hearing is appropriate.

ARGUMENT II

APPELLANT'S NEEDLESS SUFFERING AND UNCERTAINTY DURING HIS TIME ON DEATH ROW VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The Circuit Court erroneously denied relief on this claim, asserting that courts have consistently rejected the claim. (SPCR. 1136). First, this claim is specific to Appellant. It is based on the circumstances of Appellant's stay on death row, during which he spent years without competent counsel and years engaging in a painful campaign to locate a lawyer to represent him. This claim—based on Appellant's specific experiences—has never been raised before. It certainly has not been rejected by this Court or the Supreme Court. And it is a claim that becomes ripe for review only after an execution is set, because it seeks to prohibit that execution.

A. Among Appellant's undisputed proffer was evidence of his lengthy incarceration on death row and troubling experiences with Florida's capital punishment defense system[13]

Appellant presented undisputed evidence regarding the extensive suffering he experienced on death row, which was directly caused and exacerbated by a lack of meaningful representation. Since Appellant's arrest, the entire history of his representation is a tragic story of the funding shortfalls of state defender agencies, a failed pilot registry attorney program, conflicts of interest, and legal abandonment by those who were supposed to be his advocates.

After Appellant's conviction became final on May 12, 1997, the case was assigned to the Office of Capital Collateral Regional Counsel for the Northern Region (CCRC-N), where Appellant went without a designated attorney from the date the mandate issued until October 1, 1998. An amended petition for postconviction relief was finally filed in March 2003, right before CCRC-N was defunded. Due to a lack of funding and resources, the first post-conviction counsel withdrew. Michael Reiter, former head of CCRC-N, took over the case as a registry attorney. Appellant wanted to challenge the new registry system, leading to inherent conflict with Mr. Reiter, but Mr. Reiter refused to withdraw. In federal court, Appellant again sought appointment of conflict-free counsel, first in District Court

[13] For Mr. Branch's experience on death row as submitted to the court below, *see* Appellant's R. 3.851 motion. (SPCR. 237-310).

and then in the Eleventh Circuit, which finally permitted Mr. Reiter to withdraw after it denied relief. This started a years-long search by Mr. Branch, his cousin, other family, and the ABA to find counsel. By the time the ABA secured pro bono counsel for Appellant, it was too late. His appeals had long since been denied.

B. This claim is not procedurally barred

There is no procedural impediment to Appellant's Eighth Amendment claim that it would be cruel and unusual to execute him after his particularly anguishing twenty-four years of confinement on death row, during which his desperate attempts to obtain meaningful representation went repeatedly unanswered.

Like a claim of incompetency to be executed, *see Panetti v. Quarterman*, 551 U.S. 930 (2007), or a broad claim that it would be cruel and unusual to execute a prisoner who had spent an inordinate amount of years on death row, *see Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Stevens, J., statement respecting the denial of certiorari), Appellant's Eighth Amendment claim did not become ripe until his death warrant was signed and execution became imminent. This claim "is measured at the time of the execution, not years before then." *Tompkins v. Secretary*, 557 F. 3d 1257, 1260 (11th Cir. 2009).

C. Appellant has endured needless suffering and uncertainty during his time on Florida's death row

Appellant has been on death row for twenty-four years, and he has spent most of that time fighting for competent legal representation. His days have been filled

with uncertainty, never knowing when he would finally receive a response from one of the many lawyers, law firms, and legal aid organizations he contacted for legal counsel or whether the governor would sign his death warrant. The United States Supreme Court precedent recognized a predicament such as Appellant's over a hundred years ago: "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). As Justice Brennan noted, "The 'fate of ever-increasing fear and distress' to which the expatriate is subjected, *Trop v. Dulles*, 356 U.S. 86, 102, (1958), can only exist to a great degree for a person confined in prison awaiting death." *Furman v. Georgia*, 408 U.S. 238, 289 (1972).

Although the Supreme Court has held that capital punishment does not violate the Eighth Amendment, the Court also recognized that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

The Circuit Court dismissed Appellant's claim as a garden-variety "*Lackey*" claim—a complaint about the number of years Appellant has spent on death row—without recognizing that Appellant's claim was *actually* about the needless suffering and uncertainty he faced as he begged for proper counsel and navigated the perils of the failed Florida registry program from his 6 x 9 x 9.5 foot cell. *Death Row Fact*

Sheet, www.dc.state.fl.us/oth/deathrow. Rather than speculation about the "ever-increasing fear and distress," *see Trop*, 356 U.S. at 102, Appellant must have felt, the record reflects Appellant's own articulation of that point. Appellant's letters and pleadings (described in detail in the 3.851 motion) serve as a remarkable documentation of his inner fear and pain suffered throughout his time on death row. For example, when the District Court for the Northern District of Florida denied his § 2254 petition, Appellant speculated that he only had seven months to one year of appeals left. He wrote, "Assuming I win nothing than [sic] it's up to the governor. It could be a week. It could be 10 yrs after. But he can sign my warrant at any moment after my appeal expires." (SPCR. 434-68 (Letter Excerpts from Appellant to Leora Nosko-Passmore; his grandmother; his aunt, Connie Branch; and his cousin, Alex Branch (2008 to 2013))).

Appellant panicked even more when the Eleventh Circuit denied relief, causing him to fear that he would imminently end up on the "Ready List"—a list of death row prisoners provided to the governor indicating they have exhausted all appeals and are ready for execution. Appellant explained, "Once I am on the list, staying there 3 months is normal. Remaining there 3 yrs is extraordinary. Meaning I have up to 3 months but less than 3 yrs to make something happen or die." Shortly thereafter, Appellant grew even more fearful when the United States Supreme Court denied his petition for writ of certiorari, again writing, "There is no hope of lasting

3 years on the Ready List for the simple fact they will run out of people on the list long before that and have to kill me." Sure enough, Appellant received notification that he was on the governor's list less than a month later.

The pressure started to weigh on Appellant. He wrote, "Most days I don't even feel like opening my eyes. I am constantly tired, sad, lonely, hungry, and generally miserable . . . ." Appellant ended up filing for certiorari review *pro se*. Almost a year after Appellant's certiorari petition had been denied, he told his cousin, "I feel like somebody has been standing behind me with a gun to my head for a year now."

Appellant described what it felt like to have the men living around him taken away and killed one by one:

> The tough part is that now everyone they are killing has been here with me for 20 years. Its [*sic*] kind of like coming into work and finding every month another person you've worked in the office with for 20 years has been taken out back and killed. Even when it's not you, it's so much stress.

In 2013, Florida passed the Timely Justice Act. It required the governor to issue a warrant within thirty days of clemency denial, and to schedule an execution within 180 days of the warrant. This caused utter panic on Florida's death row, as the prisoners wondered how quickly their executions would be processed and if there might be mass warrants. Appellant described the fearful atmosphere, writing:

> Now, every time the door opens, it falls quiet, everybody wondering if he did it . . . signed all our warrants or is he coming after just one of us today . . . . Anybody who survives this will be driven nuts, watching

> 120 people they know get killed, wondering at each open door – am I next? It's too much.

Exacerbating Appellant's anxiety was that most of his time on the row, he was represented by inadequate conflicted counsel. In over sixty letters to his loved ones, Appellant lamented his lack of appropriate representation all through his state and federal review. He reached out to Florida and national attorneys and organizations. *See, e.g.*, (SPCR at 475-76). He filed numerous *pro se* pleadings, most of which were stricken due to his representation by the court-appointed counsel he wanted removed from the case. He finally got some assistance when he reached out to the American Bar Association's Death Penalty Project in April of 2010. (SPCR. 503-58). However, it took the ABA more than three years to find counsel for Appellant, and by then his appeals were completely exhausted. Ms. Emily Olson-Gault of the ABA wrote, "We recognize that if we had been able to find a law firm sooner – or if Appellant had received consistent, qualified representation from court-appointed counsel throughout the case – his legal situation might be different." *See* (SPCR. 430-32). Ms. Olson-Gault said of Appellant:

> During the years we were looking for pro bono counsel, Appellant stayed in frequent contact with the Project, asking about our efforts and urging us to not give up trying to find counsel for him. He provided me with suggestions for lawyers that I might try to contact and kept me updated on legal developments in his case. . . . He was as diligent and persistent in seeking representation and trying to preserve his claims as any death-sentenced prisoner I have encountered in my many years of working with the Project.

As the Supreme Court once stated about the death penalty, "one of the most horrible feelings to which [the prisoner] can be subjected during that time is the uncertainty during the whole of it." *Medley*, 134 U.S. at 172. Appellant's letters put that uncertainty on full display, along with the fear, paranoia, and tension of those living under a death sentence—but further exacerbated by Appellant's lack of meaningful counsel. Executing Appellant after those twenty-four years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment, not solely because of the length of time he has been on death row but because of the psychological suffering he endured as he wrote letter after letter complaining about his attorney, drafting *pro se* motions that would be ignored by the courts, and launching campaigns from death row to find an attorney anywhere in the United States who would represent him—the whole time fearing that "whenever the Governor wants me to die, I will." This Court should permit a hearing on this claim.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S PUBLIC RECORD REQUESTS MADE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.852(h) AND FLORIDA STATUTES CHAPTER 119, WHICH RESULTED IN A DENIAL OF DUE PROCESS AND PROCEEDINGS THAT WERE NEITHER FULL NOR FAIR.

On January 22, 2018, Appellant sent demands for public records pursuant to Fla. R. Crim. P. 3.852(h) and Florida Statutes Chapter 119 to the Florida Department of Corrections (FDOC), the Florida Department of Law Enforcement (FDLE), and

the Office of the Medical Examiner, District Eight, seeking information in support of a potential Eighth Amendment lethal injection claim. (SPCR. 66-121). Appellant requested the following records from FDLE and DOC:

a. Public records, including logs or record books regarding the purchase, storage, maintenance, use, distribution, disposal, and expiration dates of etomidate, rocuronium bromide, and potassium acetate that show compliance (or non-compliance) with the Federal Controlled Substances Act and Florida Statutes, Chapters 828, 893, and 465 from September 9, 2013 to January 4, 2017.

b. Public records showing the name of the manufacturer and distributor of the lethal injection drugs including package insert information and/or manufacturer's instructions, the date of manufacture, and the shelf life of etomidate, rocuronium bromide, and potassium acetate currently possessed by the DOC.

c. Public records, including the required logs, notes, memoranda, letters, electronic mail, and facsimiles, relating to the executions by lethal injection of Mark Asay, Michael Lambrix, and Patrick Hannon.

(SPCR 67; 95-96).

Appellant asked the Eighth District Medical Examiner's Office for the following records:

a. Copies of documents concerning post mortem examinations performed on Mark Asay, Michael Lambrix, and Patrick Hannon, including but not limited to autopsy narrative reports, notes, diagrams, photographs, and toxicology reports.

(SPCR. 118).

In support of his demands, Appellant attached all the information in his possession regarding the State's current supply of lethal drugs. (SPCR. 74-92; 99-

117). The logs show that the State of Florida does not currently possess unexpired etomidate, and their rocuronium supply expires this month. (SPCR. 75; 83). The Circuit Court denied the requests, reasoning that since the current protocol was upheld as constitutional as applied to another inmate in a separate death warrant proceeding, the matter is firmly settled. (SPCR. 233). This is far from accurate. Appellant cannot be deprived of his rights by prior litigation to which he was not a party. *Martin v. Wilks*, 490 U.S. 755 (1989). He is entitled to make his own factual record. Nor is his claim foreclosed by established law. Further, as will be discussed further below, any other citizen could request these same records and would not have to make any showing of relevance. This is a denial of Appellant's equal protection rights.

Without access to relevant public records, Appellant was prevented from finding out relevant information that would support an Eighth Amendment claim. The records requests made by Appellant are not, as the State suggests, a "fishing expedition," but instead were filed in response to well-founded concerns regarding the constitutionality of his pending execution based on the drug logs that the State voluntarily disclosed previously in an out-of-state court proceeding.

In *Sims v. State*, 753 So. 2d 66 (Fla. 2000), Justice Anstead cautioned that "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing

his constitutional right as a citizen to access to public records that any other citizen could routinely access." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000) (Anstead, J. concurring). Yet, this is exactly what occurred in Appellant's case. Justice Anstead had earlier emphasized that "[t]rial courts must be mindful of our intention that a capital defendant's right of access to public records be recognized under this rule," because "[i]f there is any category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed." *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod.*, 683 So. 2d 475, 477 (Fla. 1996). Furthermore, Justice Anstead acknowledged assurances from the State and its agencies that they will essentially follow an "open file" policy. *Id.* This promise has been not been fulfilled. Instead, these agencies have continuously shielded themselves with a harsh and unconstitutional interpretation of Fla. R. Crim. P. 3.852 to avoid turning over to capital defendants, including Appellant, the information they need to fully plead their lethal injection claims.

The information that was requested was narrowly tailored for a specific reason—to make sure the State possesses unexpired drugs in which to humanely carry out the execution of Appellant. It is undisputed that using expired lethal drugs will subject Appellant to a substantial risk of serious harm in violation of *Glossip v. Gross*, 135 S. Ct. 2726 (2015), and the Eighth Amendment's prohibition against

cruel and unusual punishment. Knowing the expiration dates of the drugs is a basic and fundamental fact, and there is absolutely no rational basis for refusing to disclose this information. None of the cases relied upon by the Circuit Court address the specific issue regarding expired drugs, and thus do not provide any guidance for this Court. Appellant made a simple request below: provide him with proof that the State's drug supply is unexpired. In light of the fact that the current logs suggest the supply *is in fact expired or about to expire*, this is far from an unreasonable request.

The State of Florida claims that it is "proud to lead the nation in providing public access to government meetings and records" because the "[g]overnment must be accountable to the people." *See* http://www.myflsunshine.com/ (last visited February 2, 2018). The State also touts that, "in Florida, transparency is not up to the whim or grace of public officials. Instead, it is an enforceable right." *Id*. However, in practice, in a setting where transparency is needed most, the State is keeping a capital defendant in the dark.

Appellant, a prisoner on Florida's Death Row, is about to be executed without being able to enforce "his constitutional right as a citizen to access to public records that any other citizen could routinely access." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000) (Anstead, J., concurring). The lower court's denial of Appellant's access to public records was an abuse of discretion, which denied Appellant due process under the Fourteenth Amendment of the United States Supreme Constitution and resulted

in proceedings that were neither full nor fair. This Court should order the records disclosed, and remand to the Circuit Court for a full and fair hearing.

CONCLUSION

Appellant prays that the Court grant oral argument, stay this execution, direct that an evidentiary hearing be conducted in the Circuit Court, and ultimately prohibit his execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2018, the foregoing was electronically served via the e-portal to Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas
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CERTIFICATE OF FONT

This is to certify that the foregoing Initial Brief of Appellant has been reproduced in Times New Roman 14-point font, pursuant to Rule 9.100(1), Florida Rules of Appellate Procedure.

Respectfully submitted,

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 6

**IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA**

STATE OF FLORIDA

CASE NO. 1993-CF-870-A

v.

ERIC SCOTT BRANCH,
Defendant.
_____/

APPLICATION FOR STAY OF EXECUTION AND MOTION TO VACATE JUDGMENT AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND

Defendant, **ERIC SCOTT BRANCH**, through counsel, moves to vacate his death sentence pursuant to Fla. R. Crim. P. 3.851.

APPLICATION FOR STAY OF EXECUTION

The claims raised herein are unencumbered by legitimate procedural impediments: one is founded on a new scientific consensus that was not available during prior proceedings; the other is a claim that becomes ripe for review only after a death warrant is issued. Both claims implicate the Eighth Amendment's constitutional prohibitions against cruel and unusual punishment.

This case deserves meaningful consideration, and a meaningful evidentiary hearing, without the truncating concerns of a death warrant. This Court is authorized to enter a stay of execution. As this submission demonstrates, the equities of this case make it appropriate for this Court's exercise of its authority to enter a stay.

PROCEDURAL AND FACTUAL HISTORY[1]

Eric Scott Branch was indicted on one count of first degree murder, one count of sexual battery and one count of grand theft auto on February 23, 1993. Trial began on March 7, 1994.

[1] The judgments and sentences under attack are as follows: Judgment of guilty for Count I (first degree murder), sentence of death; judgment of guilt for Count II (sexual battery), life sentence; judgment of guilty for Count III (grand theft auto), sentence of five years imprisonment.

Mr. Branch was convicted as charged on March 10, 1994. The jury recommended death by a vote of 10-2 and the trial court followed its recommendation, sentencing Mr. Branch to death on May 3, 1994. The Florida Supreme Court affirmed Mr. Branch's convictions and death sentence on direct appeal. *Branch v. State*, 685 So. 2d 1250 (Fla. 1996).[2] The United States Supreme Court denied certiorari review on May 12, 1997. *Branch v. Florida*, 520 U.S. 1218 (1997).

On May 7, 1998, Mr. Branch filed a Rule 3.850 motion. It was amended on April 1, 2003 and again on October 10, 2003.[3] After an evidentiary hearing, the circuit court denied relief. On appeal, the Florida Supreme Court affirmed.[4] On August 31, 2005, Mr. Branch filed a petition for

[2] The following issues were raised on direct appeal: (1) failure to grant a continuance; (2) failure to conduct a *Nelson* hearing; (3) failure to give a requested circumstantial evidence instruction; (4) error in admitting a photograph of the victim; (5) insufficient evidence; (6) improper comment on Mr. Branch's right to remain silent; (7) failure to give a requested jury instruction defining mitigating circumstances; (8) error in admitting evidence of other crimes; and (9) improper victim impact evidence. The Florida Supreme Court denied all of Mr. Branch's claims.

[3] Mr. Branch raised the following issues: (1) Ineffective assistance of counsel at the guilt phase; (2) ineffective assistance of counsel at the penalty phase; (3) newly discovered evidence that the judge and jury considered a non-statutory aggravator; (4) Mr. Branch's rights under *Ake v. Oklahoma* were violated; (5) Mr. Branch was denied his constitutional rights when his lawyer was prevented from interviewing jurors; (6) Mr. Branch's sentencing jury's sense of responsibility was improperly diminished; (7) Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*; (8) lethal injection is cruel and unusual punishment; (9) Mr. Branch may be incompetent at the time of execution; (9) the trial court improperly relied on an automatic aggravator; (10) Mr. Branch was denied due process due to omissions in his trial transcripts; (11) agencies improperly withheld public records; (12) Florida's capital sentencing scheme is unconstitutional on its face; and (13) cumulative error.

[4] In his Rule 3.851 appeal, Mr. Branch raised nine issues: (1) The trial court erred in finding that defense counsel was not ineffective for failing to file a motion to suppress; (2) the trial court erred in finding defense counsel was not ineffective for failing to investigate and present mitigation; (3) the trial court erred in finding defense counsel was not ineffective for failing to hire experts; (4) the trial court erred in finding the Indiana conviction amounted to a prior violent felony; (5) the trial court erred in finding defense counsel was not ineffective for failing to object to the Indiana abstract judgment; (6) the trial court erred in finding defense counsel was not ineffective for failing to impeach; (7) the trial court erred in finding Mr. Branch's failure to investigate claim without merit; (8) the trial court erred in finding defense counsel's failure to object reasonable; and (9) the trial court erred in not addressing cumulative errors.

writ of habeas corpus in the Florida Supreme Court. The Florida Supreme Court denied Mr. Branch's petition on August 31, 2006.[5] Rehearing was denied on March 12, 2007.

On March 28, 2007, Mr. Branch filed a federal habeas petition in the Northern District of Florida. Mr. Branch's petition was denied on March 30, 2010, with a Certificate of Appealability granted. The Eleventh Circuit denied Mr. Branch's appeal on April 21, 2011. *Branch v. Sec'y*, 638 F.3d 1353 (2011).

I. Eric Branch's Life History

From running barefoot through a blizzard covered in blood to get away from his abusive father at the age of five, to his anguish-filled decision to give his daughter up for adoption, thereby losing his first chance to have the family he so desperately wanted, to becoming the victim of a gang-rape in prison as a teenager, Eric's traumatic upbringing was riddled with physical and emotional abuse, neglect and abandonment. Eric's short life before ending up on death row can only be described as a series of one tragic day followed by another.

The science of human brain development today "informs that the human brain is not appropriately 'formed' or mature until an individual reaches their mid-twenties." Report of Faye E. Sultan, Ph.D., at 16. "[S]cience now recognizes that the cut-off of 18 years is arbitrary, and not in accord with the current understanding of the scientific community. . . . [T]he current scientific understanding of adolescent brain development was not available during earlier proceedings in

[5] In his federal habeas petition, Mr. Branch raised four issues: (1) Ineffective assistance of appellate counsel for failing to sufficiently argue the State failed to prove the prior violent felony aggravator; (2) ineffective assistance of appellate counsel for failing to raise the issue of the trial court's error in admitting DNA evidence; (3) ineffective assistance of appellate counsel for failing to raise the issue of the trial court's error in denying Mr. Branch access to his attorney; and (4) ineffective assistance of appellate counsel for failing to argue that Florida's *Nelson* inquiry is unconstitutional.

Eric Branch's case." Report of James Garbarino, Ph.D., at 1. Eric Branch was a 21-year-old traumatized, alcohol-addled boy at the time of the offense.

A. Eric Branch was born to teenage parents in an unstable environment and a family with a history of substance abuse

Eric Branch was born on February 7, 1971, in Rockport, Indiana, to Sharon and Neal Branch. When Eric was born, they already had one child, Robert Neal Branch. Sharon was fifteen and Neal was sixteen at the time, and Neal's family, the Branches, felt marriage was the appropriate thing to do. Pryor Dec. at ¶ 5. Sharon had an eighth grade education and grew up in extreme poverty in Appalachian Kentucky. Because she was so young when she married, she had no idea how to be a wife and mother. Barbara Jo Pryor Dec. at ¶ 2. She did not know how to cook, clean, or take care of herself, let alone two children. *Id.* Sharon drank a lot, and she was likely drinking while pregnant with Eric. Pryor Dec. at ¶ 4. Sharon was an alcoholic who "was drunk more often than she was sober." Nosko-Passmore Dec. at ¶ 4. The environment in the home was deplorable and chaotic. Pryor Dec. at ¶ 13. "The kids were neglected terribly." Pryor Dec. at ¶ 10. Sharon would leave Eric lying in his crib unattended for hours. C. Branch Dec. at ¶ 3. She left him for so long that his head flattened. Sharon left the house dirty. The kids were dirty and just ran around in diapers. Pryor Dec. at ¶ 10. On another occasion, when Eric was about 18 months old, his aunt came over to find Robert running around in a diaper and Eric left in a filled sink. Pryor Dec. at ¶ 10. Sharon was passed out in her room. Pryor Dec. at ¶ 10.

Neal was incredibly violent with his wife and children. He had a reputation in the community for being a "raging, violent, alcoholic." D. Branch Dec. at ¶ 3; *see also* Bickel Dec. at ¶ 2; Pryor Dec. at ¶ 7. Neal could not function without being drunk. R. Branch Dec. at ¶ 12. He also used drugs. D. Branch Dec. at ¶ 3. One of Eric's childhood friends described Neal as "the most despicable person [he had] ever met." Bickel Dec. at ¶ 2. Neal beat Sharon during both of

her pregnancies. Dee Eval. at 10. He fought with Sharon often, not caring if they were in front of the children. Robert and Eric were only toddlers, and the fights scared them. The boys would huddle in the corner, terrified. Dee Eval. at 10. When Eric was three, Neal threw Sharon to the ground and stomped on her right in front of him. Dee Eval. at 10. He beat Sharon so badly that she needed to be taken to the hospital on multiple occasions. One time, he punctured her kidney, and she had to have it removed. Pryor Dec. at ¶ 7. Neal Branch would sometimes beat his wife and kids out in the open. Bickel Dec. at ¶ 3.

After a few years, Neal and Sharon divorced. Eric was still a toddler. Dee Eval. at 4. After the divorce, Sharon took the kids to Neal's parents, Alfred and Marcille Branch, and she moved back home with her own parents. Alfred and Marcille took care of the kids while Sharon tried to get back on her feet. Neal moved away to Arizona. While there, he went to prison for beating his new wife. R. Branch Dec. at ¶ 5. One of Eric's first memories of his father is seeing Neal in handcuffs at the courthouse in Phoenix. Dee Eval. at 5. Neal was in prison before returning to Indiana. During that time, "Eric's mother was completely absent from his life. His father was in prison out of state. He had no love or support from either of his parents." Melton Dec. at ¶ 3. One of Eric's childhood friends described this period in Eric's life:

> Eric never stood a chance in life. Eric's father was a real piece of shit. He was a physically abusive alcoholic. Eric's mother for all intents and purposes abandoned him. Eric's grandparents were very nice but completely ill-equipped to take care of him. Their lack of discipline, rules, and consequences proved to be disastrous for him. Eric received no structure, routine, direction, or guidance from anyone.

Greene Dec. at ¶ 2.

When Neal returned to Indiana, he moved onto his parents' property. By the time Eric was in kindergarten, the boys were living with their father. R. Branch Dec. at ¶ 13. Neal was incredibly violent with his children. Neal beat them even when they were toddlers. R. Branch Dec. at ¶ 7. He

would punch Eric and slam him into the concrete when Eric was just a young child. *Id.* Eric would have black eyes, bruises, and busted lips. Bickel Dec. at ¶ 4. Robert explains, "We were whipped in a manner far beyond what any child would ever deserve." R. Branch Dec. at ¶ 7. "[I]t happened all the time." *Id.*

Neal was particularly violent with Eric. "He would grab, beat, and hit Eric with whatever he could get his hands on. He would grab him by the hair, punch him in the face, and slam him to the ground. He beat Eric like he was a full grown man, even when Eric was a small child." R. Branch Dec. at ¶ 8. Eric would sometimes try to run away from the beatings, and Neal would just chase him out into the yard and continue the beatings there. *Id.*

When Eric was only five, he went running to a neighborhood friend for escape. As Jay Bickel describes:

> During the blizzard of 1976, when Eric was about five, he ran to my house barefoot in the snow covered in blood. Neal had beaten him in the face and head severely. Eric's face was totally swollen. He looked like he had been in a boxing match with a prizefighter. He was beat so severely that some of his teeth were loose.

Bickel Dec. at ¶ 7.

In addition to the violence, Neal was negligent toward his children. At six, Robert was in charge of caring for himself and Eric. He had to get both of them up, dressed, and ready for school. R. Branch Dec. at ¶ 7. There was no structure or parental figure. Eventually, the kids went back to stay with their grandparents.

A large part of Neal's ability to get away with this violence and neglect was his family's prominence in the community. Unlike Sharon's family, Neal's family had some money. Neal was "a spoiled brat whose family owned a restaurant, motel, and gas station in town." Declaration of Dixie Davis at ¶ 2. Neal's parents, Marcille and Alfred, had a history of bailing Neal out of situations when he got into trouble. They did so even when he was violent toward them. They

didn't report him when he punched Alfred and stole $5,000 from him. R. Branch Dec. at ¶ 3. Neal did not have to learn accountability. Neal would get arrested for the abuse, but nothing ever came of it. Bickel Dec. at 6. Alfred would pull strings to make the charges go away. *Id.* As a result, Neal was self-centered and never took responsibility for his actions. R. Branch Dec. at ¶ 2. Shortly before Alfred's death a few years ago, Alfred admitted to Eric's brother, Robert that his biggest regret was not making Neal accountable for his actions. R. Branch Dec. at ¶ 3. Alfred would later go on to cover for Eric in much the same way.

B. After Eric Branch's mother remarried, he had difficulty adjusting to the change

Sharon married Doug McMurtry when Eric was still in elementary school. McMurtry Dec. at ¶ 1. Eric and his brother moved out of their grandparents' house and back in with their mom and new stepfather in Lynnville, Indiana. R. Branch Dec. at ¶ 14. The change in environment was drastic. While Alfred and Marcille were financially stable, Doug and Sharon had almost no money and could not meet Eric and Robert's basic needs. They could not even keep the heat on, and the family started using food stamps. R. Branch Dec. at ¶ 18. The four of them lived in a singlewide trailer, and Eric and his brother shared a room. D. Branch Dec. at ¶ 5. Eric had become accustomed to being able to keep up with the latest trends at school, but he was no longer able to do so once he moved back home with his mother. R. Branch Dec. at ¶ 17. From as far back as Robert could remember, his little brother was obsessed with being cool. R. Branch Dec. at ¶ 21. It was much more difficult to do so in Lynnville without any money. Eric was desperate to fit in and be popular, so he started showing off to try and get attention. Eric had such a hard time with the transition that he failed and had to repeat the third grade. R. Branch Dec. at ¶ 19-20; Dee Eval. at 5.

Making matters worse, Eric had a very tense relationship with his stepfather. Life with his grandparents meant almost no discipline. Eric was used to Neal not caring and letting the kids run

wild, so Eric "didn't know how to live with rules and couldn't listen." Davis Dec. at ¶ 5. Doug had a military background and was extremely strict. R. Branch Dec. at ¶ 14. Doug expected the children to earn everything, including their dinner. Eric once reported, "You got the feeling you had to earn your meals even in the 3rd grade." Dee Eval. at 6. Doug took a hard labor approach to discipline, and when the boys misbehaved, Doug would make them do strenuous physical activity for hours on end. Robert had to chop wood for 12 hours straight one night, R. Branch Dec. at ¶ 15, and Eric was left outside all night pulling weeds. Dee Eval. at 11. Robert quickly fell in line to avoid this discipline as much as possible. Eric was unable to control his emotions and actions, so he continued to get in trouble, further worsening his relationship with Doug. Robert tried telling Eric to just do as Doug said, but Eric could not figure out how to stay away from Doug's wrath.

Eric's tense relationship with Doug affected his relationship with his mother and brother. Eric felt that Sharon chose Doug over him. Nosko-Passmore Dec. at ¶ 4. Robert got into trouble less often, so Eric felt that his mother loved Robert more than him. He felt like she favored Robert over him and started to resent his brother for their mother's attention. R. Branch Dec. at ¶ 22. Others could tell by the family's interactions with each other that there was validity to the way Eric felt. Greene Dec. at ¶ 6; McMurtry Dec. at ¶ 5; Nosko-Passmore Dec. at ¶ 4. "Robert was the chosen one. Eric was the black sheep." *Id.* Because of this, Eric developed a low self-esteem. R. Branch Dec. at ¶ 22.

Eric had difficulty controlling his emotions. He would go into fits of rage where he would destroy furniture. He threw tantrums, even when he was far too old to be doing so. R. Branch Dec. at ¶ 23. He did this all the time. *Id.* He would "kick, scream, punch walls, and break things. *Id.* His emotions overwhelmed him, like they do with little kids." *Id.* He could not stand being told no and

would go into rages. McMurtry Dec. at ¶ 3. He could not control his impulses and "acted like a child much younger than his age." *Id.*

Sharon started having difficulties with her emotions too. Around the time that Eric was in 5th grade, his mother had a tubal pregnancy that terminated after a miscarriage. Dee Eval. at 6. Sharon was depressed about losing her baby and started having sudden mood swings. She would seem happy and then suddenly be distant and withdrawn. She would go through weeks of depression at a time.

In seventh grade, Eric started drinking to cope with his feelings. He would skip school and go to the woods to drink beer and whiskey. The family would throw huge parties on the weekends. R. Branch Dec. at ¶ 26; McMurtry Dec. at ¶ 6. There would be a lot of people over, and both Sharon and Doug would get drunk. *Id.* Robert and Eric would steal some of the alcohol and slip off into the woods to drink it. *Id.* The boys started drinking as much as they could, whenever they got the chance. *Id.* As the two boys got older, it got easier for them to find alcohol. *Id.* at 27. They would have "epic drunk fests," where they would drink until they passed out. *Id.* at 27.

Eric and Robert's instantaneous penchant for alcohol was no surprise given the family history. Sharon's grandfather was an alcoholic, and her father was a binge drinker. Phillips Dec. at ¶ 6. Sharon and her sister Dixie struggled with drugs and alcohol. *Id.* Her brothers, Jimmy and Dale, were also alcoholics. *Id.*

Desperate for some kind of attention, Eric started getting increasingly reckless. He would ride his bicycle along a two-story railing with nothing but a mattress on the ground to break his fall. R. Branch Dec. at ¶ 31. He climbed a thirty-foot-high building and jumped off it into piles of sand. *Id.* He had a bad motorcycle accident when he was only thirteen or fourteen. *Id.* at 32. Robert

describes that his brother was "fueled by adrenaline." *Id.* at 32. Between Neal's beatings and Eric's many accidents, his brother thinks Eric had "countless concussions." *Id.* at 34.

Then, Eric's life changed suddenly when he was in middle school and the family took a vacation to Gatlinburg, Tennessee. Eric saw a cassette tape that he wanted and impulsively grabbed it. He changed his mind before leaving the store and put the tape back, but the store security guards had already seen him. They stopped him on the way out, and his family found out what happened. Doug was furious. He said that a thief would not live in his house. As soon as the family got back to Indiana, they dropped Eric off at Neal's house. Doug pulled Eric's clothes out of the suitcase and threw them on the porch. Sharon, Doug, and Robert drove off without him.

To Eric, this was the ultimate act of abandonment by his mother. His brother got to go home with their mother, while he was left with an alcoholic, abusive father. He was hurt that his mother and brother had not even stood up for him. Dee Eval. at 7.

C. In high school, Eric Branch began to self-medicate with alcohol and acted in reckless and impulsive, "childish" ways

When Eric moved back in with Neal, his father had no interest in taking care of him. Neal would leave some money for Eric and then disappear for days at a time. Dee Eval. at 7. After six months, Eric wanted to return home to his mother, but Doug refused. His grandparents lived next door to Neal, so Eric spent most of his time staying there with them. At his grandparents' house, Eric did not have any structure or discipline. D. Branch Dec. at ¶ 6. Instead, his grandfather started making excuses for Eric just as he had with his own son, Neal. *Id.* As a young teenager, this was the time when he needed structure most. However, as his cousin Alex reports, "My grandparents did not give Eric any consequences for his actions. This contributed to Eric's immaturity and inability to develop an understanding of the world. Eric needed direction." *Id.*

By the time Eric was a teenager, he felt completely rejected by his family. He became even more desperate to get attention and acceptance from his peers. He had no emotional support from his family. O'Brien Dec. at ¶ 3. Eric's relationship with his grandparents "was like, here is a bed and here is the fridge, now take care of yourself." *Id.* They were barely even home. *Id.*

Eric's lack of familial support affected his decisions. "The abandonment of his parents and lack of structure in Eric's life largely played into his personality. Eric had the pathological need to be accepted and liked by all." Greene Dec. at ¶ 9. He had to be the center of attention. O'Brien Dec. at ¶ 5. Eric would "act goofy, tell jokes and stories, or take any type of bets or dares to monopolize the attention." *Id.* For Eric, "attention was affection." Greene Dec. at ¶ 13. He started hanging out with a wilder crowd. Around them, Eric felt the need to be the daredevil and try to outdo all of them. Eric also started getting in more trouble at school. Between his father and his grandparents, Eric had no authority figures at home. He was allowed to do whatever he wanted. Melton Dec. at ¶ 4. He kept getting into trouble. Dee Eval. at 7. Some of Eric's childhood friends started distancing themselves from Eric because they did not like the reckless path he was on. Bickel Dec. at ¶ 10.

Eric's recklessness grew more extreme over the years. He felt the need to outdo everyone around him. Greene Dec. at ¶ 12. He played chicken while driving cars and started breaking into buildings. D. Branch Dec. at ¶ 9. Before Eric even had a driver's license, he took his grandparent's car to a rock quarry and drove quickly before locking the car brakes. Melton Dec. at ¶ 7. The car "skidded to a stop just feet from a one hundred foot drop." *Id.* Eric would make "donuts around S curves in the road, drive far too fast, and spin the tires." D. Branch Dec. at ¶ 14. He drove a motorcycle at 150, and even 185, miles per hour. R. Branch Dec. at ¶ 30; Melton Dec. at ¶ 6. During a family trip to the Ozarks, they went on a whitewater rafting trip. Phillips Dec. at ¶ 5. The

family was told not to dive off the cliffs because the water was too shallow. Eric climbed to the tops of the cliffs and jumped off into the water anyway. *Id.* Alex, Eric's cousin, now realizes in retrospect that Eric "felt he was all alone. He felt and acted like he had been abandoned. Eric's attention-seeking behavior, his need to be accepted, and his need to be popular were all things he did to fill a hole in his life." D. Branch Dec. at ¶ 8.

Eric did not always make it through his exploits unscathed. When Eric was 16, he was riding on the back of his Uncle Dean's motorcycle when he fell off and hit his head. Eric was unconscious for at least five minutes, but nobody took him to the hospital. Dee Eval. at 9.

Eric's fits from his youth also extended into his teenage years. D. Branch Dec. at ¶ 15. He acted like a five-year-old when things did not go his way. *Id.* He would get upset easily and "seemed unable to accept perceived losses and move on." O'Brien Dec. at ¶ 7. He had difficulty controlling his emotions in other ways too. He had a hard time taking anything seriously. R. Branch Dec. at ¶ 36. He would laugh at inappropriate times, like when he got in trouble. *Id.*; Greene Dec. at ¶ 16. It was like he could not control it. This would further infuriate anyone trying to discipline him. D. Branch Dec. at ¶ 36; McMurtry Dec. at ¶ 4.

As a teenager, Eric still suffered through extraordinary violence by Neal. Eric lived with his father and grandparents, who lived next door to each other, while his brother Robert was in Lynnville with their mom and stepdad. R. Branch Dec. at ¶ 10. Robert would come to Rockport to see Eric on the weekends. Each time Robert saw Eric, he was still getting beat up by Neal. R. Branch Dec. at ¶ 10. Neal would fluctuate quickly between not caring at all about what Eric was doing and suddenly beating him. R. Branch Dec. at ¶ 11. Robert was around for one particularly violent beating when Eric was 15. R. Branch Dec. at ¶ 9. Neal beat Eric and pulled out a clump of his hair. *Id.* He also broke a lamp over Eric's head. C. Branch Dec. at ¶ 12. When Neal would

start beating Eric, Eric would try to escape and run to his grandparents' house. Neal would follow him outside and continue beating him. R. Branch Dec. at ¶ 9.

Eric struggled with responsibility. He and his cousin got jobs together at a local drive-in theater but Eric could not handle minor responsibility. Alex says, "Eric often wouldn't show up for his shifts. I would end up having to do his job for him." D. Branch Dec. at ¶ 16.

Eric's grandparents failed to hold him accountable at home. Eric and his friends would come back in time for their curfews but go back out again. Greene Dec. at ¶ 7. This led to Eric's inability to understand consequences, whether legal or physical. *Id.* at ¶ 13. Robert Greene, a high school friend, remembers that one time Eric drove a group of them to a high school football game. Greene Dec. at ¶ 15. Eric was pulled over by a state trooper and received a speeding ticket. Before even getting out of eyesight of the trooper, Eric tore up the ticket and threw it out the window. Robert Greene told Eric that he could not do things like that, but Eric did not understand. *See also* Melton Dec. at ¶ 8 (describing how Eric and his friends threw corncobs at a police car and, when caught, the other kids went running away but Eric ran right toward the officer).

Eric continued to drink heavily. He and his friends drank daily if possible. O'Brien Dec. at ¶ 8. Eric would drink cases of beer and whiskey. *Id.* He drank to the point of blacking out multiple times. *Id.* A friend of Eric's says his "goal was to get as fucked up as possible." *Id.* at ¶ 9. Eric would drink Purple Passion, a malt beverage. When it was halfway done, he would fill it with a half pint of Everclear, a pure grain alcohol that is 190 proof. *Id.* Eric also experimented with LSD and Rush, an inhalant. *Id.* at 11.

When Eric was 15, he and a friend went to a fraternity party at Indiana University. Melton Dec. at ¶ 10. Eric got "absolutely smashed drunk." *Id.* Eric vomited in the bathroom before falling down a flight of steps while sitting in a wheeled desk chair. *Id.* at 10, 12. He lay motionless at the

bottom of the steps for quite a while. When Eric got up, he suddenly became overwhelmed by his emotions and broke down crying. He told the fraternity brothers at the party about the abuse he was going through at home and asked them to start beating him. "Some of the fraternity brothers were so disturbed" that they called the police. *Id.* at 11. People from social services were at Eric's house by the time he and his friend made it home. *Id.*

As a young teenager with no support or guidance, Eric started to get into legal trouble. When he was 14, he and some friends got a set of janitor's keys for the school. They did it because they were bored. O'Brien Dec. at ¶ 13. They went in at night to goof around, and a fire started. Eric and the other boys were charged with arson and theft. Eric was sent to the Indiana Boy's School. Upon his release, Eric was withdrawn and depressed. He started drinking heavily and experimenting with marijuana and other drugs. Eric told his mother, "Do you know what happens to boys in here?" His mother believed that Eric had been sexually assaulted. His juvenile probation officer at the time also suspected that Eric had suffered from sexual abuse. Dee Eval. at 11.

When Eric started having legal problems, his grandfather reached out to attorney Verdelski Miller. Verdelski found that Eric was impulsive and lacked any ability to gauge the seriousness of his legal problems. There was no forethought or sinister intent, but Eric would react without thinking and could not understand consequences. Even in his late teens, Verdelski observes, Eric "had the mentality of a twelve year old." Miller Dec. at ¶ 6. Eric was referred for therapy at Southern Hills Counseling Center in 1987. The clinician there noted that he "appear[ed] immature and resistant to assuming responsibility." Southern Hills Counseling Records at 11.

D. A bright spot in Eric Branch's life was his relationship with Leora Nosko-Passmore, and it ended in sadness and loss

Eric finally found some positivity in his life when he started dating Leora Anne Nosko-Passmore (then Leora Nosko or Annie Nosko). To this day, Leora describes Eric as her soulmate.

Nosko-Passmore Dec. at ¶ 1. When the two first started dating, Leora and Eric would talk on the phone for hours. *Id.* at ¶ 3. Eric would tell Leora about how "hurt he felt by not being loved by his family, not fitting in, and not being accepted." *Id.* His "abandonment" was palpable. *Id.* He also told her about Neal's violence over the years. Eric told Leora that Neal only paid him any attention when Neal was beating him; otherwise, "Neal had nothing to do with Eric." *Id.* at ¶ 6. Leora describes that this "had a profound impact on Eric." *Id.*

Leora's father was also physically abusive. *Id.* at ¶ 9. Eric would talk her through the hard times and encourage her to stand up to him. Leora explains, "In many ways Eric liberated me from my father." *Id.* Eric would stand up to Leora's father too. One time, Leora's dad blocked Eric on the road and tried to beat him up. They got into a fight. When Eric got back to Leora that night, he was covered in blood. *Id.*

While Eric was happy about his relationship with Leora, he was still going through a lot in other aspects of his life. Leora's mom, Laura Chubick, allowed Eric to come stay with them for a while. Laura Chubick Dec. at ¶ 2. Laura did not actually like that Eric was dating her daughter, but she allowed it thinking she could keep a better eye on them. Chubick Dec. at ¶ 8. He was overjoyed at being invited to do simple family things, like attend the Easter church service with them. Chubick Dec. at ¶ 7. Eric "loved being included in the family environment. He needed affection and was longing for somewhere to fit in." Chubick Dec. at ¶ 7. While Laura's acquiescence in Eric's relationship with her daughter and later invitation to him to come stay with them was "begrudging," she realizes in hindsight that "Eric's relationship with my family was of utmost importance to him." Chubick Dec. at ¶ 8. Indeed, Eric told Leora that she and her mother "were the only people who ever truly love or cared for him." *Id.* "We were all he had," Leora explained. Nosko-Passmore Dec. at ¶ 8.

Laura tried giving Eric some guidance herself, encouraging him to get a job and giving him the gas money to do so, but Eric was incapable of keeping things together. Chubick Dec. at ¶ 4. Laura remembers, "He was unable to reason the way a person of his age should. He was always just going here and there aimlessly." Chubick Dec. at ¶ 5. Eric was still having problems controlling his actions and getting into trouble. Leora and her mother were going through a difficult time with Leora's own violent father, and they moved with Eric into Leora's grandmother's house. Nosko-Passmore Dec. at ¶ 7. Leora's mom asked Eric to help around the house, but he could not do it. Chubick Dec. at ¶ 6. One night there was a huge snow storm coming, and Eric said he was taking Leora to the next town over. *Id.* Leora's mom asked Eric to have Leora home by a certain time to get home safely before the storm. *Id.* Not only did they not return home on time, but Eric had actually taken Leora to another town about two hours away. *Id.*

Leora noticed Eric's immaturity herself. He was not goal-oriented. Nosko-Passmore Dec. at ¶ 12. He would brag about doing juvenile things like skipping school and encouraged her to do the same. *Id.* Whenever Eric made any money, he would go on shopping sprees and spend it all right away. *Id.* at 14. Once, they went to visit his cousin Alex in Panama City Beach. Nosko-Passmore Dec. at ¶ 13. Leora thought the trip was planned, but she found out once they were there that Eric had not even told Alex they were coming. He just decided to go spur of the moment. *Id.*

Eric was unable to think out the consequences of his actions and acted recklessly around Leora. One time they were in the car with one of her friends when they got into an argument. *Id.* at ¶ 15. The friend was driving down the highway, and Eric, out of anger, reached over and threw the car in reverse without thinking what could happen. *Id.*

When Leora was fifteen, she got pregnant with Eric's child. Nosko-Passmore Dec. at ¶ 2. Eric desperately wanted a family, and now he would have the opportunity to have one of his own.

However, one night when he and Leora were having one of their rough patches, Eric went to a party with some friends. IN Tr. at 21. They met a couple girls. *Id.* Eric thought that one of the girls liked him, so he took her on a moped ride to a more isolated spot. *Id.* at 21-22. He pushed her down and touched her breast before realizing that she did not want to go any further with him. *Id.* at 23. Eric was convicted of sexual battery, a class D felony in Indiana. The judge sentenced him to three years in prison with one year suspended. Eric was sent to Rockport Detention Center, an adult prison.

While incarcerated, Eric kept in touch with Leora about their baby girl, Nicole. They decided they would give her up for adoption but, wanting to stay in touch with her, would try an open adoption. Through the help of a minister, they located a stable family out in Washington to adopt Nicole. Eric wrote Leora from prison encouraging her that this was the best thing for their baby and that they were doing the right thing.

Eric was devastated over the loss of his daughter. Nosko-Passmore Dec. at ¶ 2. He blamed Leora for giving their baby away, even though he had fully supported their decision while she was still pregnant. *Id.* at ¶ 11. Leora describes, "The most angry and emotional I ever knew Eric to become was when I tried to break up with him over the phone after the adoption of our daughter . . . ." *Id.* at ¶ 10. This was an emotional time for Leora, too, but in his own anguish, Eric blamed her rather than supported her. *Id.* at ¶ 11.

In addition to the strain over the adoption of their baby, Leora noticed that Eric was drinking more than he ever had before after his release from jail. He drank "to medicate." *Id.* at ¶ 18. He was also angrier and moodier. Leora wondered what was wrong, and Eric opened up to Leora about his time in R.D.C. Eric was very small for his age, so it was difficult for him to be at an adult prison. *Id.* at 16. While at R.D.C., he had been held down by a group of men and brutally

gang raped. This experience caused Eric to go "to very dark places." *Id.* at 16. While Eric had been impulsive and made stupid decisions before he went to prison, Leora reports, "I had never seen the rage in Eric like he had after getting out of prison." *Id.* at ¶ 17.

Eric decided to leave Indiana and go to Panama City Beach where Alex was attending college. Leora joined Eric for about a week, but she ultimately decided to go back to Indiana. She broke up with Eric one final time. Eric was heartbroken once again. Alex had hoped that, once Eric got to Florida, he would start taking things seriously, get a job, and start attending the same college Alex attended. D. Branch Dec. at ¶ 17. Instead, Eric started going to clubs every night, partying, and drinking. A few weeks later, Eric found himself facing the most severe legal trouble of his short life.

E. In his extended adolescence, Eric Branch was plagued by his immaturity and failed to understand the trouble he faced, even when on trial for his life

When Eric arrived in Florida, he was an immature, child-like boy who struggled to grasp reality. He had been erroneously released from prison in Indiana early but moved to Florida with his cousin by the time anyone realized it. His lawyer, Verdelski Miller, contacted Eric to come back to Indiana to clear things up. The lawyer explained that it was not Eric's fault, so he would not have gotten into any trouble. Eric still did not understand. He told Verdelski that he would deal with it later. He did not grasp the urgency in getting it resolved quickly. Miller Dec. at ¶ 7.

After his crimes in Florida, Verdelski arranged Eric's surrender in Indiana. Once again, Eric did not grasp how much trouble he was in. Even after Eric was in jail in Florida, he did not realize the seriousness of his charges. Verdelski traveled to Florida multiple times with Alfred Branch to visit Eric at the jail. Eric did not understand why Verdelski had not gotten him out on bail already. Miller Dec. at ¶ 11.

Robert, Eric's brother, testified during both phases of the trial. He knew that Eric did not understand the gravity of the situation. R. Branch Dec. at ¶ 40. Eric could not grasp that he was on trial for his life. Burns Dec. at ¶ 4. There were news cameras at the trial, and Eric was distracted by the cameras instead of paying attention to the witnesses. *Id.* He bit his lips a lot and kept fixing his hair. *Id.* When Eric testified, he was completely calm and did not realize how he was coming across. *Id.* at ¶ 6. He did not interact with his attorney or try to assist in his defense. *Id.* at ¶ 5. He was used to his grandfather getting him out of trouble, so Eric thought that would happen again. Observers said, "Given how he was acting at trial, it was so clear that he did not understand the magnitude of what was going on around him." Burns Dec. at ¶ 5; *see also* R. Branch Dec. at ¶ 40.

F. As this submission describes, the mental health professional consensus today recognizes Mr. Branch's lack of development and demonstrates that he should not be subject to capital punishment

Faye E. Sultan, Ph.D., explains that there is a "new mental health professional consensus that brain development continues into the twenties." Sultan Report at 17. According to James E. Garbarino, Ph.D., "our science now recognizes that the cut-off of 18 years is arbitrary, and not in accord with the current understanding of the scientific community." Garbarino Report at 1. "[H]uman brain maturation is ordinarily not complete until the mid-20's . . . ." *Id.* at 2.

> *Today it is established in the medical and scientific literature that brain development does not reach "full maturity" until approximately the period of mid-twenties.* Synaptic pruning, the process by which brain synapses are selectively "pruned" or eliminated continues until this time, allowing for more efficient later brain functioning. The myelination process - the development of the substance which provides insulation for the nerve fibers – continues as well. This allows a mature individual to effectively transmit signals, promoting healthy brain functioning and allowing more complex functions. *This process continues until well-into the individual's twenties. Also continuing until approximately mid-twenties is the increasing connectivity between regions of the brain.* As these connections are strengthened, the brain becomes better able to transmit information between regions and becomes better at planning, dealing with emotions, and problem-solving.

Sultan Report at 21 (emphasis added). Dr. Sultan explains that, "[s]ignificant development of "the pre-frontal cortex area of the brain" also continues "until at least the mid-twenties." This is the region of the brain where "executive functions are developed," meaning that executive functioning skills—the skills to "assess risk, think ahead, set goals, and plan ahead" and "[c]omplex planning, the ability to focus on one thing while ignoring distractions, decision-making, impulse control, logical thinking, risk management, organized thinking—are not fully developed until a person's mid-twenties." *Id.*

"This new mental health professional consensus was not available during previous proceedings in the case of Eric Branch. This new mental health professional consensus has real consequences in the case of Eric Branch." Sultan Report at 16. Dr. Sultan concluded that—based on her assessment of Mr. Branch and on the new scientific information—"Mr. Branch, at age 21, still had an 'underdeveloped brain.'" Sultan Report at 17.

Dr. Sultan and Dr. Garbarino explain that this knowledge about the development of an adolescent brain, like that of Mr. Branch, is new science. Sultan Report at 21-22; Garbarino Report at 2-3. "The new professional mental health consensus about the developing human brain in the case of a twenty-one-year-old, such as Eric Branch, was not available to the experts who assessed this case in the past." *Id. See also* Garbarino Report at 1 ("[T]he current scientific understanding of adolescent brain development was not available during earlier proceedings in Eric Branch's case."). When Dr. Henry Dee assessed Mr. Branch, "the science of brain development had not progressed to the point where [Mr. Branch's psychological] problems could be recognized for what they were: developmental brain immaturity." Garbarino Report at 3.

Mr. Branch's prior counsel, S. Douglas Knox, confirms that the science about Mr. Branch's immature brain was not available to him when he represented Mr. Branch.

> This science did not exist at the time I represented Eric or beforehand. It explains Eric's immature behavior before and at the time of the offense and during the trial, and his subsequent maturation by the time I came to represent him. Eric was 21 at the time of the offense.
>
> Had this new scientific understanding in the mental health professions been available to me during the time I represented Eric, I certainly would have used it. I would have litigated that his death sentence was unconstitutional and that he should not be executed due to the lack of moral culpability related to his immature level of functioning.

Knox Dec. at ¶ 3-4. The instant submission is the first opportunity Mr. Branch has had to challenge the constitutionality of his death sentence based on the medical consensus that at the age of 21, after a lifetime of trauma (including abuse, neglect, and rape) and years of self-medicating with alcohol, his brain was not fully developed; like seventeen-year-olds, he had diminished moral culpability, and his execution would serve no penological purpose. Garbarino Report at 4 ("An individual such as Eric Branch should not be considered eligible for imposition of the death penalty, given his age of 21 and developmental history.").

G. Mr. Branch has matured into a reflective man and an engaged father while incarcerated

Mr. Branch has matured and worked hard to better himself as he grew up while incarcerated. He received a certificate in paralegal studies. *See* Blackstone School of Law, Legal Assistant/Paralegal Certificate, for Eric Branch (March 4, 1996). He spends much of his time helping fellow prisoners. His disciplinary record has been exemplary. Mr. Branch has worked hard to build the familial connections he was unable to have earlier. Mr. Branch has stayed in touch with his daughter, Niki. He sends her letters and artwork regularly. Niki is a talented artist, and Mr. Branch encourages her in her art. He has also maintained relationships with much of his family, including his aunt, cousin, and brother. He has reunited with Leora, and remained an important factor in her life. He cherishes these relationships he has maintained through the years,

at one point telling his cousin "The love and connection I share is what defines me. In my own clumsy way, I have tried to teach Niki this life lesson. The people who love us and who we love – even if they do drive us nutty – it is these relationships that give life meaning." Excerpts from Mr. Branch to Leora Nosko-Passmore; his grandmother; his aunt, Connie Branch; and his cousin, Alex Branch (2008 to 2013) (hereinafter "Branch Excerpts").

II. Mr. Branch's lengthy incarceration on death row and troubling experiences with Florida's capital punishment system

Since Mr. Branch's arrest, the entire history of his representation is a tragic story of the funding shortfalls of state defender agencies, a failed pilot registry attorney program, conflicts of interest, and legal abandonment by those who were supposed to be his advocates. Underlying this history are years of letters Mr. Branch sent to his loved ones documenting the profound stress he was going through during his lengthy incarceration – years waiting to die while on death row.

A. Mr. Branch struggled to find adequate legal representation

Mr. Branch's series of inexcusably inadequate attorneys started at his trial. As discussed previously, in Indiana, the family relied on a local attorney, Verdelski Miller, who had extensive contacts within the community. When they learned of Mr. Branch's charges in Florida, Verdelski and Mr. Branch's grandfather, Alfred, traveled to Pensacola in the hope of finding someone who knew the area, especially the courts.

Having never been involved in a capital trial before, Alfred and Verdelski were unknowingly and woefully underfunded. Alfred offered a flat fee of $15,000 to anyone who would take his grandson's capital case. Alfred hired the one lawyer who agreed to this low-budget defense: John Lewis Allbritton.

Alfred quickly became disillusioned with Mr. Allbritton's performance. He pleaded with Mr. Allbritton to hire experts and a mitigation specialist. It was not until February 2, 1994, a month

before the trial, that Mr. Allbritton hired a mitigation specialist, Saundra Morgan. In February of 1994, approximately one month before the trial was to start, Alfred submitted an affidavit conveying his complaints about Mr. Allbritton's performance, including that Mr. Allbritton had met with Mr. Branch once, for five minutes; that Mr. Albritton had only met with two members of the family, Alfred and Marcille, for just an hour and a half; and that Mr. Branch had been declared partially indigent, so Alfred and Mr. Branch expected the legal team to include an investigator, a second lawyer, a mitigation specialist, and a psychiatrist.

Finally, Alfred became so frustrated that he appeared in court and demanded to speak to the Court himself on March 1, 1994, a week before the start of the trial. He wanted to discuss the affidavit he had submitted about Mr. Allbritton's performance. The Circuit Court told Alfred there was nothing it could do, as Alfred had retained Mr. Allbritton. R. 154-56.

After Alfred's appearance in court, Mr. Allbritton finally went to meet with Mr. Branch. Other than the brief five-minute introduction in October, this was his first meeting with his client.

On February 23, 1994, Ms. Saunders sent Mr. Allbritton an update on her progress in Mr. Branch's case. She informed Mr. Allbritton that her investigation would take at least another five weeks "to prepare a basic social history" to provide to experts. Mr. Allbritton sought a continuance on February 28, 1994, which was denied. About a week later, Mr. Branch was found guilty of first-degree murder. On March 11, 1994, the day the penalty phase was to start, Mr. Allbritton informed this Court he was not ready to proceed and moved for a continuance. The request was denied, prompting Mr. Allbritton to initially waive the penalty phase before hurriedly deciding to present Mr. Branch's brother and grandfather.

B. Mr. Branch's legal woes continued into his state post-conviction when his post-conviction team, while initially competent, was disbanded by the Legislature's defunding of CCRC-North

The mandate in Mr. Branch's case was issued by the Florida Supreme Court on February 7, 1997. PC-R. 213. His conviction became final on May 12, 1997, when the United States Supreme Court denied certiorari review. *Branch v. Florida*, 520 U.S. 1218 (1997).

Although Mr. Branch's post-conviction case fell under the jurisdiction of the Office of the Capital Collateral Counsel for the Northern Region ("CCRC-N"), he was without designated counsel from the date the mandate issued in February 1997 until October 1, 1998. *Id.* On May 7, 1998, CCRC-N filed a "shell" 3.850 pleading in the trial court. PC-R. 137-200. The "shell" motion was filed because CCRC-N was "unable to designate counsel to represent Mr. Branch and prepare and file his Rule 3.850 motion." PC-R. 137. The pleading also stated that "Mr. Branch is being denied his right to counsel, due process and equal protection of the law in pursuing post-conviction remedies." PC-R. 138. CCRC-N also filed the incomplete pleading to toll the time to file his petition for writ of habeas corpus in federal court. PC-R. 139.

Mr. Branch's initial, and incomplete, 3.850 motion details the struggles of CCRC-N to adequately represent death row inmates in North Florida, "[d]ue to the budgetary shortfall CCR experienced in FY 96-97; the retirement, resignations and dismissal of qualified attorneys from the CCRC-N; and the reorganization of the former office of CCR into three separate and independent CCRC offices (as required by chapter 97-113)." PC-R. 140.

Andrew Thomas was designated as Mr. Branch's post-conviction counsel on October 1, 1998. PC-R. 213. Mr. Thomas was immediately confronted with the challenges of the newly-implemented records collection rules in capital post-conviction claims established in Fla. R. Crim. P. 3.852 and the creation of the records repository of the Secretary of State. Mr. Thomas filed a

motion to stay the applicability of the rule and extend the filing deadline established in Fla. R. Crim. P. 3.852(g)(1) that went into effect October 1, 1998. PC-R. 213. The circuit court granted the motion PC.R. 220-221, as well as a second motion to extend the filing deadline for Mr. Branch's records requests filed on April 21, 1999. PC-R. 227-236. Ultimately, this Court extended the filing deadline for Mr. Branch's amended 3.851 motion to April 1, 2003. PC-R. 603.

Mr. Branch was represented by Heidi Brewer and Jennifer Blakeman of CCRC-N from 1999 to 2003. Michael Reiter was the head of the agency and performed a purely administrative role during that period of time. Ms. Brewer filed an amended 3.851 motion with a request for leave to amend on March 31, 2003. PC-R. 601-749.

On May 19, 2003, the Florida Legislature voted to terminate funding of CCRC-N. CCRC-N's representation of Mr. Branch officially ended on July 1, 2003, when CCRC-N was eliminated as an agency. In its place, the Legislature instituted an experimental registry attorney program to represent death row inmates in their post-conviction claims in North Florida. CCRC-South and CCRC-Middle remained open. The registry of death penalty lawyers was a pilot program or experiment in the northern region of Florida that sought to assess whether it was more cost-effective to out-source capital cases to private attorneys on a local registry rather than continue to send death penalty cases to the regional Capital Collateral Regional Counsel offices in the Northern, Middle and Southern regions. *Fla. Stat.* 27.702(4)(b). The registry program allowed payment to only one attorney with no oversight as to their level of post-conviction experience in capital cases or the quality of their representation. A $15,000 cap was allotted for investigation upon approval of the court, the same allotted for expenses, copying costs, and expert witnesses upon approval of the court. Registry counsel had no control over whether the court would approve necessary costs. Registry counsel had to front the money for the costs of travel and experts for an

evidentiary hearing. The JAC, which provided payments, could delay payment, challenge funding requests, or withhold fees. The only time registry counsel could get paid is when certain pleadings were filed, whether or not it was in the client's best interest to file them.

Ms. Brewer declined to represent Mr. Branch as his registry attorney, citing the statutory caps for fees and case expenses. On June 20, 2003, Michael Reiter filed a motion to have himself appointed as Mr. Branch's registry attorney under §§ 27.7001, 27.710 and 27.711. PC-R. 861-864. He represented to the Circuit Court that he had been Mr. Branch's designated counsel at CCRC-N. PC-R. 861. This was not quite accurate. Mr. Reiter also wrote that "[s]ince counsel is familiar with the facts, circumstances and challenges with Mr. Branch's convictions and sentences and has met with Mr. Branch several times to discuss his case, Mr. Branch approves of Mr. Reiter's continued representation." PC-R. 862. Despite Mr. Reiter's representation of Mr. Branch's consent, Mr. Branch in fact objected to Mr. Reiter's appointment and the Circuit Court held a hearing on Mr. Reiter's motion on July 14, 2003. PC-R. 865-876. Assistant Attorney General Cassandra Dolgin appeared on behalf of the State, and she voiced her own concerns about Mr. Reiter representing Mr. Branch as registry counsel. She reported that Mr. Reiter requested that she set up the phone conference "because all he had was a cell phone, and obviously being in private practice, there are going to be some expenditures out of pocket." PC-R. 869. Ms. Dolgin was concerned about Mr. Reiter's ability to front the cost of Mr. Branch's post-conviction case. However, the Circuit Court appointed Michael Reiter to serve as Mr. Branch's registry counsel, over Mr. Branch's objections and the concerns of the assistant attorney general. PC-R. 877.

Ms. Dolgin's concerns were legitimate and foreshadowed of Mr. Branch's struggles over the next several years. If Mr. Branch had been represented by a CCRC office, he would have had access to, at least, two qualified attorneys assigned to his case, one investigator, support staff, a

paralegal and research assistance. CCRC retains the right to hire any expert necessary to defend the case without court approval or disclosure. The agency controls its own budget, including attorney salaries, guaranteeing them a monthly paycheck. Mr. Reiter was a sole practitioner, worked out of his garage, and his practice was limited to appointments from the registry.

Mr. Branch later detailed his conflicts with Mr. Reiter in his *pro se* Motion for Appointment of Conflict Counsel and Leave to Amend Habeas Corpus filed August 2, 2007 in the United States District for the Northern District of Florida, *infra*. As soon as Mr. Reiter was appointed, Mr. Branch requested that Mr. Reiter file a motion to exceed the fee cap in his case. Mr. Branch was aware that the meager fee and litigation expense caps were completely inadequate for the magnitude of investigation and preparation necessary for success in his post-conviction case. Mr. Reiter eventually filed the motion on the eve of Mr. Branch's evidentiary hearing. Although Mr. Branch was never provided an order on the motion, Mr. Reiter told him the Circuit Court had denied the funding. (Undersigned counsel has conducted a diligent review of the post-conviction record on appeal and has been unable to locate record evidence that Mr. Reiter filed such a motion.)

Mr. Reiter also refused Mr. Branch's numerous requests to file a constitutional challenge to the pilot registry program in his 3.850 motion or his subsequent appeal to the Florida Supreme Court. Mr. Reiter depended on the registry program for his livelihood, creating an apparent conflict.

An evidentiary hearing was held the week of April 26, 2004. At the start of the hearing, Mr. Reiter told the Court, "I do want to mention that . . . you have seen the witnesses are quite extensive and for the purposes of the record, . . . [some] we have found and because of financial constraints were not able to appear. Not being CCR anymore, we don't have the money up front." PC-T. 8. Mr. Reiter did not make any other requests following that revelation. The Circuit Court

issued its Order Denying Defendant's Motion to Vacate Judgment and Sentence on March 4, 2005. PC-R. 1591-1616. On August 31, 2006, the Florida Supreme Court affirmed the order and also denied Mr. Branch's petition for writ of habeas corpus. *Branch v. State*, 952 So. 2d 470 (Fla. 2007). Rehearing was denied March on 12, 2007.

C. Mr. Branch's federal court litigation was marred by a years-long search for conflict free counsel

On March 28, 2007, Mr. Reiter moved to represent Mr. Branch in his federal habeas proceedings. *Branch v. McDonough*, N.D. Fla. No. 4:06-cv-486-RH, ECF No. 8. Judge Hinkle of the Northern District of Florida granted the motion. ECF No. 10. In a pre-*Martinez v. Ryan* world, Mr. Branch filed a *pro se* motion for appointment of counsel on limited bases to argue conflict of interest claim. ECF No. 11; *see also Martinez v. Ryan*, 566 U.S. 1 (2012) (holding that "inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial"). The State opposed appointment because "[i]neffective assistance of collateral counsel [was] not a cognizable claim in federal habeas." ECF No. 12. The Northern District of Florida denied Mr. Branch's motion. ECF No. 15. In the meantime, Mr. Reiter filed a motion to adjust the date of his appointment out of concern for not getting reimbursed for some of the hours he had worked. ECF No. 16.

After a delay in getting the court's order denying his request for counsel other than Mr. Reiter, Mr. Branch wrote the court a letter seeking to clarify that he was not asserting ineffective assistance of collateral counsel, but that he wanted conflict-free counsel. ECF No. 23. Alternatively, Mr. Branch stated, "Since there was a state-created bar to raising the issues *pro se* in state court, this court should develop and hear each." *Id.* Mr. Branch explained, "There are some serious issues in play, with life and death implications that must be answered. And while I can

write a neat motion – even quote law if provided time to find it. But I am not a attorney [*sic*] and I cannot be expected to properly argue the issues." *Id.*

On August 2, 2007, Mr. Branch filed another motion for appointment of conflict counsel and leave to amend habeas corpus. ECF No. 21. In that motion, Mr. Branch more clearly laid out the conflict of interest points relating to Mr. Reiter's representation of him in his § 2254 petition. *Id.* His motion was based on his desire to challenge the failed registry system and the problems he had with Mr. Reiter's conflict during his state court proceedings. *Id.* The District Court ultimately would deny the request because of a prohibition on *pro se* filings by a petitioner represented by counsel. ECF No. 22.

Mr. Branch wrote a letter to the clerk asking about the status of his August 2, 2007, motion. ECF No. 24. He also filed a motion to stay habeas corpus proceedings until conflict counsel issue was resolved. ECR No. 27. The district court again declined to review *pro se* pleadings. ECF No. 26. Mr. Branch filed another motion requesting a ruling on the merits. ECF No. 28. Mr. Branch wrote,

> Here, Petitioner would much rather find these issues presented by counsel. Certainly, he never wanted to find himself stuck in a position of having to file *pro se* motions to protect his appeals. But as he has found himself in that position, with all do [*sic*] respect to this court, Petitioner cannot locate a single court ruling supporting the proposition that when faced with representation by counsel practicing under a conflict of interest, a petitioner must first provide that attorney a [*sic*] opportunity to file a claim against his own self-interest.

Id. The district court denied these motions. ECF No. 29.

Mr. Branch continued to be proactive about finding new representation. In January of 2010, he told his aunt that he had spent the last month and a half writing letters to lawyers. Branch Excerpts.

The district court denied relief on Mr. Branch's § 2254 petition on March 30, 2010. *Branch v. McDonough*, 779 F. Supp. 2d 1309 (N.D. Fla. 2010). Mr. Branch panicked. He wrote to his grandmother:

> [T]his basically means, unless I can create something, I have about 7 months, maybe a year of appeals left. After they are gone. Assuming I win nothing than [*sic*] it's up to the governor. It could be a week. It could be 10 yrs after. But he can sign my warrant at any moment after my appeal expires. And given my case, I assume, I will be at or near the top of the list.

Branch Excerpts.

On April 27, 2010, Mr. Branch sent his first letter to the American Bar Association Death Penalty Project begging for help. His letter began: "Sorry to be so blunt but I need an attorney." Letters from Mr. Branch to the American Bar Association Death Penalty Representation Project (hereinafter "Branch Letters to ABA"). His grandmother also reached out to Emily Williams (now Emily Olson-Gault), an attorney with the ABA's Project, sending her a copy of Mr. Branch's pleadings. *See* Petitioner's 1983 Civil Rights Action. This began a years-long struggle by the ABA to find someone to take Mr. Branch's case. *See* ABA Letter.

After receiving the letters from Mr. Branch and his grandmother, Ms. Olson-Gault reached out to her Florida colleagues to get a status on Mr. Branch's case. In a letter describing the ABA's involvement with Mr. Branch, she wrote:

> Through them we confirmed that pro bono assistance was needed and also learned about the troubling history of counsel appointments and turnover in Mr. Branch's case, including the loss of his CCRC-North team during the now-abandoned experiment with relying on a registry counsel system, and the replacement of that team with severely under-resourced counsel."

ABA Letter.

Mr. Branch filed a *pro se* motion to amend or alter the judgment. ECF No. 39. Mr. Branch also filed a motion to hold the notice of appeal in abayance [*sic*] and grant leave to file amended

notice of appeal, ECF No. 38, and for tolling of his deadline to file the certificate of appealability. ECF No. 37. As he is a prisoner with no income, doing so came at a great cost to him. In a letter to his grandmother, Mr. Branch explained, "I had to mail 4 copies to the court. That cost me $10.95 as I had to put it in a priority box. Mail cost is killing me . . . . I refuse to simply give up." Branch Excerpts.

Mr. Branch wrote the Court yet again notifying the Court of his *pro se* status. ECF No. 36. He informed the court that Mr. Reiter was no longer representing him, writing that he was "examining his options" for retaining a lawyer for his Eleventh Circuit appeal. *Id.* Subsequently, the court denied Mr. Branch's post-judgment motions. ECF No. 45. Mr. Branch amended his *pro se* notice of appeal to include the denial of these motions. ECF 47.

After all district court litigation had been completed, Mr. Reiter filed a motion in the Eleventh Circuit to withdraw from Mr. Branch's case, in part because he had a conflict since he was a registry attorney and Mr. Branch was attempting to challenge the registry system. *See* ECF No. 73.

On June 22, 2010, Mr. Branch wrote Ms. Olson-Gault to inform her that Mr. Reiter had requested to withdraw from the case. Branch Letters to ABA. He continued to send her copies of the *pro se* motions he was filing in federal court. *Id.* He wrote, "If you cannot find anyone willing to help, please let me know. Because with a death sentence hanging over my head, I don't want to get stuck with no representation. I'm not a fool." *Id.*

On April 21, 2011, the Eleventh Circuit denied Mr. Branch and Mr. Reiter's attempts to get Mr. Reiter off the case. Mr. Branch continued to write to Ms. Olson-Gault. He wrote, "It's getting dire. I gotta have a [*sic*] attorney or else the 11th Circuit is going to force me to accept

representation from a [*sic*] attorney who informed the court he could not ethically represent me." *Id.*

Mr. Branch doubted Mr. Reiter's dedication to his appeal. In a letter he wrote at that time, Mr. Branch stated:

> My lawyer. He does not want the appeal. He is mad that the court won't let him quit. In return, he is just tossing something in front of the court trying to get it done and over. This frightens the hell out of me. His apathy has already wrecked my appeal. I simply cannot afford more of the same.

Branch Excerpts.

The Eleventh Circuit affirmed the circuit court's denial of relief. *Branch v. Sec'y*, 638 F.3d 1353 (2011). Ms. Olson-Gault and the ABA then shifted their efforts to find someone to represent Mr. Branch in a § 1983 action or file an F.R.C.P. 60(b) motion on his behalf. She explains, "The hope was to obtain extraordinary relief and reopen post-conviction proceedings so that the claims that had been abandoned by prior counsel could be fully investigated and litigated for the first time." ABA Letter.

Completely without representation at this point, Mr. Branch filed a *pro se* certiorari petition in the United States Supreme Court. He sent Ms. Olson-Gault a copy. Mr. Branch's sense of panic was palpable at this point. He told her:

> Once the Court denies [the petition], as inevitably they will, my name will be added to the 'Ready List.' As a [*sic*] attorney, I am sure you know what I mean by that. Once I am on the list, staying there 3 months is normal. Remaining there 3 yrs is extraordinary. Meaning I have up to 3 months but less than 3 yrs to make something happen or die.

Branch Letters to ABA. While Ms. Olson-Gault was aggressively trying to find someone for Mr. Branch, he remained proactive and sent her suggestions of people to contact. *See* ABA Letter. His cousin, Alex Branch, sent emails with copies of Mr. Branch's pleadings to attorneys and organizations all over the country. *See* Emails from Alex Branch to Capital Defense Lawyers.

On March 5, 2012, the United States Supreme Court denied Mr. Branch's certiorari petition. *Branch v. Tucker*, 565 U.S. 1248 (2012). Mr. Branch immediately started bracing himself for execution. Later that month, in a letter to Leora, he wrote:

> In the next 30 to 45 days I will be placed on the 'Ready List' after which the governor can kill me at any time he wants. A scary thought with the sudden rush to execute guys down here. Since last I wrote, they killed a man I called friend . . . . There is no hope of lasting 3 years on the Ready List for the simple fact they will run out of people on the list long before that and have to kill me.

Branch Excerpts. Less than a month later, Mr. Branch received a copy of correspondence to Governor Scott's office notifying Governor Scott that Mr. Branch had exhausted his appeals. Mr. Branch wrote, "Julie McCall . . . inform[ed] Governor Scott that I am ready to be executed. Well, I am not ready but that is of little consequence. They are ready for me." *Id.* Mr. Branch went on to bluntly state, "No escaping it any longer. It is here. Basically, whenever the Governor wants me to die, I will." *Id.*

Mr. Branch's attempts to predict when he would die continued. Shortly after his clemency hearing, he wrote:

> Another concern. It's based on rumor. The governor has a list of 17 men, myself included. They are rushing clemency proceedings, hoping to execute us 17 during his term. I cannot confirm that fact . . . . But this much is clear. My two neighbors appeals were over years ago. Neither of them have had clemency. Whereas I, in 5 months since my last appeal, have had a hearing.

Id.

Left with little to think of except his pending execution, Mr. Branch wrote, "Most days I don't even feel like opening my eyes. I am constantly tired, sad, lonely, hungry, and generally miserable . . . ." *Id.* Mr. Branch, a man who for years had so proactively fought to save his life, finally stated, "Often I think I should disappear, leaving everybody . . . alone as I vanish from

existence. . . . My mind is full of these struggles which lately seem to take up more of my time than legal work." *Id.*

In January 2013, almost a year after the United States Supreme Court had denied certiorari review, Mr. Branch told his cousin, "Way too much damn stress. I feel like somebody has been standing behind me with a gun to my head for a year now. It's fucking exhausting." *Id.* A few months later, Mr. Branch wrote:

> The tough part is that now everyone they are killing has been here with me for 20 years. Its [*sic*] kind of like coming into work and finding every month another person you've worked in the office with for 20 years has been taken out back and killed. Even when it's not you, it's so much stress.

Id.

In the spring of 2013, the "Timely Justice Act" made its way through the Florida legislature. Mr. Branch was certain this meant his execution was imminent. He said to his cousin,

> I am a bit panic-stricken and filled with an overwhelming sense of dread. Honestly, I wish I could but I simply don't know how to break free of it. With each motion and letter to the attorneys, the Florida Bar, the courts, it becomes increasingly clear that I probably am not going to see another year – possibly another winter. Hope is in short-supply and without hope, is it possible to break free and escape the dread?

Id.

The Act made it even harder to obtain representation. On June 12, 2013, Ms. Olson-Gault contacted Alex Branch to make him aware of the Act and its effects on the ABA's efforts. She warned him, "We are continuing to try to recruit someone for Eric's case, but particularly with all the uncertainty regarding the new law, firms are reluctant to get involved." Email from Emily Olson-Gault, American Bar Association, to Alex Branch (June 12, 2013).

Mr. Branch started planning a legal challenge to the registry system. He sent the petition to his family to type. Branch Excerpts. Mr. Branch was still concerned about the three month wait on the "Ready List," and he planned his filings around that time. *Id.*

On June 23, 2013, Mr. Branch filed a 192-page motion for appointment of counsel and supporting memorandum of law. ECF No. 68. The motion noted then-recent Supreme Court decisions *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Since exhausting his appeals in federal court, Mr. Branch had returned to state court to file a successive 3.851 motion and also filed a § 1983 action based on those decisions. *Id.* The State opposed appointment of counsel to represent Mr. Branch in those actions. ECF No. 69. It argued that Mr. Branch could have counsel to represent him through warrant litigation and nothing else. *Id.* In his reply, Mr. Branch wrote:

> It must be noted that unlike the majority of petitioners filing claims under *Martinez*, here, the record will reflect that beginning in state court, Petitioner repeatedly attempted to inform the courts about his lawyer and, [*sic*] all the courts, including this one, silenced Petitioner, denying/voiding his pleadings on the State's argument that they were illegal filings or that because he had no constitutional right to counsel, he had no right to effective or conflict free counsel.

ECF No. 70. Mr. Branch went on to argue that because of the registry system, "constitutionally meritorious claims have gone without review or remedy." *Id.* The district court granted Mr. Branch's motion and allowed access to his court file "to any attorney who indicates the attorney is willing to consider accepting an appointment." ECF No. 71.

A month later, the district court ordered Mr. Branch to find his own counsel to be appointed by the Court. ECF No. 73. In that order, the court noted that the Eleventh Circuit had permitted Mr. Reiter to withdraw from Mr. Branch's case. *Id.* The court lamented that it was "no easy task" to find representation for Mr. Branch. *Id.* The court went on, "At my direction, my staff has contacted attorneys to determine their willingness to accept an appointment. None have agreed to do so." *Id.* The court then gave Mr. Branch ninety days to find his own attorney. *Id.*

Following the court's order, Mr. Branch immediately contacted his cousin to suggest more names and firms. Branch Excerpts. Alex Branch reached back out to many of the attorneys he had

previously contacted to let them know the court would ensure payment for their service. *See* Emails from Alex Branch to Capital Defense Lawyers. Mr. Branch updated Ms. Olson-Gault: "I'm hoping the fact the court has agreed to appoint and thus pay whoever I find will be enough to pursuade [*sic*] someone to say yes." Letters from Branch to ABA.

In the fall of 2013, Ms. Olson-Gault was able to find a team of local lawyers to help her find a firm to take on Mr. Branch's case, including Karen Gottlieb and Sonya Rudenstine. Another ABA attorney, Becca Eden, was also assisting Ms. Olson-Gault. With all their contacts, they still struggled to find anyone who could take on Mr. Branch's case by the deadline.

Meanwhile, Mr. Branch grew increasingly concerned when Governor Scott signed a warrant for Mark Kimbrough, who had had his clemency hearing on the same day as Mr. Branch. Branch Excerpts. Mr. Branch told Leora that Governor Scott was going to sign warrants for the 13 men who had had their clemency hearings during his term before moving on to others who had exhausted their appeals. *Id.* The Timely Justice Act had struck a stronger sense of paranoia on death row, and the men wondered to themselves how many warrants would be signed at one time. Mr. Branch described the tense environment:

> Now, every time the door opens, it falls quiet, everybody wondering if he did it . . . signed all our warrants or is he coming after just one of us today . . . . Anybody who survives this will be driven nuts, watching 120 people they know get killed, wondering at each open door – am I next? It's too much.

Id.

Mr. Branch's increasing stress was known to those trying to assist him. On November 7, 2013, Ms. Olson-Gault wrote to Ms. Rudenstine, "[H]e is understandably stressed about the situation." More than a month later, the ABA was still struggling to find representation for Mr. Branch. In an email to Ms. Gottlieb, the ABA wrote, "I want to provide an update that we are still looking for counsel to assist you and Sonya with the case but have had no luck this far." Feeling

they needed more contacts, Ms. Gottlieb reached out to Stephen Harper who runs the capital trial defense law clinic at Florida International University Law School. Even after Ms. Gottlieb recruited Mr. Harper, on December 11, 2013, she told him and Ms. Rudenstine, "[E]very competent capital attorney has been contacted and refused to take Eric's case."

On November 15, 2013, Sylvia Walbolt of Carlton Fields PA offered her assistance and sent a letter to the court requesting more time to find Mr. Branch a lawyer. ECF No. 74. The court extended the deadline. ECF No. 75.

Mr. Branch submitted his own update to the court on December 4, 2013. ECF No. 76. Mr. Branch noted the efforts of the ABA. *Id.* He also mentioned that his cousin and Ken Driggs, a former CCR attorney, were conducting their own search for counsel. *Id.* Mr. Branch promised another update by December 15, 2013. *Id.*

In his status report to the court, Mr. Branch documented his extensive search for representation. ECF No. 77. He included his years-long correspondence with the American Bar Association. *Id.* He noted Alex Branch's exhaustive attempt to find counsel, including a list of the various lawyers and organizations that Alex Branch had contacted. *Id.* The search included local members of the capital defense community, as well as capital defense lawyers, experts, such as Professor Michael L. Radelet, Ph.D., and Supreme Court litigators, such as Seth Waxman. *Id.* Alex Branch also quickly contacted the newly-formed Capital Collateral Regional Counsel – North. *Id.* In his status report, Mr. Branch wrote:

> Petitioner is well aware that in capital cases who lives and who dies is often more the result of quality of counsel than the crime they are accused of committing. As Petitioner's report and appendix demonstrates, he is giving the search for counsel that degree of seriousness, reaching out into the world to every connection he has made the past twenty years . . .

Id. In a 78-page appendix, Mr. Branch included correspondence he and Alex Branch had had with attorneys and organizations across the country in an effort to find a lawyer. *Id.*

After a three and a half year search, Ms. Olson-Gault found counsel for Mr. Branch. On December 23, 2013, Mr. Branch notified the court that the ABA had been able to find a local lawyer, Jason Cromey of Pensacola, and Doug Knox, of Quarles & Brady, to represent Mr. Branch. *Id.* On December 24, 2013, the district court appointed Jason Cromey to represent Mr. Branch in any collateral proceedings under the Criminal Justice Act. ECF No. 79.

In all, the ABA pitched Mr. Branch's case to more than a dozen law firms nationwide. Letter from the ABA Death Penalty Representation Project to Kimberly Newberry (January 25, 2018) (hereinafter "ABA Letter"). His case had been highlighted in emails to over 100 law firm pro bono coordinators and during "recruitment meetings hosted by state and federal judges in several cities." *Id.* Ms. Olson-Gault remembers Mr. Branch's frequent contact in getting updates and sending suggestions through the entire search. Alex Branch also routinely communicated with her. Ms. Olson-Gault writes of Mr. Branch: "He was as diligent and persistent in seeking representation and trying to preserve his claims as any death-sentenced prisoner I have encountered in my many years of working with the Project." *Id.* Indeed, in 60 letters to various family members through the years, Mr. Branch mentioned the problems he was having with is attorneys, strategies for getting a new attorney, or pleadings he was drafting himself due to his dearth of adequate counsel. *See* Branch Excerpts.

Ultimately, by the time the ABA confirmed pro bono counsel for Mr. Branch, it was too late. When Mr. Branch first wrote the ABA, the district court had just denied his § 2254 petition. When James Cromey and Doug Knox filed their notices of appearance, Mr. Branch's Eleventh

Circuit appeal and petition for writ of certiorari were long since denied. As Ms. Olson-Gault describes:

> [I]t is extremely regrettable that it took so much time to secure representation for Mr. Branch, because his case was in a very difficult procedural posture by the time those pro bono lawyers finally took over. We recognize that if we had been able to find a law firm sooner – or if Mr. Branch had received consistent, qualified representation from court-appointed counsel throughout the case – his current legal situation might be different.

ABA Letter.

III. Grounds for Relief

Claim 1: MR. BRANCH'S DEATH SENTENCE IS PRECLUDED BY THE EIGHTH AMENDMENT BECAUSE THERE IS AN EMERGING CONSENSUS THAT BRAIN DEVELOPMENT CONTINUES INTO THE MID-TWENTIES, RENDERING PEOPLE IN THEIR EARLY TWENTIES, SUCH AS MR. BRANCH, COGNITIVELY COMPARABLE TO JUVENILES UNDER THE AGE OF EIGHTEEN

I. This claim satisfies procedural requirements and this Court has the authority to grant a hearing and relief on the merits

A. This claim satisfies the procedural requirements of Fla. R. Crim. P. 3.851(e)(2) and should be decided on the merits

Defendant's claim that his execution would violate the Eighth Amendment due to his cognitive underdevelopment, satisfies the procedural requirements of Fla. R. Crim. P. 3.851(e)(2). Emerging medical science not available during Defendant's prior litigation establishes that human brain development, once thought to be functionally completed by the late teenage years, continues into an individual's mid-twenties, rendering those in their early twenties cognitively comparable to juveniles under the age of eighteen. This emerging science is a valid basis for assessing Defendant's claim on the merits, under the newly-discovered evidence prong of Rule 3.851(e)(2).

Florida's courts have long understood, and recently reaffirmed, that emerging science can constitute newly discovered evidence for purposes of post-conviction litigation. *See, e.g.*, *Duncan*

v. State, No. 2D16-2625, 2017 WL 1422648, at *2 (Fla. 2d DCA Apr. 21, 2017) ("[W]e disagree with the postconviction court's conclusion that scientific evidence in the form of articles and studies cannot constitute newly discovered evidence."); *Clark v. State*, 995 So. 2d 1112, 1113 (Fla. 2d DCA 2008) (holding that new scientific evidence could be considered newly discovered evidence); *Zamarippa v. State*, 100 So. 3d 746, 747 (Fla. 2d DCA 2012) (reversing and remanding for an evidentiary hearing because a scientific organization's new report on comparative bullet-lead analysis could constitute newly discovered evidence); *Murphy v. State*, 24 So.3d 1220, 1222 (Fla. 2d DCA 2009) (same).

The Florida Supreme Court has also consistently held that new scientific evaluations relating to evidence presented in a defendant's prior litigation can qualify as newly-discovered evidence. For example, mental health examinations conducted years after trial can produce newly-discovered evidence. *See State v. Sireci*, 502 So. 2d 1221 (Fla. 1987). Scientific advances also give rise to "newly discovered evidence claims predicated upon new testing methods or technologies that did not exist at the time of trial, but are used to test evidence introduced at the original trial." *Wyatt v. State*, 71 So. 3d 86, 100 (Fla. 2011); *see also Preston v. State*, 970 So. 2d 789, 798 (Fla. 2007) (holding new DNA testing of pubic hair constituted newly discovered evidence); *Hildwin v. State*, 951 So. 2d 784, 788-89 (Fla. 2006) (holding new DNA testing of semen and saliva was newly discovered evidence).

To the extent Florida has not yet grappled with the specific question whether emerging science since *Roper v. Simmons*, 543 U.S. 551 (2005)—establishing that individuals in their early-to-mid-twenties are no more cognitively developed than individuals in their mid-to-late teens—can constitute newly-discovered evidence for purposes of successive post-conviction litigation, this Court should hold that such evidence does satisfy procedural requirements in Florida.

Defendant's claim goes to the fundamental premise of *Roper*'s holding that the Eighth Amendment prohibits the death penalty for juveniles, and suggests that a modification of that premise in Florida, from a rigid cutoff of 18 years old, to a more holistic approach that allows individuals in their twenties to demonstrate that they are the cognitive equivalent of juveniles, is necessary to prevent a miscarriage of justice in this case.

Any uncertainty over whether Defendant's newly presented evidence constitutes newly discovered evidence within the meaning of Rule 3.851(e)(2) should be resolved at an evidentiary hearing. *See Swafford v. State*, 679 So.2d 736 (Fla. 1996) (remanding to the trial court for an evidentiary hearing on whether evidence was newly-discovered for purposes of successive post-conviction litigation). This is especially true in a capital case. *See id.* at 740-41 (Harding, J., concurring) (explaining that, to the extent using newly discovered evidence to attack a judgment is inconsistent with the concept of finality, "it is an inconsistency that comports with fairness in certain circumstances . . . . While finality is important in all legal proceedings, its importance must be tempered by the finality of the death penalty."); *see also Jones v. State*, 678 So. 2d 309, 310 (Fla. 1996) (staying execution and remanding for an evidentiary hearing to determine whether some of the evidence proffered was newly discovered).

As set forth below, Defendant's evidence regarding the emerging science on cognitive brain development, considered cumulatively with all of the evidence in this case, establishes that the Eighth Amendment principle announced in *Roper* applies equally to his case and prohibits his execution based on his age and cognitive brain development at the time of the offense. *See Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) (explaining that the impact of newly-discovered evidence must be evaluated in combination with the totality of the evidence in the case). In accord with these principles, prior counsel explains that this claim could not have been raised before. Knox

Dec. at 3-4 ("This science did not exist at the time I represented Eric or beforehand. . . . Had this new scientific understanding in the mental health professions been available to me during the time I represented Eric, I certainly would have used it.").

B. This Court has the independent authority to grant more expansive constitutional relief

This Court has the authority to grant expansive constitutional relief on Defendant's claim than the minimum standard set forth in *Roper*. The United States Supreme Court has not yet addressed whether *Roper*'s prohibition on the execution of juveniles who were under age 18 at the time of the offense should be expanded to include individuals like Defendant, who was in his early twenties at the time of the offense but was in a medical sense no more cognitively developed than a person in his mid-teens. But this Court need not await a ruling from the United States Supreme Court on that issue before granting relief. While *Roper* sets the minimum standards, or constitutional "floor," the Florida Supreme Court has long recognized that Florida's state courts are empowered to provide defendants greater-than-minimum protections.

The Florida Supreme Court recently reaffirmed the prerogative to grant more expansive relief under the Eighth Amendment, as well as the corresponding provisions of the Florida Constitution, even where the United States Supreme Court had not directly addressed the issue at hand. In *Hurst v. State*, 202 So. 3d 40, 59-60 (Fla. 2016), the Florida Supreme Court held that, despite the United States Supreme Court's decision to address only the Sixth Amendment implications of Florida's prior capital sentencing scheme, the Florida Supreme Court was empowered to rule that the scheme violated the Eighth Amendment and accordingly to grant relief. *Id.* at 50 ("Although the United States Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases, the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death.");

see also id. at 74 (Pariente, J., concurring) (explaining that because the United States Supreme Court had not addressed the relevant Eighth Amendment question, the Florida Supreme Court could properly consider and decide the matter itself for Florida).

As another example, before the United States Supreme Court held that its Eighth Amendment decision barring mandatory life sentences for juveniles must be applied retroactively on collateral review, the Florida Supreme Court had already applied the decision retroactively to all Florida defendants in *Falcon v.* State, 162 So. 3d 954 (Fla. 2015), under its independent authority to expand upon the minimum constitutional standards set by the United States Supreme Court. *See also Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (noting that states are free to expand protections "as long as they do not infringe on federal constitutional guarantees").

Roper set the floor of constitutional protection for juveniles facing the death penalty. This Court need not await guidance from the United States Supreme Court on whether the Eighth Amendment also protects from execution those like Defendant who were the cognitive, if not numerical, equivalent of juveniles at the time of their defense. This Court has the authority to and should reach Defendant's claim on the merits now, based upon Eighth Amendment's requirements, and create a record upon which the Florida Supreme Court and, if necessary, the United States Supreme Court can exercise their appellate judgment.

II. It is cruel and unusual punishment to impose death sentences on those in their late teens and early twenties, functional adolescents whose culpability is comparable to juveniles under eighteen

Mr. Branch's execution would violate the Eighth Amendment. He was twenty-one years old at the time of the offense. While the United States Supreme Court has already precluded capital punishment for juveniles under the age of eighteen, *see Roper v. Simmons*, 543 U.S. 551 (2005), the evolving standards of decency today show that extended adolescents in their late teens and

early twenties also do not have the requisite culpability to be sentenced to death. Today's newly developed science in the area of adolescent brain development shows that extended adolescents are more comparable to their younger counterparts than they are to people with matured adult brains. While twenty-one-year-olds generally bear these characteristics, Mr. Branch in particular had cognitive delays due to his traumatic childhood and history of adolescent alcohol and substance abuse. Accordingly, Mr. Branch's execution would be a violation of the Eighth Amendment protection against cruel and unusual punishment.

A. The Eighth Amendment prohibits cruel and unusual, as well as excessive, punishment and envisions a fluid concept determined by the evolving standards of decency

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" and 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). To align with the Eighth Amendment, a punishment must be "graduated and proportionate to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). Whether a punishment is proportionate is determined by the evolving standards of decency, since "the 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) (citing *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, J., dissenting)). Accordingly, the Eighth Amendment guarantee is not restricted by those punishments deemed unconstitutional during the eighteenth century when the Bill of Rights was originally drafted. *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). The standard is ever-changing as "public opinion becomes enlightened by a humane justice," *Gregg*, 428 U.S. at 171 (citing *Weems*, 217 U.S. at 378), and it is a well-established principle that "[t]he Amendment must draw its

meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).[6]

The Eighth Amendment places strict limits on how far the government can go in exercising the "power to punish." *Kennedy*, 554 U.S. at 435. It must stay "within the limits of civilized standards." *Trop*, 356 U.S. at 100. The Supreme Court has also stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* The "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Kennedy*, 554 U.S. at 420.

The concern over cruel and unusual punishment becomes even more significant when a person's life is at stake. When this happens, "the Court has been particularly sensitive to insure that every safeguard is observed," because "[t]here is no question that death as a punishment is unique in its severity and irrevocability." *Gregg*, 428 U.S. at 187. Accordingly, there are two rules that courts must follow when imposing a sentence: "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." *Id.* at 173 (internal citations omitted). When applied to the death penalty, a death sentence "is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Id.* at 183. The sentence must meet both of these conditions, since

[6] "[E]volving standards of decency" necessarily evolve, and what may have been acceptable to the courts and society at large historically may not prove acceptable later in time. *Compare Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding constitutional the execution of intellectually disabled people), *with Atkins*, 536 U.S. at 319 (prohibiting the execution of intellectually disabled people); *compare Stanford v. Kentucky*, 492 U.S. 361, (1989) (holding constitutional the execution of offenders under 18 years), *with Roper*, 436 U.S. at 560 (prohibiting the execution of offenders under 18 years).

"[a] punishment might fail the test on either ground." *Kennedy*, 554 U.S. at 441 (citing *Coker*, 433 U.S. 584, 592 (1977)).

When deciding the proportionality of a death sentence, "the Court [also] insists upon confining the instances in which the punishment can be imposed." *Id.* at 420. The result has been that the death penalty is only proportionate when used for "'a narrow category of the most serious crimes' and on those whose extreme culpability makes them 'the most deserving of execution.'" *Id.* (citing *Roper*, 543 U.S. at 568). Accordingly, when capital punishment was reintroduced in 1976, the trend nationwide was to provide factors to narrow the jury's discretion when deciding who fits into that category. *See, e.g.*, *Roper*, 543 U.S. at 568 (recognizing that the death penalty should be reserved for "the worst of the worst").

At the same time as narrowing the death penalty's use, however, the Court has also emphasized the importance of considering the individual circumstances of each offender and the underlying crime. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). "Given that the imposition of death by public authority is so profoundly different from all other penalties, . . . an individualized decision is essential in capital cases." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). The jury may not be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. However, because of "the resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment," courts must "insist upon confining the instances in which capital punishment may be imposed." *Kennedy*, 554 U.S. at 440.

There are times, then, when a death sentence is unconstitutionally excessive. In light of these principles, the Supreme Court has adopted two steps when faced with excessiveness claims

regarding the death penalty. It first looks to "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, 543 U.S. at 563. To make this assessment the Court generally considers "the historical development of the punishment at issue, legislative judgments, international opinion, and sentencing decisions juries have made . . . ." *Enmund*, 458 U.S. at 788. After the objective indicia, the Court moves to the second step, which considers proportionality in light of the "standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, meaning, and purpose." *Kennedy*, 554 U.S. at 421. This second step is the more dominant factor. *Enmund*, 458 U.S. at 797 ("Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty."). By using this test, the Supreme Court has found the death penalty unconstitutionally excessive when used against those who have not committed homicide, *see Kennedy*, 554 U.S. at 421; *Enmund*, 458 U.S. at 801; *Coker*, 433 U.S. at 59; those with intellectual disabilities, *see Atkins*, 536 U.S. at 321; and juveniles under eighteen, *see Roper*, 543 U.S. at 578. Such decisions are made in light of the underlying principles of narrowing the death penalty's use and exercising restraint on potential brutality, and in doing so courts must ensure that only those viewed as having the most severe culpability face execution.

As part of the evolving standards of decency, it is important to consider the consensus of the medical community and scientific data in determining where to draw the lines of culpability. For example, in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Supreme Court relied heavily on the standards the medical community had devised for determining intellectual disability. As the Court explained in *Kennedy*:

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those

> professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Kennedy, 134 S. Ct. at 1993. In *Hall*, the Supreme Court found that Florida's brightline test precluding anyone with an I.Q. score of over 70 ignored the medical consensus that I.Q. score alone is not conclusive evidence of a person's intellectual capacity, while also disregarding the imprecision of I.Q. testing. *Hall*, 134 S. Ct. at 1995. For this reason, the Court found:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's [brightline cutoff] contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Id. at 2001. Thus, when confronted with medical indicia of a person's culpability, or lack thereof, courts cannot choose to ignore any scientific consensus. *Id.*

B. The evolving standards of decency no longer allow for the imposition of death sentences on people in their late teens and early twenties

The United States Supreme Court prohibited the death sentence for juveniles under eighteen in *Roper*, 543 U.S. at 578. That case was in itself an adjustment to the evolving standards of decency, as it revisited its 1989 decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), allowing for the imposition of death sentences on sixteen- and seventeen-year-olds. The medical community has now overwhelmingly determined that adolescents in their late teens and early twenties are more comparable to their younger peers than they are to adults in their late-twenties or thirties with fully developed brains. For the same reasons *Roper* extended the categorical bar to all adolescents under eighteen, it is now time for the law to meet science and for *Roper* to extend to those in their early twenties.

1. The Eighth Amendment already treats juveniles under eighteen as a separate category from adults

In *Roper*, the Court explained, "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." *Roper*, 543 U.S. at 572-73.

Relying on scientific studies, the Court observed: "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. First, "[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.* (citations omitted). The Court next observed:

> [J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

Id. Finally, the Court explained, "The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 570. "These differences render suspect any conclusion that a juvenile falls among the worst offenders." *Id.*

The Court applied this same reasoning ten years later when it held unconstitutional the imposition of mandatory life without parole sentences on individuals who were under eighteen at the time of the offense. *Miller v. Alabama*, 567 U.S. 460 (2012). In explaining its reasoning, the Court stated:

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

> entrenched patterns of problem behavior. And in *Graham*, we noted that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control. We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed.

Id. at 471-72 (citations omitted) (internal quotation marks omitted).

2. There is now a consensus in the medical community that the brain continues developing through the mid-twenties, meaning that adolescents in their late teens and early twenties are no more culpable for their crimes than those under eighteen

Since the Court's decision in *Roper*, scientific and social-science research has demonstrated that, like sixteen- and seventeen-year-olds, people in their late teens and early twenties do not have fully developed brains, are immature, and are vulnerable to peer pressure and risk-taking behavior. "The age of 18 as a 'bright line' is not in accord with the current findings of research in developmental science. This research reveals that human brain maturation is ordinarily not complete until the mid-20's . . . . This [is a] new understanding . . . ." Garbarino Report at 2.

> Today it is established in the medical and scientific literature that brain development does not reach "full maturity" until approximately the period of mid-twenties. Synaptic pruning, the process by which brain synapses are selectively "pruned" or eliminated continues until this time, allowing for more efficient later brain functioning. The myelination process – the development of the substance which provides insulation for the nerve fibers – continues as well. This allows a mature individual to effectively transmit signals, promoting healthy brain functioning and allowing more complex functions. This process continues until well-into the individual's twenties. Also continuing until approximately mid-twenties is the increasing connectivity between regions of the brain. As these connections are strengthened, the brain becomes better able to transmit information between regions and becomes better at planning, dealing with emotions, and problem-solving.

Sultan Report at 21.

In *Roper*, the first category of traits cited by the Supreme Court as grounds for treating juveniles differently than adults includes immaturity, irresponsibility, and impulsivity. *Roper*, 543

U.S. at 569. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). As the reports submitted in this proceeding relate:

> 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. Complex planning, the ability to focus on one thing while ignoring distractions, decision-making, impulse control, logical thinking, risk management, organized thinking, and short-term memory are all functions of the pre-frontal cortex.
>
> 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.

Sultan Report at 21.

> 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: "gray matter"- the outer layer of the brain, "white matter connections" - the brain cells serving as the "wiring" between neurons, and activity in the chemicals or "neurotransmitters" that execute messages within the brain. *All three are compromised in an individual in his early 20's.*

Garbarino Report at 2 (emphasis added).

A consequence of their immature brains, adolescents seek risk. Research has shown that "individuals in the young adult period (i.e. ages 18-21)" are at a greater risk to engage in risky behavior than younger adolescents, which indicates "that this period of development is an important transition." Rudolph, M., *At Risk of Being Risky: The Relationship between 'Brain Age' under Emotional States and Risk Preference,* Dev. Cognitive Neurosci. 24:93-106 at 102 (2017). This is because the prefrontal cortex, crucial to executive functioning—which encompasses a

broad array of abilities such as impulse control, risk management, and decision making—continues to develop until "at least the mid-twenties." Sultan Report at 21.

The second category of traits cited by the *Roper* Court as grounds for treating juveniles differently than adults includes vulnerability and susceptibility. *Roper*, 543 U.S. at 569. "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570. The vulnerabilities of twenty-one year olds are analogous to those of seventeen year olds.

> [T]he hormonal conditions of such youths contribute to impaired brain function (relative to adults) in matters of assessing and taking risks, emotional intensity, and dealing with peers (including social rejection). All of these considerations underlie the current scientific recognition that extended adolescents (people in their early 20's) are a special class. The process of brain maturation is not complete in any person until he/she reaches their mid 20's.

Garbarino Report at 3.

The third category of traits cited by the *Roper* Court as grounds for treating juveniles differently than adults includes transitory personality and unfixed character. *Roper*, 543 U.S. 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. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

This reasoning applies with equal force to those in their early twenties as it does to seventeen year olds. The brain development integral for a person to gain the capacity to achieve a stable identity is not complete until the mid-twenties. *See generally* Garbarino Report at 3-4. And with respect to Mr. Branch:

> 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 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.

Id. at 4.

As the United States Supreme Court explained in *Hall*, "The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall*, 134 S. Ct. at 1992 (quoting *Weems*, 217 U.S. at 349). In *Hall*, the Court stated that "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*." *Hall*, 134 S. Ct. at 1993. And in *Miller*, the Court discussed that the decisions in *Roper* and *Graham* "rested not only on common sense . . . but on science and social science . . . and 'developments in psychology and brain science.'" *Miller*, 567 U.S. at 471. Similarly, it is appropriate for this Court to consider scientific and social science studies to assess the age and neurological development of defendants in their mid-twenties, like Mr. Branch.

As the aforementioned reports detail, there is no meaningful difference between a person in his mid-twenties and a seventeen-year-old. Both have brains that have not fully developed; both are prone to immaturity, recklessness, and impulsivity. Both are still in the neurological development phase; both are vulnerable, have transitory personality traits, and are searching for a stable, authentic identity.

3. Other objective indicia demonstrate that society as a whole is treating older adolescents in the same way as their younger counterparts

In addition to the emerging consensus of the medical and scientific community, state and local governments, juries, and international governments are increasingly treating extended adolescents in ways similar to younger juveniles.

a. A national consensus reflects that individuals in their early to mid-twenties should not be executed

There is an emerging national consensus that older adolescents should be treated differently than adults and more similarly to juveniles under eighteen. In assessing the existence of national consensus on an issue, the United States Supreme Court has examined laws enacted by the various state legislatures and the decisions of sentencing juries, appellate courts, and governors about whether to execute defendants who belong to a particular category of individuals, such as those under eighteen. *Roper*, 543 U.S. at 563-65; *see also Atkins*, 536 U.S. at 313-17. "Statistics about the number of executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society." *Kennedy*, 554 U.S. at 433.

In *Roper*, the Court examined national consensus with respect to the execution of juvenile offenders. According to the Court, "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach." *Roper*, 543 U.S. at 564. The Court also looked to the number of executions for defendants who were sixteen or seventeen at the time of their crimes, finding that "even in the 20 States without a formal prohibition on executing juveniles, the practice [was] infrequent." *Id.* at 564-67. Ultimately, the Court found that "the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the intellectually disabled, as "categorically less culpable than the

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

Here, there is similarly a trend supporting the idea that extended adolescents should not be subjected to the death penalty. First, extended adolescents over seventeen would not be executed for any offense in twenty-three states, the District of Columbia, and the five United States territories. Currently, nineteen states and the District of Columbia have abolished the death penalty as to all crimes. *Facts about the Death Penalty*, Death Penalty Information Center (2018). [7]

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

And the governors of four states have imposed moratoria on executions: Pennsylvania, Oregon, Washington, and Colorado. In *Hall*, the Court characterized the moratoria states as being on the defendant's "side of the ledger" in the national consensus equation. *Hall*, 134 S. Ct. at 1997.

Put simply, in twenty-three states, the District of Columbia, and the five United States Territories, those just past the *Roper* cut-off would be excluded from eligibility from the death penalty.

Second, a court must look to the states who allow a punishment but do not actually impose it. The *Graham* Court noted:

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

> [T]he many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And "it is fair to say that a national consensus has developed against it."

Graham, 560 U.S. at 67 (citations omitted). The Court's opinion makes clear that actual practice—even among States that appear to authorize a particular punishment—must be considered in determining national consensus.

Here, among states that theoretically authorize the death penalty for extended adolescents over seventeen, seven reveal a trend against using eighteen as the cut-off. They have not executed any offender under the age of twenty-one years in the last fifteen years. Even if those seven states have offenders under twenty-one on their death rows, they have not imposed any new death sentences on offenders in that age group in the last 20 years. This means that 30 States, plus the District of Columbia and the five U.S. Territories, have decided to go beyond age eighteen in banning outright or imposing death sentences for adolescents older than seventeen.[8]

Similarly, states are expanding past the *Roper* cutoff in decreasing the number of executions for those who were younger at the time of their crimes. Even in the remaining states with the death penalty as an authorized punishment for offenders under 21 years, executions occur in a minority of the states. In the last ten years, for example, only 12 states have actually executed offenders who were 21 or younger at the time of their offenses: Texas, Virginia, Oklahoma, Florida, Delaware, Mississippi, Alabama, Ohio, Georgia, South Carolina, Indiana, and South

[8] The most recent example of a state departing from *Roper's* age eighteen cutoff is Kentucky, where a circuit court judge has ruled the death penalty unconstitutional for those under twenty-one in two cases. *See* Vandiver, B., *Trial Delayed, Death Penalty under Review*, University of Kentucky Kentucky Kernel (Oct. 20, 2017), http://www.kykernel.com/news/trial-delayed-death-penalty-under-review/article. Mr. Branch asserts that while this shows that states are willing to go beyond eighteen, this does not go far enough to protect all extended adolescents who have similar cognitive deficiencies.

Dakota. Since 2011, that number has dropped to nine states. Indeed, of the 29 states that have had executions since 2000, 14 states did not execute anyone under 21 years, and four of those states have since repealed the death penalty or imposed a moratorium on executions. Of the remaining states, death sentences are infrequently imposed on defendants under 21 or younger, and actual executions of such individuals are even rarer.

b. State and federal laws reflect the consensus that people in extended adolescence are categorically less mature and less responsible than older people whose brains have reached full maturity

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

The same is true for extended adolescents. In the capital sentencing context, while age is not yet a categorical ban, it is a mitigating factor in almost all death penalty states. Since capital punishment is prohibited for those under eighteen, the age mitigating factor clearly goes to those who are in extended adolescence.[9]

[9] Twenty-three of the death penalty states that provide specific mitigating factors in their capital sentencing statutes, including Florida, include age of the offender at the time of the crime. *See* Alabama, Ala. Code § 13A-5-51(7); Arizona, Ariz. Rev. Stat. § 13751(5); Arkansas, Ark. Code. Ann. § 5-4-605(4); California, Cal. Penal Code § 190.3 (i); Colorado, Colo. Rev. Stat. Ann. § 18-1.3.1201(a); Florida, Fla. Stat. Ann. § 921.141 (g); Kansas, Kan. Stat. Ann. § 21-6625(7); Kentucky, Ky. Rev. Stat. Ann. & 532.025(8); Louisiana, La. C.Cr. P. art. 905.5(f); Mississippi, Miss. Code Ann. § 99-19-101(g); Missouri, Mo. Ann. Stat. § 565.032(7); Nebraska, Neb. Rev. Stat. Ann. § 29-2523(d); Nevada, Nev. Rev. Stat. Ann. §200.035(6); New Hampshire, N.H. Rev. Stat. Ann. § 630:5(d); North Carolina, N.C. Gen. Stat. Ann. § 15A-2000(7); Ohio, Ohio Rev. Code Ann. §(4); Pennsylvania, 42 Pa. Stat. § 9711(4); South Carolina, S.C. Code Ann. § 16-3-20(7); Tennessee, Tenn Code Ann. § 39-13-204(7); Utah, Utah Code Ann. § 76-3-207(e); Virginia, Va. Code Ann. § 19.2-264.4(v); Washington, Wash. Rev. Code Ann. § 10.95.070(7); Wyoming, Wyo. Stat. Ann. § 6-2-102(vii).

In determining intellectual disability, one of the prongs is onset during the developmental period. While this is commonly thought of to be age eighteen, three death penalty state have interpreted 'onset in the developmental period' as onset prior to age twenty-two: Indiana, Utah, and Maryland. 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 arises in civil commitment cases. There, some non-death penalty states have civil commitment statutes which interpret "onset in the developmental period" as onset prior to age twenty-two: Minnesota, New Mexico, and Rhode Island. Minn. Stat. § 253B.02; N.M. Stat § 28-16A-6; N.M. Stat § 43-1-3; R.I. Gen. Laws § 40.1-1-8.1. In Wisconsin's statutes, "intellectual disability" is not individually defined but is encompassed within the definition of "developmental disability." Wis. Stat. § 51.01(5)(a). "Developmental disability" is then defined, in part, as "manifested before the person has attained the age of 22." Wis. Stat. § 51.62(1).

In the criminal justice system more generally, there are many examples of courts and legislatures recognizing that people in their early to mid-20s are not full-fledged adults. For example, in Nebraska, the Douglas County Young Adult Court "is a judicially supervised program that provides a sentencing alternative for youthful offenders up to age 25."[10] There is also a young adult court in Idaho, recognizing that the "18-24 [year-old] brain is unique," due to the

Two more states include this factor for defendants who are under the age of eighteen, but as that is now a complete bar to a death sentence, presumably they consider evidence of youth for those over the age of eighteen as well. *See* Indiana, Ind. Code Ann. § 35-50-2-9(6); Montana, Mont. Code Ann. § 46-18-304(g).

[10] https://www.dc4dc.com/young-adult-court

"[p]refrontal cortex" being "not fully developed," and that offenders in this age range are at high risk.[11]

In California, a young adult court serves people ages 18 to 25. These courts are based on the growing body of research that "the prefrontal cortex of the brain—responsible for our cognitive processing and impulse control—does not fully develop until the early to mid-20s."[12] The young adult courts acknowledge "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.* It accommodates these differences because "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 New York, a young adult court serves people ages 16 to 24 in response to "the latest findings on adolescent brain developments."[13]

States are increasingly opening young adult correctional facilities to focus more on rehabilitation and building life resources. They have done this in Connecticut (for 18 to 25 year olds), Maine (for 18 to 26 year olds), and New York (a unit at Rikers Island specifically houses 18 to 21 year olds).

Other, non-legal examples of where society treats extended adolescents differently than adults include rental cars, where rental car companies charge young driver fees to those between

[11] https://www.nadcp.org/sites/default/files/2014/CG-12.pdf

[12] http://www.sfsuperiorcourt.org/divisions/collaborative/yac

[13] https://www.courtinnovation.org/areas-of-focus/youth-programs

eighteen and twenty-four, and healthcare, where young adults are allowed to stay on their parents' health insurance until age twenty-six.

c. International opinion on the death penalty and the treatment of criminal offenders 21 years of age or younger further supports the premise that the death penalty should be categorically prohibited

The *Roper* Court considered the laws of the international community as "instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper*, 543 U.S. at 575-76. *See also id.* at 604 (O'Connor, J., dissenting) ("Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency."). The death penalty is not implemented at all in a majority of other countries, let alone against extended adolescents. Although the number of death sentences handed down globally increased in 2016, the trend towards abolition of the death penalty continues, with 104 countries having abolished the punishment by the end of 2016 as compared to 64 countries which had done so as of 1997. *Death Sentences and Executions 2016*, Amnesty International, at 24 (2017).

Imposition of the death penalty has declined internationally. According to Amnesty International, 37 percent fewer executions occurred worldwide in 2016 than in 2015. *Death Sentences and Executions 2016*, Amnesty International, at 4 (2017). Saudi Arabia, Iran, Iraq and Pakistan accounted for 87 percent of the global number of executions. *Id.* Two countries, Benin and Nauru, abolished the death penalty for all crimes, and one country, Guinea, abolished it for "ordinary crimes." *Death Sentences and Executions 2016*, Amnesty International, at 9 (2017).

Other countries and the United Nations have also recognize that people are not fully adults the moment they turn eighteen years old and that juvenile punishments, rather than adult punishments, are appropriate to those in their extended adolescent years. For example, members

of the international community also recognized the need to treat youthful offenders as juveniles rather than as adults in the criminal context. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) require that "(e)fforts shall also be made to extend the principles embodied in the Rules to young adult offenders," and extend the protection afforded by the Rules to cover proceedings dealing with extended adolescents.[14] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 3.3 & Commentary to Rule 3.3, adopted by General Assembly resolution 40/33 of 29 November 1985.[15]

European countries' treatment of people in their early 20s in the criminal context is informative on whether the death penalty should be formally abolished for that age group in the United States. In Germany, all young adults ages 18 to 21 fall within the jurisdiction of the juvenile courts, but those courts have the option of sentencing according to the juvenile law or the adult law. The German Supreme Federal court has further developed the law by ruling that a young adult has the maturity of a juvenile if his or her personality is still developing; this logic has been used to argue that juvenile justice options should be available for young adults up to the age of 24 years. In 2014 the Netherlands enacted a law which extends the applicability of juvenile sanctions to young adults aged 18 to 23 years.[16]

[14] "A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult(.)" Beijing Rules, Rule 2.2(a).

[15] Available at http://www.un.org/documents/ ga/res/40/a40r033.htm.

[16] In other European countries, youth between the ages of 18 to 21 are not subject to the jurisdiction of adult courts. In Austria, for example, youths who commit offenses at 21 are subject to special youth courts. Various provisions of the juvenile code, rather than the adult code, apply to these offenders. Croatia, too, provides that persons ages 18 to 21 will be treated by specialized juvenile courts and fall within the juvenile courts act. There are also reduced penalties for offenders under 21 years. European countries also distinguish extended adolescents at the trial court stage. In

4. The Supreme Court's own jurisprudence calls for the prohibition of imposing death sentences on extended adolescents

As it can be established that the objective indicia treats older adolescents like their younger peers, this Court must move on to the second step: Supreme Court jurisprudence.

As with adolescents under eighteen, death sentences imposed upon extended adolescents have little or no penological purpose. They do not meet any of the three principal rationales of punishment: "rehabilitation, deterrence, and retribution." *Kennedy*, 554 U.S. at 420. "Rehabilitation, it is evident, is not an applicable rationale for the death penalty." *Hall*, 134 S. Ct. at 1992-93 (citation omitted). Thus, "capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy*, 554 U.S. at 441; *Gregg v. Georgia*, 428 U.S. 153 (1976) (noting that the death penalty should serve these "two principal social purposes").

"Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Indeed, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State (that is, if the State cannot execute all murderers), the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Atkins*, 536 U.S. at 319.

Finland and Sweden there are no specialized juvenile courts; rather, these countries approach punishment of all offenders from a rehabilitative standpoint. Still, offenders under 21 years who are sentenced to prison get released after serving one-third of their time while adults are released after serving one-half or two-thirds of their sentences. In Sweden, imprisonment for youth 21 or younger is a last resort, and such offenders can be subject to the same supervision (called "youth service") as juveniles. As for terms of imprisonment, the maximum term for offenders 21 years old or younger is fourteen years.

The reasoning of *Atkins* also applies here: the culpability and blameworthiness of youthful offenders in extended adolescence are diminished to a substantial degree by their youth and immaturity. American society recognizes the dual need to provide greater protections for this group and to prohibit them from participating in activities where youthful impulsivity and immaturity could put them or others at risk. The law does not grant these youth the same rights and entitlements of adults; and for purposes of punishment, they should not be treated the same as adults. Just as with juveniles under 18 years of age, research suggests that this group can mature and "age out" of the recklessness and impulsiveness that can characterize this group of individuals. The fact that this group can mature—can attain a better understanding of their own humanity—necessarily means that they cannot be the "worst of the worst" so as to justify the ultimate sanction.

As for the rationale of deterrence, "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles." *Roper*, 543 U.S. at 571. "The same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* The *Roper* Court explained that "[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." *Id.* Indeed, "to the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.*; *see also Atkins*, 536 U.S. at 319-20 (noting that the impairments of intellectually disabled offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect particularly in that population).

The reasoning about the lack of deterrence applies to individuals in extended adolescence, too. Deterrence as a rationale for punishment necessarily requires a group to reflect upon the consequences of its actions. People in their early to mid-20s suffer from the same impulsivity as younger teenagers. They act rashly, without reflection and full consideration of the consequences of their actions. They do not grow out of this behavior until their brains have fully formed. Like seventeen year olds, adolescents in their early 20s also lack the self-regulation and executive functioning to appreciate the death penalty as a deterrent.

Capital punishment is only lawful if the offender's "consciousness [is] materially more 'depraved' than that of any person guilty of murder." *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). The characteristics of adolescents—for example, impulsivity and lack of full brain development—so affect their individual responsibility and moral guilt that it categorically precludes such a finding. Thus, their execution is categorically unconstitutional.

C. Mr. Branch's case is especially demonstrative of why *Roper* should be extended, given the effects of his traumatic childhood on his cognitive development and his immature functioning at the time of the offense

In addition to Mr. Branch being only twenty-one at the time of his crime, so that he already lacked a fully matured adult brain in all the ways discussed above, Mr. Branch's traumatic childhood and history of adolescent substance abuse would have delayed his brain development even more. The unique characteristics and experiences of an individual impacts the development of his brain. "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.'" Garbarino Report at 3. "If trauma occurs repeatedly and for a prolonged time, as it did for Eric Branch, it impedes brain development even further." Report of Dr. Sultan, at 21.

For Mr. Branch, these impactful experiences include the abuse and neglect he suffered, the instability of his home life, and alcohol use. As Faye Sultan, Ph.D., found, these adverse childhood experiences had a devastating effect on the development of Mr. Branch's brain.

> It is the professional opinion of this examiner, stated to a reasonable degree of certainty, that the cognitive and emotional development of Eric Branch, was significantly impaired and delayed by the above-described factors, and most particularly his yet undeveloped brain at the time of the offense, when he was twenty-one years old.

Report of Dr. Sultan, at 21. "In the case of Eric Branch, his social history indicates he is just such an individual - growing up with much adversity, including psychological adversity such as experiences of parental rejection, and physical maltreatment (including physical traumas which may have resulted in insults to his brain)." *Id.*

Dr. Sultan described how the trauma Mr. Branch suffered impacted his brain development:

> Eric Branch was exposed to chronic trauma within his home and within his community. Traumas, and the resulting fear produced by such situations, are now understood to undermine the development of a child's brain. The brain adjusts to patterned-repetitive experiences that are understood through the senses. Trauma impacts brain areas like the amygdala (involved in emotion management) and the hippocampus (involved in memory and memory consolidation).

Report of Dr. Sultan, at 21.

Mr. Branch's neurological development was also impacted by the consumption of alcohol. The relationship between alcohol use and a developing brain is complex. Alcohol use is also related to a young person's brain not being fully formed, and concurrently alcohol use impedes neurological development. Alcohol consumption is both a cause and an effect of the delays in brain development.

According to Dr. Sultan, Mr. Branch's brain development was impaired and delayed due to self-medication with alcohol.

Mr. Branch, like other adults with chronic trauma, demonstrated difficulty with the

> formation and maintenance of intimate relationships. He developed inappropriate ways to deal with the people in his life. He had trouble expressing his emotional needs, and he was distrustful of others to the extreme. In order to cope with his unmet emotional needs, Eric Branch turned to alcohol binging and substance abuse.
>
> * * *
>
> Medical research has demonstrated that adolescent substance abusers show abnormalities on multiple measures of brain functioning which is linked to changes in cognitive ability, decision-making, and the regulation of emotions. Abnormalities have been seen in brain structure volume, white matter quality, and activation to cognitive tasks.

Report of Dr. Sultan, at 20-21. "Deficits in executive functioning, specifically in the areas of abstract reasoning ability and problem-solving ability have also been linked directly to adolescent substance abuse." *Id.* Because of this, "[t]he normal maturational process of the brain is disrupted by the introduction of alcohol and other substances." Report of Dr. Sultan, at 21.

According to Dr. Garbarino, "[w]hile such consumption by a traumatized person like Mr. Branch has a self-medicative component, its significance . . . is that such a history additionally impairs brain development for adolescents and individuals in their early 20's." Garbarino Report at 5. "[G]iven the trauma and social deprivation that he experienced growing up and his immature development, traumatized, impulsive, and socially inexperienced. But more than that, as a twenty one-year-old, he was still years away from the developmental time when brains mature." *Id.*

Based on medical and scientific developments conclusively showing that a person's brain is not fully developed until late in the third decade of life, the national consensus against the execution of people in late adolescence—as shown through laws and practices—and legislation at the local, state, and international level that protects people in their early twenties (and treats them akin to juveniles), it is unconstitutional to execute extended adolescents. There is no meaningful difference between a seventeen year old and someone like Mr. Branch, due to the biological

immaturity of their brains and their compromised functioning. No penological purpose is served by the execution of either.

The execution of Mr. Branch, whose "cognitive and emotional development . . . was significantly impaired and delayed," Report of Dr. Sultan, at 21, would be unconstitutional. His death sentence, excessive and unconstitutional, must be vacated.

Claim 2: The needless suffering and uncertainty Mr. Branch has experienced during his time on death row is in violation of the Eighth Amendment prohibition against cruel and unusual punishment

I. There is no procedural impediment to this claim, which did not become ripe until Defendant's death warrant was signed, and the Court should therefore decide the claim on the merits

There is no procedural impediment to Defendant's Eighth Amendment claim that it would be cruel and unusual to execute him after his particularly anguishing 24 years of confinement on death row, during which his desperate attempts to obtain counsel to assist with his case went repeatedly unanswered. This Court should decide this claim on the merits, and grant relief for the reasons discussed below.

Like a claim of incompetency to be executed, *see Panetti v. Quarterman*, 551 U.S. 930 (2007), or a broad claim that it would be cruel and usual to execute a prisoner who had spent an inordinate number of years on death row, *see Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Stevens, J., statement respecting the denial of certiorari), Defendant's Eighth Amendment claim did not become ripe until his death warrant was signed and an execution became imminent. Because Defendant's claim is not only that his arduous years spent looking for counsel on death row themselves give rise to an Eighth Amendment violation—but rather, that his execution, in light of and on the heels of those years, would violate the Eighth Amendment's prohibition on cruel and unusual punishment—the claim "is measured at the time of execution, not years before then." *Tompkins v. Secretary*, 557 F.3d 1257, 1260 (11th Cir. 2009).

Where a defendant's claim does not become ripe until a death warrant is signed, the claim should not be denied during under-warrant litigation on the ground that it is barred under the procedural requirements for successive post-conviction applications. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). Instead, the newly-ripe claim should receive merits considerations, as it is the defendant's first and only opportunity for such review. As the Florida Supreme Court has observed, a claim that does not ripen until a death warrant is signed cannot be raised in an earlier post-conviction proceeding, and would be subject to immediate dismissal on ripeness grounds. *See Griffen v. State*, 866 So. 2d 1 (Fla. 2003). This makes sense because such claims "mean[] nothing unless the time for execution is drawing nigh." *Tompkins*, 557 F.3d at 1260. But, once a warrant is signed, the defendant should be afforded an opportunity for review of the claim on the merits.

Defendant could not have raised his Eighth Amendment claim in an earlier post-conviction proceeding because it did not become ripe until the eve of this litigation. Under these circumstances, a "literal application" of the successive motion requirements in Fla. R. Crim. P. 3.851(e)(2) would not only work a miscarriage of justice in this case but "would frustrate the purposes" of the successive rules, and promote judicial inefficiency, by leading litigants to inundate the state's courts with unripe and premature claims. *See Stewart v. United States*, 646 F.3d 856 (11th Cir. 2011). As set forth below, Defendant has colorable arguments in support of his constitutional claim that deserve this Court's consideration. This Court should decide the claim on the merits.

II. Mr. Branch has experienced needless uncertainty and suffering during his time on death row

Eric Branch has been on death row for 24 years, and he has spent most of that time fighting for competent legal representation. His days have been filled with uncertainty, never knowing

when he would finally receive a response from one of the many lawyers, law firms, and legal aid organizations to whom he had reached. And his days have been filled with uncertainty whether the governor would sign his death warrant, as he had done to so many of Mr. Branch's friends over the past 24 years. The United States Supreme Court recognized Mr. Branch's predicament over a hundred years ago, observing that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). As Justice Brennan noted, "The 'fate of ever-increasing fear and distress' to which the expatriate is subjected, *Trop v. Dulles*, 356 U.S. 86, 102, (1958), can only exist to a great degree for a person confined in prison awaiting death." *Furman v. Georgia*, 408 U.S. 238, 289 (1972).

Although the United States Supreme Court has held that capital punishment does not violate the Eighth Amendment, the Court also recognized that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

Rather than speculating about the "ever-increasing fear and distress," *see Trop*, 356 U.S. at 102, Mr. Branch must have felt, he has made the point himself. Years of Mr. Branch's letters and pleadings serve as a remarkable documentation of his inner thoughts throughout his time on death row. For example, when the District Court for the Northern District of Florida denied his § 2254 petition, Mr. Branch speculated that he only had seven months to one year of appeals left. He wrote, "Assuming I win nothing than [*sic*] it's up to the governor. It could be a week. It could be 10 yrs after. But he can sign my warrant at any moment after my appeal expires." Letter

Excerpts from Mr. Branch to Leora Nosko-Passmore; his grandmother; his aunt, Connie Branch; and his cousin, Alex Branch (2008 to 2013) (hereinafter "Branch Letter Excerpts").

Mr. Branch panicked even more when the Eleventh Circuit denied his appeal, causing him to fear that he would imminently end up on the "Ready List" – a list of death row prisoners provided to the governor indicating they have exhausted all appeals and are ready for execution. Mr. Branch explained, "Once I am on the list, staying there 3 months is normal. Remaining there 3 yrs is extraordinary. Meaning I have up to 3 months but less than 3 yrs to make something happen or die." *Id.* Shortly thereafter, Mr. Branch grew even more fearful when the United States Supreme Court denied his petition for writ of certiorari, again writing, "There is no hope of lasting 3 years on the Ready List for the simple fact they will run out of people on the list long before that and have to kill me." *Id.* Sure enough, Mr. Branch received notification that he was on the governor's list less than a month later.

The pressure started to weigh on Mr. Branch. His letters became darker, and he wrote, "Most days I don't even feel like opening my eyes. I am constantly tired, sad, lonely, hungry, and generally miserable . . . ." *Id.* Almost a year after Mr. Branch's certiorari petition had been denied, he told his cousin, "I feel like somebody has been standing behind me with a gun to my head for a year now. It's fucking exhausting." *Id.*

Mr. Branch also described what it felt like to have the men living around him taken away and killed one by one:

> The tough part is that now everyone they are killing has been here with me for 20 years. Its [*sic*] kind of like coming into work and finding every month another person you've worked in the office with for 20 years has been taken out back and killed. Even when it's not you, it's so much stress.

Id.

In 2013, Florida passed the Timely Justice Act. It required the governor to issue a warrant within 30 days of clemency denial, and to schedule an execution within 180 days of the warrant. This caused utter panic on Florida's death row, as the prisoners wondered how quickly their executions would be processed and if there might be mass warrants. Mr. Branch described the fearful atmosphere, writing:

> Now, every time the door opens, it falls quiet, everybody wondering if he did it . . . signed all our warrants or is he coming after just one of us today . . . . Anybody who survives this will be driven nuts, watching 120 people they know get killed, wondering at each open door – am I next? It's too much.

Exacerbating Mr. Branch's anxiety was that most of his time on the row, he was represented by inadequate conflicted counsel. *See* Part III, *supra*. In over sixty letters to his loved ones, Mr. Branch lamented his lack of appropriate representation all through his state and federal review. He reached out to local Florida and notional attorneys and organizations. *See, e.g.*, Letter from Mr. Branch to Michael Radelet. He filed numerous pro se pleadings, most of which were stricken due to the representation by his conflicted counsel. Mr. Branch finally got some assistance when he reached out to the American Bar Association's Death Penalty Project in April of 2010. *See* Letters from Mr. Branch to the ABA. However, it took the ABA more than three years to find counsel for Mr. Branch, and by then his appeals were completely exhausted. Ms. Emily Olson-Gault of the ABA wrote, "We recognize that if we had been able to find a law firm sooner – or if Mr. Branch had received consistent, qualified representation from court-appointed counsel throughout the case – his legal situation might be different." *See* Letter from the ABA Death Penalty Representation Project to Kimberly Newberry (January 25, 2018).

Ms. Olson-Gault said of Mr. Branch:

> During the years we were looking for pro bono counsel, Mr. Branch stayed in frequent contact with the Project, asking about our efforts and urging us to not give up trying to find counsel for him. He provided me with suggestions for lawyers that

> I might try to contact and kept me updated on legal developments in his case. . . . He was as diligent and persistent in seeking representation and trying to preserve his claims as any death-sentenced prisoner I have encountered in my many years of working with the Project.

Id.

As the Supreme Court once stated about the death penalty, "one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *Medley*, 134 U.S. at 172. Mr. Branch's letters put that uncertainty on full display, along with the fear, paranoia, and tension familiar to those living under a death sentence—but exacerbated by Mr. Branch's lack of adequate conflict-free counsel. Executing Mr. Branch after those twenty-four years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment, not solely because of the length of time he has been on death row, but because of the psychological suffering he endured as he wrote letter after letter complaining about his attorney, drafting pro se motions that would be ignored by the courts, and launching campaigns from death row to find an attorney in the United States that would represent him – the whole time fearing that "whenever the Governor wants me to die, I will." *Id.*

CONCLUSION

For the foregoing reasons, Mr. Branch's death sentence violates the Eighth Amendment. It is unconstitutionally excessive because Mr. Branch's age and under-developed brain at the time of the offense prevented him from having the requisite culpability to be eligible for a death sentence. It is unconstitutional, because Mr. Branch's time on death row, anguishing over when he would be killed and constantly having to seek legal representation, was cruel and unusual punishment.

WHEREFORE, this Court should:

1. Enter a stay of execution;
2. Grant an evidentiary hearing to resolve contested issues of fact;

3. Allow amendment of this submission as may by just and proper;

4. Vacate Mr. Branch's sentence of death and prohibit his execution.

Respectfully submitted,

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Counsel for Eric Branch

CERTIFICATION OF COUNSEL

Pursuant to Fla. R. Crim. P. 3.851(e)(1)(F), undersigned counsel hereby certifies that they have discussed the contents of this motion fully with Defendant Eric Branch and have complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

/s/ Billy H. Nolas
Billy H. Nolas

/s/ Stacy Biggart
Stacy Biggart

CERTIFICATE OF SERVICE

I certify that on January 29, 2018, the foregoing was served via the e-portal to Assistant Attorney General Charmaine Millsaps at cappapp@myfloridalegal.com and Assistant State Attorney John Molchan at jmolchan@sa01.org.

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 7

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
SEVENTH DIVISION
CASE NO. 14-CR-161

COMMONWEALTH OF KENTUCKY PLAINTIFF

v.

TRAVIS BREDHOLD DEFENDANT

ORDER DECLARING KENTUCKY'S DEATH PENALTY STATUTE AS UNCONSTITUTIONAL

This matter comes before the Court on Defendant Travis Bredhold's Motion to declare the Kentucky death penalty statute unconstitutional insofar as it permits capital punishment for those under twenty-one (21) years of age at the time of their offense. Mr. Bredhold argues that the death penalty would be cruel and unusual punishment, in violation of the Eighth Amendment, for an offender under twenty-one (21) at the time of the offense. The defense claims that recent scientific research shows that individuals under twenty-one (21) are psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty, in *Roper v. Simmons*, 543 U.S. 551 (2005). The Commonwealth in turn argues that Kentucky's death penalty statute is constitutional and that there is no national consensus with respect to offenders under twenty-one (21). Having the benefit of memoranda of law, expert testimony, and the arguments of counsel, and being otherwise sufficiently advised, the Court sustains the Defendant's motion.

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FINDINGS OF FACT

Travis Bredhold was indicted on the charges of Murder, First Degree Robbery, Theft by Unlawful Taking $10,000 or More, and three Class A Misdemeanors for events which occurred on December 9, 2013, when Mr. Bredhold was eighteen (18) years and five (5) months old.

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg in the case of Commonwealth v. Diaz, et al., No. 15-CR-584.[1] Dr. Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."[2] Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.[3]

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[1] See Order Supplementing the Record. Com. v. Diaz is also a Seventh Division case. The Commonwealth was represented by Commonwealth Attorney Lou Anna Red Corn, and her assistants in both cases, 14-CR-161 & 15-CR-584. Dr. Steinberg was aptly cross-examined by the Commonwealth Attorney.
[2] Hearing July 17, 2017 at 9:02:31.
[3] Defendant's Supplement to Testimony of Laurence Steinberg, July 19, 2017.

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On May 25th and 26th, 2016, an individual assessment of Mr. Bredhold was conducted by Dr. Kenneth Benedict, a clinical psychologist and neuropsychologist. A final report was provided to the Defendant's counsel and the Commonwealth and has been filed under seal. After reviewing the record, administering multiple tests, and conducting interviews with Mr. Bredhold, members of his family, and former teachers, Dr. Benedict found that Mr. Bredhold was about four years behind his peer group in multiple capacities. These include: the development of a consistent identity or "sense of self," the capacity to regulate his emotions and behaviors, the ability to respond efficiently to natural environmental consequences in order to adjust and guide his behavior, and his capacity to develop mutually gratifying social relationships.[4] Additionally, he found that Mr. Bredhold had weaknesses in executive functions, such as attention, impulse control, and mental flexibility.[5] Based on his findings, Dr. Benedict diagnosed Mr. Bredhold with a number of mental disorders, not the least being Attention Deficit Hyperactivity Disorder (ADHD), learning disabilities in reading and writing, and Post Traumatic Stress Disorder (PTSD).[6]

CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A. Const. Amend. VIII. This provision is applicable to the states through the Fourteenth Amendment. The protection flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen the consistent reference to "the evolving standards of decency that mark the progress of a maturing

[4] *Id* at 6.
[5] *Id* at 3.
[6] *Id* at 5.

society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the "evolving standards of decency" test are: (1) objective indicia of national consensus, and (2) the Court's own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper v. Simmons*, 543 U.S. 551 (2005).

I. Objective Indicia of National Consensus Against Execution of Offenders Younger than 21

Since *Roper*, six (6) states[7] have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states[8] have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven[9] (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.[10]

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[7] The states that have abolished the death penalty since *Roper* and year of abolition: Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007).

[8] The governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively. The governor of Oregon extended a previously imposed moratorium in 2015. The governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013.

[9] Kansas and New Hampshire have not executed anyone since 1977. Montana and Wyoming have never executed anyone who was under twenty-one (21) years of age at the time of their offenses, and they currently have no such offenders on death row. Utah has not executed anyone who was under twenty-one (21) years of age at the time of their offense in the last fifteen (15) years, and no such offender is currently on Utah's death row. Idaho and Kentucky have not executed anyone who was under twenty-one (21) years old at the time of their offense in the last fifteen (15) years.

[10] Chart of Number of People Executed Who Were Aged 18, 19, or 20 at Offense from 2000 to Present, By State [current as of February 29, 2016]

Those nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011 – nineteen (19) of which have been in Texas alone.[11] Considering Texas an outlier, there have only been fourteen (14) executions of defendants under the age of twenty-one (21) between 2011 and 2016, compared to twenty-nine (29) executions in the years 2006 to 2011, and twenty-seven (27) executions in the years 2001 to 2006 (again, excluding Texas).[12] In short, the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods.

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.[13] Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20).

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to

[11] *Id.*
[12] *Id.*
[13] Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from https://deathpenaltyinfo.org/documents/FactSheet.pdf.

twenty-one (21. "[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles … as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

2. The Death Penalty is a Disproportionate Punishment for Offenders Younger than 21

As the Supreme Court in *Roper* heavily relied on scientific studies to come to its conclusion, so will this Court. On July 17, 2017, in the case of Commonwealth of Kentucky v. Diaz, this Court heard expert testimony on this topic. Dr. Laurence Steinberg testified and was also allowed to supplement his testimony with a written report. The report cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable. It is based on those studies that this Court has come to the conclusion that the death penalty should be excluded for defendants who were under the age of twenty-one (21) at the time of their offense.

If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late

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teens.[14] Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.[15]

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.[16] First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.[17] Second, they are more likely to engage in "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).[18] Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because gains in impulse control continue to occur during the early twenties (20s).[19] Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the

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[14] B. J. Casey, et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104-110 (2005).

[15] N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358-1361 (2011); D. Fair, et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); A. Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies*, 33 HUM. BRAIN MAPPING 1987-2002 (2012); A. Pfefferbaum, et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176-193 (2013); D. Simmonds, et al., *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*. 92 NEUROIMAGE 356-368 (2014); L. Somerville, et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124-133 (2010).

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

[17] T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).

[18] E. Cauffman, et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc.12532. (2017).

[19] L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28-44 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

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ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.[20] As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.[21] The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.[22] In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).[23]

Recent neurobiological research parallels the above psychological conclusions. This research has shown that the main cause for psychological immaturity during adolescence and the early twenties (20s) is the difference in timing of the maturation of two important brain systems. The system that is responsible for the increase in sensation-seeking and reward-seeking—sometimes referred to as the "socio-emotional system"—undergoes dramatic changes around the time of puberty, and stays highly active through the late teen years and into the early twenties (20s). However, the system that is responsible for self-control, regulating impulses, thinking ahead,

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[20] L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[21] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

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

[23] B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

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evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the "cognitive control system"—is still undergoing significant development well into the mid-twenties (20s).[24] Thus, during middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual's twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.[25]

There are considerable structural changes and improvements in connectivity across regions of the brain which allow for this development. These structural changes are mainly the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, allowing for more efficient transmission of information) and myelination (insulation of neuronal connections, allowing the brain to transmit information more quickly). While synaptic pruning is mostly complete by age sixteen (16), myelination continues through the twenties (20s).[26] Thus, while the development of the prefrontal cortex (logical reasoning, planning, personality) is largely finished by the late teens, the maturation of connections between the prefrontal cortex and regions which govern self-regulation and emotions continues into the mid-twenties (20s).[27] This supports the psychological findings spelled out above which conclude that even intellectual young adults

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[24] B. J. Casey, et al., *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEV. PSYCHOL. 225-235 (2010); L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78-106 (2008); L. Van Leijenhorst, et al., *Adolescent Risky Decision-making: Neurocognitive Development of Reward and Control Regions*, 51 NEUROIMAGE 345-355 (2010).

[25] D. Albert & L. Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211-224 (2011); S-J Blakemore & T. Robbins, *Decision-Making in the Adolescent Brain*, 15 NAT. NEUROSCIENCE 1184-1191 (2012).

[26] S-J, Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397-406 (2012); R. Engle, *The Teen Brain*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).

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

may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

Perhaps one of the most germane studies to this opinion illustrated this development gap by asking teenagers, young adults (18-21), and mid-twenties adults to demonstrate impulse control under both emotionally neutral and emotionally arousing conditions.[28] Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen– (18) to twenty-one– (21) year–olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens.[29] Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty– (20) year–old functions similarly to a sixteen– (16) or seventeen– (17) year–old.

In addition to this maturational imbalance, one of the hallmarks of neurobiological development during adolescence is the heightened plasticity—the ability to change in response to experience—of the brain. One of the periods of the most marked neuroplasticity is during an individual's late teens and early twenties (20s), indicating that this group has strong potential for behavioral change.[30] Given adolescents' ongoing development and heightened plasticity, it is difficult to predict future criminality or delinquent behavior from antisocial behavior during the teen years, even among teenagers accused of committing violent crimes.[31] In fact, many

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[28] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOL. SCI. 549-562 (2016).
[29] *Id.*
[30] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).
[31] T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, 3(2) DEV. & PSYCHOPATHOLOGY (2016).

researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.[32]

Travis Bredhold was eighteen (18) years and five (5) months old at the time of the alleged crime. According to recent scientific studies, Mr. Bredhold fits right into the group experiencing the "maturational imbalance," during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses. He also fits into the group described in the study above which was found to act essentially like a sixteen– (16) to seventeen– (17) year–old under emotionally arousing conditions, such as, for example, robbing a store. Most importantly, this research shows that eighteen– (18) to twenty-one– (21) year–olds are categorically less culpable for the same three reasons that the Supreme Court in *Roper* found teenagers under eighteen (18) to be: (1) they lack maturity to control their impulses and fully consider both the risks and rewards of an action, making them unlikely to be deterred by knowledge of likelihood and severity of punishment; (2) they are susceptible to peer pressure and emotional influence, which exacerbates their existing immaturity when in groups or under stressful conditions; and (3) their character is not yet well formed due to the neuroplasticity of the young brain, meaning that they have a much better chance at rehabilitation than do adults.[33]

Further, the Supreme Court has declared several times that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568

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[32] K. Monahan, et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093-1105 (2013); E. Mulvey, et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453-475 (2010).
[33] *Roper*, 543 U.S. at 569-70.

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(quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("the death penalty must be reserved for 'the worst of the worst'"). Given Mr. Bredhold's young age and development, it is difficult to see how he and others his age could be classified as "the most deserving of execution."

Given the national trend toward restricting the use of the death penalty for young offenders, and given the recent studies by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age. Accordingly, Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense.

It is important to note that, even though this Court is adhering to a bright–line rule as promoted by *Roper* and not individual assessment or a "mental age" determination, the conclusions drawn by Dr. Kenneth Benedict in his individual evaluation of Mr. Bredhold are still relevant. This evaluation substantiates that what research has shown to be true of adolescents and young adults as a class is particularly true of Mr. Bredhold. Dr. Benedict's findings are that Mr. Bredhold operates at a level at least four years below that of his peers. These findings further support the exclusion of the death penalty for this Defendant.

So ORDERED this the 1 day of August, 2017.

JUDGE ERNESTO SCORSONE
FAYETTE CIRCUIT COURT

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CERTIFICATE OF SERVICE

The following is to certify that the foregoing was served this the 1st day of August, 2017, by mailing same first class copy, postage prepaid, to the following:

Lou Anna Red Corn
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116 North Upper Street, Suite 300
Lexington, KY 40507

Joanne Lynch
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BY: M Kuhles D.C.

A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT
BY M Kuhles DEPUTY

EXHIBIT 8

ADOPTED

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

REPORT

Introduction

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

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

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

[1] ABA House of Delegates Recommendation 117A, (adopted Aug. 1983), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/juvenile_offenders_death_penalty0883.authcheckdam.pdf.
[2] ABA House of Delegates Recommendation 107 (adopted Feb. 1997), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/aba_policy_consistency97.authcheckdam.pdf.
[3] Brief for the ABA as Amicus Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005).
[4] Brief for the ABA as Amicus Curiae Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012).

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

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

[5] Brief for the ABA as Amicus Curiae Supporting Respondent at 5-11, *Roper v. Simmons*, 543 U.S. 551 (2005).
[6] Brief for the ABA as Amicus Curiae Supporting Respondent at 18, *Roper v. Simmons*, 543 U.S. 551 (2005).
[7] Brief for the ABA as Amicus Curiae Supporting Petitioners at 12*, Miller v. Alabama*, 567 U.S. 460 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 79 (2010)).
[8] *See, e.g., Miller v. Alabama,* 567 U.S. 460, 474 (2012); *Graham v. Florida ,* 560 U.S. 48, 50, 76 (2010); *Roper v. Simmons*, 543 U.S. 551, 553 (2005).
[9] *See Life Without Parole,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/life-without-parole (last visited Sept. 28, 2017).
[10] Notes, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1845- 47 (2006).
[11] *Facts about the Death Penalty,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Nov. 7, 2017).
[12] Damantae Graham was under the age of 19 at the time of his crime. *See* Jen Steer, *Man Sentenced to Death in Murder of Kent State Student,* FOX 8 (Nov. 15, 2016), http://fox8.com/2016/11/15/man-sentenced-to-death-in-murder-of-kent-state-student. Justice Jerrell Knight was under the age of 21 at the time of his crime. *See* Natalie Wade, *Dothan Police Arrest Teenager in Murder of Dothan Man; Another Suspect Still at Large,* AL.COM (Feb. 8, 2012), http://blog.al.com/montgomery/2012/02/dothan_police_arrest_teenager.html.
[13] *See Searchable Execution Database,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2017&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply (last visited Nov. 13, 2017).
[14]*See Atkins v. Virginia*, 536 U.S. 306 (2002). The ABA was at the forefront of this movement as well, passing a resolution against executing persons with intellectual disability in 1989. *See* ABA House of Delegates Recommendation 110 (adopted Feb. 1989),

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

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

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

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

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

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

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

Major Constitutional Developments in the Punishment of Juveniles for Serious Crimes

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

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

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

[19] *See, e.g.*, *May v. Anderson*, 345 U.S. 528, 536 (1953) ("Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State 's duty towards children."); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) ("[A child] cannot be judged by the more exacting standards of maturity.").
[20] *In re Gault*, 387 U.S. 1, 13 (1967).
[21] *Schall v. Martin*, 467 U.S. 253, 263 (1984) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)) (holding that juveniles have no right to jury trial).
[22] Apart from the sentencing decisions discussed herein, the Court, interpreting the Fifth and Fourteenth Amendments, held in *J.D.B. v. North Carolina,* that a juvenile's age is relevant to the *Miranda* custody analysis. 564 U.S. 261, 264 (2011). In all of these cases, the Court adopted settled research regarding adolescent development and required the consideration of the attributes of youth when applying constitutional protections to juvenile offenders.
[23] 543 U.S. 551, 570-71 (2005).
[24] 560 U.S. 48, 74 (2010).
[25] 567 U.S. 460, 479 (2012).
[26] *Miller v. Alabama,* 567 U.S. 460, 465 (2012) (citing *Graham* v. *Florida*, 560 U.S. 48, 68, 74 (2010)).
[27] *Miller,* 567 U.S. at 480.

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

The Court in *Miller* noted the scientific "findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"[29] Importantly, the Court specifically found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific."[30] Relying on *Graham*, *Roper*, and other previous decisions on individualized sentencing, the Court held "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."[31] The Court also emphasized that a young offender's moral failings could not be comparable to an adult's because there is a stronger possibility of rehabilitation.[32]

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

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

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

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

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

Increased Understanding of Adolescent Brain Development

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

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

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

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

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

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

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

[45] *See* Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731 (2007) ("When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual's future behavior and structural brain development.") (citing Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766, 766–67 (2006)); Damien A. Fair et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization,* 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 626, 632, 634 (2005) (examining a sample of 306 individuals in 3 age groups—adolescents (13-16), youths (18-22), and adults (24 and older) and explaining that "although the sample as a whole took more risks and made more risky decisions in groups than when alone, this effect was more pronounced during middle and late adolescence than during adulthood" and that "the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions"); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91 (2008) (noting that "the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults").

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

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

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

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

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

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

Legislative Developments in the Legal Treatment of Individuals in Late Adolescence

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

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

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

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

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

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

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

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

[55] 23 U.S.C. § 158 (1984).

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

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

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

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

[57] *See, e.g., What are Your Age Requirements for Renting in the US and Canada*, ENTERPRISE.COM, https://www.enterprise.com/en/help/faqs/car-rental-under-25.html (last visited Oct. 16, 2017); *Restrictions and Surcharges for Renters Under 25 Years of Age*, BUDGET.COM, https://www.budget.com/budgetWeb/html/en/common/agePopUp.html (last visited Oct. 16, 2017); *Under 25 Car Rental,* HERTZ.COM, https://www.hertz.com/rentacar/misc/index.jsp?targetPage=Hertz_Renting_to_Drivers_Under_25.jsp (last visited Oct. 16, 2017).
[58] *See Dependancy Status,* FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/fafsa/filling-out/dependency (last visited Sept. 21, 2017).
[59] *See Dependants and Exemptions 7,* I.R.S, https://www.irs.gov/faqs/filing-requirements-status-dependents-exemptions/dependents-exemptions/dependents-exemptions-7 (last visited Sept. 21, 2017); 26 U.S.C. § 152 (2008).
[60] 42 U.S.C. § 300gg-14 (2017).
[61] *See Extending Foster Care to 18*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx.
[62] 20 U.S.C. § 1412 (a)(1)(A) (2017).
[63] *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2015*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp.
[64] Jurisdictional Boundaries, *Juvenile Justice Geography, Policy, Practice & Statistics*, NAT'L CTR. FOR JUV. JUST.,http://www.jjgps.org/jurisdictional-boundaries#delinquency-age-boundaries?year=2016&ageGroup=3 (last visited Nov. 8, 2017).
[65] *Id.*

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

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

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

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

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

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

[68] *Id.*

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

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

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

Purposes Served by Executing Individuals in Late Adolescence

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

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

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

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

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

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

Conclusion

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

[76] John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate,* 58 STAN. L. REV. 791, 843 (2005).
[77] James C. Howell et al., *Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What Happens, What Should Happen, and What We Need to Know,* NAT'L INST. OF JUST. STUDY GROUP ON THE TRANSITIONS BETWEEN JUV. DELINQ. AND ADULT CRIME, at Bulletin 5, 24 (2013).
[78] *Atkins,* 536 U.S. at 320.
[79] Kathryn Monahan et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior,* 25 DEV. & PSYCHOPATHOLOGY 1093, 1093-1105 (2013); Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders,* 22 DEV. & PSYCHOPATHOLOGY 453,453-75 (2010).

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

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

Respectfully submitted,

Seth Miller
Chair, Death Penalty Due Process Review Project

Robert Weiner
Chair, Section of Civil Rights and Social Justice

February, 2018

GENERAL INFORMATION FORM

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

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

1. Summary of Resolution.

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

2. Approval by Submitting Entity.

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

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

No.

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

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

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

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

N/A.

6. Status of Legislation.

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

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

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

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

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

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

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

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

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

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

2. Summary of the Issue that the Resolution Addresses

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

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

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

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

None.

EXHIBIT 9

United States Post-*Roper* Execution Data

Death Penalty States

Alabama

- Post-Roper executions total: 31
- Post-Roper 18-21 executions: 7

Arizona

- Post-Roper executions total: 15
- Post-Roper 18-21 executions: 0

Arkansas

- Post-Roper executions total: 5
- Post-Roper 18-21 executions: 1

California

- Post-Roper executions total: 3
- Post-Roper 18-21 executions: 0

Colorado as of 2010

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Florida

- Post-Roper executions total: 36
- Post-Roper 18-21 executions: 6

Georgia

- Post-Roper executions total: 34
- Post-Roper 18-21 executions: 8

Idaho

- Post-Roper executions total: 2
- Post-Roper 18-21 executions: 0

Indiana

- Post-Roper executions total: 9
- Post-Roper 18-21 executions: 3

Kansas

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Kentucky

- Post-Roper executions total: 1
- Post-Roper 18-21 executions: 0

Louisiana

- Post-Roper executions total: 1
- Post-Roper 18-21 executions: 0

Mississippi

- Post-Roper executions total: 15
- Post-Roper 18-21 executions: 2

Missouri

- Post-Roper executions total: 27
- Post-Roper 18-21 executions: 1

Montana

- Post-Roper executions total: 1
- Post-Roper 18-21 executions: 0

Nebraska

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Nevada

- Post-Roper executions total: 1
- Post-Roper 18-21 executions: 0

New Hampshire

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

North Carolina

- Post-Roper executions total: 9
- Post-Roper 18-21 executions: 2

Ohio

- Post-Roper executions total: 40
- Post-Roper 18-21 executions: 12

Oklahoma

- Post-Roper executions total: 37
- Post-Roper 18-21 executions: 7

Oregon

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Pennsylvania

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

South Carolina

- Post-Roper executions total: 11
- Post-Roper 18-21 executions: 1

South Dakota

- Post-Roper executions total: 3
- Post-Roper 18-21 executions: 1

Tennessee

- Post-Roper executions total: 5
- Post-Roper 18-21 executions: 0

Texas

- Post-Roper executions total: 208
- Post-Roper 18-21 executions: 74

Utah

- Post-Roper executions total: 1
- Post-Roper 18-21 executions: 0

Virginia

- Post-Roper executions total: 19
- Post-Roper 18-21 executions: 6

Washington

- Post-Roper executions total: 1
- Post-Roper 18-21 executions: 0

Wyoming

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

United States Government

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

United States Military

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Non-Death Penalty States

Alaska (abolished death penalty in 1957)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Connecticut (abolished death penalty in 2012)

- Post-Roper executions total: 1
- Post-Roper 18-21 executions: 0

Delaware (abolished death penalty in 2016)

- Post-Roper executions total: 3
- Post-Roper 18-21 executions: 1

Hawaii (abolished death penalty in 1957)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Illinois (abolished death penalty in 2011)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Iowa (abolished death penalty in 1965)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Maine (abolished death penalty in 1887)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Maryland (abolished death penalty in 2013)

- Post-Roper executions total: 1
- Post-Roper 18-21 executions: 0

Massachusetts (abolished death penalty in 1984)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Michigan (abolished death penalty in 1846)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Minnesota (abolished death penalty in 1911)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

New Jersey (abolished death penalty in 2007)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

New Mexico (abolished death penalty in 2009)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

New York (abolished death penalty in 2007)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

North Dakota (abolished death penalty in 1973)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Rhode Island (abolished death penalty in 1984)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Vermont (abolished death penalty in 1964)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

West Virginia (abolished death penalty in 1965)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

Wisconsin (abolished death penalty in 1853)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

District of Columbia (abolished death penalty in 1981)

- Post-Roper executions total: 0
- Post-Roper 18-21 executions: 0

United States Total Numbers

- Post-Roper executions total: 520
- Post-Roper 18-21 executions: 130