CAPITAL CASE
EXECUTION SCHEDULED FOR THURSDAY, FEBRUARY 20, 2018, @ 6:00 P.M.

No. 17-7825

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 FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

I. Whether this Court should grant review of a decision of the Florida Supreme Court holding that the Eighth Amendment prohibition established in *Roper v. Simmons*, 543 U.S. 551 (2005), does not apply to a capital defendant who was nearly 22 years old at the time of the murder?

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Branch v. State*, __ So.3d __,2018 WL 897079 (Fla. Feb. 15, 2018) (SC18-190).

JURISDICTION

The Florida Supreme Court's opinion affirming the summary denial of the state successive postconviction motion was issued on February 15, 2018. Branch filed a petition for writ of certiorari on February 20, 2018. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(c). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

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

U.S. Const. Amend. VIII.

The Fourteenth Amendment of the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Branch was convicted and sentenced to death for the murder of a young college student, "whom he robbed and savagely beat and stomped and strangled and sexually assaulted and then left her nude body in the woods." *Branch v. Sec'y, Fla. Dep't of Corr.*, 638 F.3d 1353, 1353 (11th Cir. 2011); *see generally Branch v. McDonough*, 779 F.Supp.2d 1309, 1313-16 (N.D. Fla. 2010) (detailing the facts of the crime).

Branch had been improperly released from prison for sexual battery of a 14-year-old girl. He joined his cousin in Panama City, Florida, in a Pontiac Bonneville. Once in Panama City, Branch raped another woman. *Branch v. State*, 671 So.2d 224 (Fla. 1st DCA 1996), *affirmed*, 684 So.2d 195 (Fla. 1996) (affirming a Bay County conviction and sentence for sexual battery).

Branch spent the weekend prior to the murder on the campus of the University of West Florida in Pensacola, spending Sunday night in the dorm room of a student, Melissa. On Monday, January 11, 1993, Branch, who was worried that law enforcement was looking for him either for the recent rape or on an Indiana warrant and could trace him via the Pontiac Bonneville, drove the Bonneville to the Pensacola airport, parked it, and took a taxi back to campus.

Shortly after 8:20 p.m., Branch kidnapped a young female college student from a remote parking lot on campus to steal her car. Branch savagely beat her. The medical examiner, who had conducted thousands of autopsies, testified that he will always remember this one because of the extent of her injuries. The medical examiner testified at trial, 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." *Branch v. State*, SC18-190 (Fla. Feb. 15, 2018) (quoting the trial court's sentencing order). Branch stomped; strangled; and sexually assaulted her with a tree branch. He left her nude body in the nearby woods after covering her with leaves and debris. Branch then

stole her red Toyota Celica with a black antenna and broken left taillight. Branch then returned to the dorm room. Melissa noticed that Branch had a cut on his hand.

The next day, Branch drove back to Panama City and then to Bowling Green, Kentucky, in the victim's red Toyota. He called his grandfather in Indiana to come pick him up. The victim's car was recovered shortly afterward in a parking lot in Bowling Green.

After arriving in Indiana and speaking with a lawyer, Branch turned himself in. The booking officer who took Branch's fingerprints noticed he had a cut on his hand. *See generally Branch v. McDonough*, 779 F.Supp.2d 1309 (N.D. Fla. 2010) (detailing the facts of the crime).

Judge Edward Phillips Nickinson III, presided at the trial. The prosecution presented DNA evidence consisting of the victim's blood located on boots and socks in Branch's Pontiac Bonneville. The bloodstains matched the victim's DNA profile "conservatively" at one in 9 million. (T. Vol. III 519). The jury convicted Branch of first-degree murder, sexual battery, and grand theft. Branch testified at the guilt phase admitting that he stole the victim's car. His story was that, while he helped an "other Eric" carry the victim into the woods, it was the "other Eric" who beat and murdered her.

The jury recommended a death sentence by a vote of ten to two. The judge found three aggravators: 1) the murder was committed in the course of a sexual battery; 2) prior violent felony based on an Indiana rape conviction;[1] and 3) the murder was especially heinous, atrocious, or cruel. The trial court found several nonstatutory

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[1] The Indiana rape conviction, not the Florida rape conviction, was used as the basis for the prior violent felony aggravator. *Branch v. State*, 685 So.2d 1250, 1253 (Fla. 1996) (finding the remainder of Branch's claims in the direct appeal to be "without merit"); *Branch v. State*, 952 So.2d 470, 482 (Fla. 2006) (rejecting a claim of ineffectiveness of appellate counsel for raising but not adequately briefing the issue of the admissibility of the Indiana conviction).

mitigating circumstances, including: remorse; unstable childhood; positive personality traits; and acceptable conduct at trial. The trial court sentenced Branch to death.

In the direct appeal to the Florida Supreme Court, Branch raised nine issues. *Branch v. State*, 685 So.2d 1250, 1252, n.3 (Fla. 1996) (listing the nine issues in a footnote).[2] The Florida Supreme Court affirmed the convictions and death sentence. *Branch v. State*, 685 So.2d 1250 (Fla. 1996).

Branch then filed a petition for writ of certiorari in the United States Supreme Court raising two claims: 1) whether the Sixth Amendment requires a pre-trial inquiry into retained counsel effectiveness; and 2) whether the jury instructions sufficiently defined mitigation. On May 12, 1997, the United States Supreme Court denied review. *Branch v. Florida*, 520 U.S. 1218 (1997).

On May 7, 1998, Branch filed a shell motion for postconviction relief in state trial court and then on April 1, 2003, he filed a second amended motion, raising fourteen claims. *Branch v. State*, 952 So.2d 470, 474, n.1 (Fla. 2006) (listing the claims raised in the amended 3.851 motion).[3] The trial judge, Judge Nickinson, also presided over

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[2] The nine issues were: 1) failure to grant a continuance; 2) failure to conduct a hearing into counsel's competence; 3) failure to give a requested instruction on circumstantial evidence; 4) insufficient evidence; 5) comment on right to silence; 6) photo of the victim; 7) failure to give a requested instruction defining mitigating circumstances; 8) evidence of another crime; and 9) victim impact evidence.

[3] The fourteen claims were: 1) ineffective assistance of trial counsel at the guilt phase and violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); 2) ineffective assistance of trial counsel during the penalty phase and violations of *Brady* and *Giglio*; 3) newly discovered evidence shows that the jury and trial court considered a nonstatutory aggravating circumstance of an improper prior violent felony; 4) counsel was ineffective for failing to obtain an adequate mental health evaluation; 5) postconviction counsel was unconstitutionally hindered because of the rules prohibiting counsel from interviewing jurors; 6) jury instructions diluted the jury's sense of overall responsibility in Florida's death penalty scheme; 7) Florida's death penalty sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); 8) unconstitutionality of execution by electrocution and lethal injection; 9) defendant may become mentally incompetent by the time of his execution; 10) felony underlying felony murder was an automatic aggravating circumstance; 11) improper direct appeal and ineffective assistance of appellate counsel; 12) public records are being withheld; 13) Florida's capital punishment statute is unconstitutional because it fails to prevent the arbitrary imposition of the death penalty; and 14) cumulative error.

the state postconviction proceedings. The trial court held an evidentiary hearing on three claims. Two defense mental health experts testified at the state evidentiary hearing. Dr. James Larson, who had been hired by trial counsel as a confidential mental health expert before trial, but who was not presented at the penalty phase because his testimony would not be "helpful," testified during the postconviction evidentiary hearing. *Branch*, 952 So.2d at 478 (stating that "Dr. Larson's evaluation was not helpful to the defense"). And state postconviction counsel Michael Reiter also presented Dr. Henry L. Dee at the evidentiary hearing to support the claim of ineffectiveness for failing to obtain an adequate mental health evaluation. *Id.* (noting much of the proposed mitigation presented at the evidentiary hearing either was "not credible or would actually have been harmful to the defendant's case"). Dr. Dee's deposition was taken before the evidentiary hearing and was filed with the trial court. Dr. Dee testified during the deposition that Branch's full scale IQ was 115. The trial court denied the motion following the evidentiary hearing.

In his postconviction appeal to the Florida Supreme Court, Branch raised nine issues.[4] *Branch v. State*, 952 So.2d 470, 474 (Fla. 2006). Branch also filed a state habeas petition raising four claims of ineffectiveness of appellate counsel.[5] *Branch*,

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[4] The nine issues were: 1) trial counsel was ineffective for failing to file a motion to suppress the items taken from the Pontiac; 2) trial counsel was ineffective for failing to investigate and present sufficient mitigation evidence during the penalty phase; 3) trial counsel was ineffective for failing to hire experts; 4) trial counsel was ineffective for failing to object to the introduction of the abstract of judgment during the penalty phase; 5) trial counsel was ineffective for failing to impeach witnesses; 6) trial counsel was ineffective for failing to investigate for the guilt phase; 7) trial counsel was ineffective for failing to object at the guilt and penalty phases; 8) Branch's Indiana conviction was not a felony under Florida law in order to establish the prior violent felony aggravating circumstance; and 9) Branch was entitled to relief based on cumulative error.

[5] The four claims of ineffectiveness of appellate counsel were: 1) failing to argue that the Indiana conviction was not a felony under Florida law and the inadmissibility of the abstract of judgment; 2) failing to raise on appeal the trial court's error in admitting into evidence DNA probability statistics without conducting a proper *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), hearing; 3) failing to raise the issue of the trial court's order denying the defense's request for a recess; and 4) failing to argue that the trial court had failed to conduct a proper *Nelson v. State*, 274 So.2d 256 (Fla.

952 So.2d at 481. The Florida Supreme Court affirmed the trial court's denial of the postconviction motion and denied the state habeas petition.

On March 28, 2007, Branch, represented by Michael Reiter, filed a 132-page habeas petition in federal court, raising seven issues.[6] *Branch v. McDonough*, 4:06-cv-00486-RH (Doc #7). The district court denied the federal habeas petition but granted a certificate of appealability on one issue. *Branch v. McDonough*, 779 F.Supp.2d 1309 (N.D. Fla. 2010) (detailing the facts and denying the federal habeas petition).

The Eleventh Circuit rejected the *Doyle v. Ohio*, 426 U.S. 610 (1976), claim and affirmed the federal district court's denial of habeas relief. *Branch v. Sec'y, Fla. Dep't of Corr.*, 638 F.3d 1353 (11th Cir. 2011).

On October 19, 2011, Branch filed a petition for writ of certiorari in the United States Supreme Court from the Eleventh Circuit opinion, raising two issues: 1) whether there is a right of self-representation in a federal habeas appeal and 2) the *Doyle* issue. The United States Supreme Court denied certiorari review. *Branch v. Tucker*, 565 U.S. 1248 (2012) (No. 11-8117).

On December 7, 2012, Branch filed a *pro se* motion for DNA testing. Branch sought DNA testing of a towel in Melissa's dorm room; a brochure that may have

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4th DCA 1973), inquiry.

[6] The seven issues were: 1) ineffective assistance of counsel in (a) not filing a motion to suppress the evidence seized from the Pontiac, (b) not hiring a blood-spatter expert, (c) not hiring a forensic pathologist to rebut the medical examiner's testimony about the stick found in the victim's vagina and the effect of the ligature found around her neck, (d) insufficiently investigating and presenting evidence in mitigation, and (e) not challenging on direct appeal the admission of DNA evidence; 2) the state trial court's failure to conduct a hearing on Mr. Branch's attorney's competence; 3) the state trial court's refusal to continue the trial; 4) the prosecutor's references to Mr. Branch's failure to disclose the "other Eric" story prior to the trial; 5) the state trial court's refusal to give a requested jury instruction further defining the term "mitigation"; 6) the admission, during the penalty phase, of evidence of Mr. Branch's sexual-battery conviction in Indiana, without a showing that it was a crime of violence and a felony as required for use as an aggravating circumstance under the Florida death-penalty statute; and 7) the State's failure to provide additional postconviction resources to hire additional postconviction experts.

belonged to Eric St. Pierre, who Branch asserted was the "other Eric"; hair found in the Pontiac Bonneville; the victim's shoelaces; and a stocking used to choke the victim (actually a sock). Branch also sought a court order for DNA samples from Eric St. Pierre in Maine. Prior state postconviction counsel, registry counsel Michael Reiter, was replaced by Capital Collateral Regional Counsel - North (CCRC-N), as state postconviction counsel of record.

On March 19, 2015, CCRC-N counsel adopted the *pro se* motion for DNA testing. The State filed an answer to the DNA motion objecting the DNA testing of the towel and pointing out the DNA evidence tying Branch to the murder. At trial, the prosecution established that a sock, found in the Pontiac Bonneville that Branch had been driving and then abandoned in the Pensacola airport parking lot, had bloodstains matching the victim's DNA profile at one in 9 million. (T. Vol. III 519).

On July 1, 2015, the trial court denied the motion. The trial court noted that the towel and the stocking had been previously DNA tested and the results were admitted at the 2004 postconviction evidentiary hearing as Exhibits B & C. The DNA testing performed by the Florida Department of Law Enforcement (FDLE) on the victim's sock showed only her DNA. The trial court noted that the towel was not involved in the murder or located at the crime scene. The trial court ruled there was an insufficient nexus between the towel and the issues in the case. The trial court found the motion for DNA insufficient because Branch failed to explain how the DNA results would show he was not present at the crime scene.

The Florida Supreme Court affirmed the denial of the motion for DNA testing concluding that Branch had "failed to demonstrate a nexus between the potential results of DNA testing on each piece of evidence and the issues in the case, or how the DNA testing of each item requested to be tested would give rise to a reasonable

probability of acquittal or a lesser sentence." *Branch v. State*, 2016 WL 4182823 (Fla. Aug. 8, 2016) (SC15-1869).

On April 2, 2014, Branch, represented by S. Douglas Knox of Quarles & Brady, filed a 42 U.S.C. § 1983 action in federal district court challenging the registry statute on two equal protection grounds. The district court dismissed the § 1983 action on statute of limitations grounds. Following oral argument, the Eleventh Circuit affirmed the dismissal. *Branch v. Sec'y, Fla. Dep't of Corr.*, 608 Fed. Appx. 912 (11th Cir. 2015).

On June 30, 2016, Branch, represented by CCRC-N, filed a successive postconviction motion raising a claim that his death sentence violated the right to jury trial established in *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*). On April 3, 2017, Branch filed an amended motion. On July 12, 2017, the trial court denied summarily the *Hurst* claim concluding that *Hurst* did not retroactively apply to Branch citing *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016).

The Florida Supreme Court recently affirmed the trial court's denial of the *Hurst* claim. *Branch v. State*, 2018 WL 495024 (Fla. Jan. 22, 2018) (SC17-1509).

2018 warrant litigation

On January 19, 2018, Governor Scott signed a warrant scheduling Branch's execution for Thursday, February 22, 2018, at 6:00 p.m.

On January 29, 2018, Branch, represented by Capital Collateral Regional Counsel - North (CCRC-N), and the Capital Habeas Unit of the federal public Defender's Office (CHU), filed a successive postconviction motion raising two claims. (2018 Succ. PC 207-230). The two claims were: 1) a claim based on a combination of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), asserting

that the Eighth Amendment prohibition on execution should be extended to cognitively immaturity; and 2) a claim that 24 years on death row violates the Eighth Amendment prohibition on cruel and unusual punishment. On January 30, 2018, the State filed an answer to the successive postconviction motion. (2018 Succ. PC 1060-1088). On February 1, 2018, the trial court summarily denied the successive postconviction motion and denied the motion to stay as well. (2018 Succ. PC 1132-1138).

Branch appealed to the Florida Supreme Court raising three issues: 1) whether the trial court properly summarily denied the *Roper v. Simmons*, 543 U.S. (2005), claim; 2) whether the trial court properly summarily denied the *Lackey v. Texas*, 514 U.S. 1045 (1995), claim; and 3) whether the trial court abused its discretion in denying the public records demands of the Department of Corrections for the expiration date of the drugs used in the lethal injection protocol and the demands of the Medical Examiner's Office for the autopsy report from the Hannon execution.

On February 15, 2018, following briefing, the Florida Supreme Court affirmed the trial court summary denial of the successive postconviction motion. *Branch v. State*, __ So. 3d __, 2018 WL 897079 (Fla. Feb. 15, 2018) (SC18-190; SC18-218).

On February 20, 2018, Branch then filed a petition for writ of certiorari in this Court from the Florida Supreme Court's opinion. This is the State's brief in opposition.

REASON FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE PROHIBITION ESTABLISHED IN *ROPER V. SIMMONS*, 543 U.S. 551 (2005), DOES NOT APPLY TO A CAPITAL DEFENDANT WHO WAS NEARLY 22 YEARS OLD AT THE TIME OF THE MURDER?

Petitioner Branch seeks review of the Florida Supreme Court's decision holding that prohibition on the execution of minors established in *Roper v. Simmons*, 543 U.S. 551 (2005), does not extend to capital defendants over 17 years old at the time of the murder. Branch claims, based on recent articles regarding human brain development showing that the human brain is not fully developed until a person is 26 years old, that although he was nearly 22 years old at the time of the murder, he is the functional equivalent, in terms of cognitive maturity, of a minor. But, as the Florida Supreme Court concluded, the claim is procedurally barred. Furthermore, there is no conflict between the Florida Supreme Court's decision and this Court's jurisprudence. This Court was well aware in *Roper* and specifically noted that drawing a bright-line at 18 years of age would include mature teenagers and exclude immature adults but adopted a categorical rule anyway. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. No appellate court has extended *Roper* to adult defendants. Nor is there any reason to extend *Roper*. Age and cognitive immaturity may still be presented as mitigation at sentencing regardless of *Roper*. This Court should deny review of this claim.

The Florida Supreme Court's decision

Branch argued in the Florida Supreme Court that this Court's decision in *Roper* should be extended to cognitively immature adults.

The Florida Supreme Court rejected the claim, reasoning:

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.

543 U.S. at 574, 125 S.Ct. 1183 (emphasis added in Florida Supreme Court opinion). 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.[7] 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.

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

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[7] 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.").

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

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

Branch v. State, __ So.3d __,2018 WL 897079, *3-*5 (Fla. Feb. 15, 2018) (SC18-190) (footnotes included but renumbered).

Procedurally barred under state law

This Court normally does not grant review of issues that are procedurally barred under a state procedural rule out of respect for state courts. *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (stating it would be "unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider and noting such a rule "serves an important interest of comity"); *cf. Johnson v. Lee*, 136 S.Ct. 1802, 1804 (2016) (finding California's procedural rule which requires criminal defendants to raise available claims on direct appeal to be an independent and adequate state procedural rule precluding federal habeas review). A defendant who has not properly presented the claim to the state courts free of procedural hurdles should not be heard in this Court.

The Florida Supreme Court concluded that the *Roper* claim was procedurally barred on two grounds: 1) because Branch did not raise a claim in the direct appeal that the trial court had improperly rejected his age as mitigating; and 2) because Branch did not raise a *Roper* claim in his initial state habeas petition even though the first habeas petition was filed months after this Court's decision in *Roper* was issued.

In his petition to this Court, opposing counsel does not dispute the existence of either of these two procedural bars. Rather, opposing counsel insists that the procedural bar does not present a hurdle to this Court's review because the Florida Supreme Court's procedural holding was interwoven with its federal constitutional law holding on the merits. Opposing counsel seems confused as to the concept of alternative holdings. *Massachusetts v. United States*, 333 U.S. 611, 623 (1948) (explaining that when a case is decided on two grounds, both grounds are effective); *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008) (explaining that "alternative holdings are not dicta, but instead are as binding as solitary holdings" citing cases). Alternative holdings are not automatically interwoven as opposing

counsel would have it. The Florida Supreme Court's discussion of the procedural issue was separate and distinct from its discussion of the substantive Eighth Amendment issue. The Florida Supreme Court's holding as to the procedural issue was not interwoven with its holding as to the merits of the issue. They were true alternative holdings which does present a hurdle to this Court's review. Regardless of any holding from this Court regarding the reach of *Roper*, this Eighth Amendment claim would still be procedurally barred under state law.

This Court should not grant review of an issue that is procedurally barred under state law. The state law procedural bar is the first reason this Court should deny review.

No conflict with this Court's Eighth Amendment jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), or *Moore v. Texas*, 137 S.Ct. 1039 (2017). See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review).

The Eighth Amendment prohibition on the execution of minors established in *Roper* only applies to those under 18 years of age. *Roper* is limited to chronological age, it does not extend to cognitive maturity. Branch is seeking to expand *Roper* from minors to adults. Branch is seeking to expand *Roper* not merely to those over 18 years old but to those over 21 years of age. Branch was born on February 7, 1971, and this murder occurred on January 11, 1993. Branch was nearly 22 years old at the time of the murder. Branch was exactly 21 years and 11 months old in January 1993. Indeed, he was just 27 days shy of his twenty-second birthday.

The *Roper* Court was well aware that drawing a bright-line rule based on chronological age would include mature 17 year olds in the prohibition but exclude

immature 19 year olds. The *Roper* Court noted that drawing "the line at 18 years of age is subject, of course, to the objections always raised against categorical rules," because many of the qualities that distinguish juveniles from adults do not just "disappear when an individual turns 18," but nevertheless held that "a line must be drawn." *Roper*, 543 U.S. at 574. This Court specifically noted that drawing a bright-line at 18 years of age would include mature teenagers and exclude immature adults but adopted a categorical rule anyway. There is no conflict with *Roper*.

The Florida Supreme Court's decision in this case is also in line with this Court's decisions in *Graham v. Florida*, 560 U.S. 48, 74-75 (2010), and *Miller v. Alabama*, 567 U.S. 460, 465 (2012), which also drew the Eighth Amendment line at 18 years of age.

Furthermore, Branch is not a particularly compelling defendant to make this claim. Branch is not a defendant who was under 21 years old, of low IQ with some mental illness. Branch has none of those characteristics. He was nearly 22 years old at the time of the murder. And Branch has higher intellectual functioning than the average person. Branch's own postconviction mental health expert, Dr. Henry L. Dee, reported that Branch has a full scale IQ of 115. Nor does he suffer from any mental illness. Both of the defense mental health experts, Dr. Larson and Dr. Dee, found that Branch does not suffer from any significant mental illness. Rather, both defense experts concluded that Branch had some features of anti-social personalty disorder.[8]

Nor does the Florida Supreme Court's decision conflict with this Court's decision in *Moore v. Texas*, 137 S.Ct. 1039 (2017). In *Moore*, this Court held that the additional factors used by Texas courts to determine intellectual disability, which were an "invention" of the state court that were not "aligned" with the medical community's views, created an unacceptable risk that a person with intellectual disabilities will be

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[8] Branch's IQ of 115 means that neither *Atkins v. Virginia*, 536 U.S. 304 (2002), nor *Hall v. Florida*, 134 S.Ct. 1986 (2014), has any relevance to this case.

executed in violation of the Eighth Amendment. Moore was sentenced to death but argued in postconviction that he was intellectually disabled and therefore exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). The state postconviction court held an evidentiary hearing in 2014 and then made factual findings and determined that Moore was intellectually disabled using the current clinical standards. *Moore*, 137 S.Ct. at 1045-46. But a Texas appellate court reversed using the additional factors from the earlier case of *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). The Texas appellate court suggested other causes for Moore's adaptive deficits rather than intellectual disability such as abusive childhood, undiagnosed learning disorders, multiple elementary school transfers, racially motivated harassment and violence at school, and a history of academic failure, drug abuse, and absenteeism. *Moore*,137 S.Ct. at 1047. This Court reversed on Eighth Amendment grounds.

Texas had adopted the 1992 edition of the American Association on Mental Retardation (AAMR) manual's definition of intellectual disability as the legal standard for determining intellectual disability, but Texas courts also looked at "seven evidentiary factors" that were not part of the clinical definition from *Ex parte Briseno*. *Moore*, 137 S.Ct. at 1046.[9] The *Briseno* Court did not cite to any authority, medical or judicial, as the source for these factors. *Id.* at 1046. The additional *Briseno* factors were in this Court's words, "wholly nonclinical." *Id.* at 1053. This Court also noted that no state legislature had adopted the *Briseno* factors or any similar factors. *Id.* at 1052.

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[9] The additional *Briseno* factors were: 1) did those who knew the person best during the developmental stage — his family, friends, teachers, employers, authorities — think he was mentally retarded at that time, and, if so, act in accordance with that determination; 2) has the person formulated plans and carried them through or is his conduct impulsive; 3) does his conduct show leadership or does it show that he is led around by others; 4) is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable; 5) does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject; 6) can the person hide facts or lie effectively in his own or others' interests; and 7) putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose. *Moore*, 137 S.Ct. at 1046, n.6.

This Court noted that Texas itself did not follow *Briseno* in other contexts, such as assessing students for intellectual disabilities. *Id.* This Court characterized the *Briseno* factors as an "outlier." *Id.* This Court found that the state court's use of the *Briseno* factors deviated from current clinical standards and from the older clinical standards as well. *Id.* at 1050. This Court concluded that both by "design and in operation, the *Briseno* factors create an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1051.[10]

Branch, relying on *Moore*, argues whenever there is a new scientific consensus that new scientific consensus trumps this Court's precedent. Opposing counsel is overeading *Moore*. The *Moore* Court explained that, while the views of medical experts do not "dictate" a definition of intellectual disability determination, any definition must be "informed" by the medical community's definition and a state's definition may not "disregard" the medical definition. *Moore*, 137 S.Ct. at 1048-49. And, while states have "some flexibility" in the definition, they do not have "unfettered discretion," and the "medical community's current standards supply one constraint" on the states' leeway. *Id.* at 1052-53. Opposing counsel would have the emerging scientific consensus regarding human brain development trump the holding of this Court in *Roper*. But the *Moore* Court specifically stated that a scientific consensus does not "dictate" the law. Psychologists do not decide the law; Justices do.

Moore did not overrule *Roper*. Indeed, the *Moore* Court cited *Roper* a few times and mainly for general principles of Eighth Amendment law, such as the "Eighth Amendment prohibits cruel and unusual punishments and reaffirms the duty of the

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[10] Chief Justice Roberts in his dissenting opinion observed that the Court unanimously agreed that the *Briseno* factors were an "unacceptable" method of enforcing the guarantee of *Atkins*, and that the state trial court erred in using them to analyze adaptive deficits. *Moore*, 137 S.Ct. at 1053 (Roberts, C.J., dissenting). The dissent agreed that the *Briseno* factors were "incompatible" with the Eighth Amendment. *Id.* at 1060.

government to respect the dignity of all persons." *Moore*, 137 S.Ct. at 1048 (citing *Roper*, 543 U.S. at 560). *Roper* is still the law of the land after *Moore*.

The Florida Supreme Court's decision in this case does not conflict with either this Court's decision in *Roper* or this Court's decision in *Moore*. There is no conflict between the Florida Supreme Court and this Court.

No conflict with any federal appellate court or state supreme court

Not only is there no conflict with this Court, there is no conflict with that of any federal appellate court or state supreme court either. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

All of the federal circuit courts that have reached the issue of expanding *Roper* have rejected the invitation to do so. *United States v. Bernard*, 762 F.3d 467, 482 (5th Cir. 2014) (denying a certificate of appealability (COA) on a claim seeking to extend *Roper* to "mental age" in a case where the defendant who was 19 years old when he committed the murder citing *Parr v. Quarterman*, 472 F.3d 245, 261 (5th Cir. 2006)); *Moreno v. Dretke*, 450 F.3d 158, 166 (5th Cir. 2006) (denying a COA on a claim seeking to extend *Roper* to a defendant who was 18 years old when he committed the murder but formed the plan when he was under 18 years old); *In re Garner*, 612 F.3d 533, 534 (6th Cir. 2010) (denying permission to file a successive habeas petition seeking to extend *Roper* to a defendant who was 19 years old at the time of the murder based on "mental age"); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015)

(denying a COA on a claim seeking to extend *Roper* to a defendant who committed the murder when he was 18 years old but committed the crime used as an aggravator when he was under 18 years old). Some of these federal appellate courts have rejected invitations to expand *Roper* on more compelling facts than those Branch presents.

Branch may not rely on *Cruz v. United States*, __ F.Supp.3d __, 2017 WL 3638176 (D. Conn. Apr. 3, 2017), to establish conflict among federal appellate courts. Pet. at 12. The *Cruz* ruling is from a federal district court, not a federal appellate court. This Court's rule governing considerations as to whether to grant review looks to conflict from decisions of the United States courts of appeals only. Sup. Ct. R. 10(b). Furthermore, as this Court has observed, a federal district court's ruling is not binding precedent to any court, not even the single judge who issued the ruling. *Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011) (explaining that a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case"). And the ultimate ruling in *Cruz* was that the habeas petitioner was entitled to a hearing, not relief.[11] *Cruz* does not establish any conflict among the federal courts.

Various state supreme courts have rejected any expansion of *Roper* as well. *Thompson v. State*, 153 So. 3d 84, 177 (Ala. Crim. App. 2012) (refusing to extend *Roper* to an 18-year-old who was "traumatized, abused, and mentally ill"); *Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006) (refusing to extend *Roper* to mental age

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[11] There is no factual dispute in this case, as opposing counsel acknowledges in his petition, but then oddly requests an evidentiary hearing regardless of that acknowledgment. In the state trial court in the current warrant litigation, opposing counsel admitted that, because the State did not dispute the experts' reports or the brain development articles, there was no need for an evidentiary hearing.

Furthermore, the district court in *Cruz* mistakenly found there was "an issue of material fact as to whether the line established in *Miller* should be moved." *Cruz*, 2017 WL 3638176 at *10. But the expansion of *Miller* beyond 18 years of age is not an issue of fact, it is a question of law.

rather than chronological age); *State v. Tucker*, 181 So.3d 590, 627 (La. 2015) (refusing to extend *Roper* to a defendant who was "barely over the age of 18" and had an IQ of 74); *State v. Campbell*, 983 So.2d 810, 830 (La. 2008) (refusing to extend *Roper* to mental age in a case where the defendant was 18 years old when he committed the murder); *Mitchell v. State*, 235 P.3d 640, 659 (Okla. Crim. App. 2010) (refusing to extend *Roper* in a case where the defendant was only two weeks over 18 years old when he committed the murder).

Branch may not rely on *Commonwealth v. Bredhold*, Ky. Fayette Cir. 7th Div. No. 14–CR–161 (Aug. 1, 2017), to establish conflict among the state courts of last resort. Pet. at 20. In *Bredhold*, a Kentucky common pleas court extended *Roper* to capital defendants under 21 years of age at the time of the crime and declared Kentucky's death penalty statute unconstitutional as applied to those who were under 21-years-old. But the *Bredhold* ruling is from a state trial court, not a state supreme court. This Court's rule governing considerations as to whether to grant review looks to the decisions of the state courts of last resort only. Sup. Ct. R. 10(b). Furthermore, the ruling is in direct conflict with the holdings of the Kentucky Supreme Court. *St. Clair v. Commonwealth*, 451 S.W.3d 597, 651 (Ky. 2014) (observing that nothing in *Roper* suggests that the Constitution would bar the execution of an adult offender based on mental age and stating that *Roper* set "a bright-line rule based on chronological age"); *Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006). The *Bredhold* ruling does not

represent the current law of Kentucky.[12] *Bredhold* does not establish conflict among the state supreme courts.

Bredhold does not help Branch anyway because its ruling was limited to those ***under*** 21 years of age. Branch was ***over*** 21 years of age when he committed this brutal murder and rape. So, *Bredhold* itself does not actually conflict with the Florida Supreme Court's decision in this case anyway.

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. The lack of conflict is the second reason to deny the petition.

The Eighth Amendment prohibition and brain development articles

Even if there is a scientific consensus emerging regarding when the human brain is ***fully*** developed, that does not mean that society cannot hold a person who was nearly 22 years old at the time of the murder fully responsible for his actions. A 2-year-old, a 17-year-old; an 18-year-old, and nearly 22-year-old are not the same in terms of their brain development. There is a continuum. And this Court is entitled to draw the Eighth Amendment line on that continuum and, in fact, drew that line at 18 years old in *Roper*.

Any extension of *Roper* to include capital defendants under 21 years old would not benefit Branch. Branch was over 21 years old when he committed this brutal murder

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[12] It does not represent the current law of the Sixth Circuit, which covers Kentucky, either. *In re Ronald Phillips*, 2017 WL 4541664, *3 (6th Cir. July 20, 2017) (No. 17-3729) (denying authorization to file a successive federal habeas petition; rejecting a claim that *Roper* should be extended beyond 18 year old based on cognitive immaturity; and stating that "no authority exists at the present time," to support the argument that the capital defendant who 19 years old at the time he committed the capital offense was ineligible for the death penalty). The Sixth Circuit has rejected the exact same argument regarding cognitive immaturity based brain development studies that Branch raises in his petition.

and rape. *Roper* would have to be extended to those over 21 years old as well to matter to Branch. Indeed, under opposing counsel's logic and the brain development studies and experts he relies upon, the prohibition should logically be extended to all capital defendants under 27 years of age. Opposing counsel's position would require this Court to extend *Roper* for 10 more years than its current prohibition on the execution of 17 year olds.

Opposing counsel does not take a position on exactly what age a person is cognitively mature enough to be executed and the studies quoted in the petition and amicus draw different age limits. There does not seem to beva firm scientific consensus regarding the exact age of cognitive maturity. Furthermore, one wonders if the scientific "consensus" of these private professional associations would be a moving target as the four dissenting Justices suggested would be the case in *Hall v. Florida*, 134 S.Ct. 1986, 2006 (2014) (Alito, J., dissenting) (noting that tying Eighth Amendment law to the views of professional associations that often change would "lead to instability and continue to fuel protracted litigation").

Opposing counsel's reliance on the recent ABA resolution is unwarranted. The ABA is private professional association which presents all the problems that the dissenters in *Hall* warned about but additionally presents the problem that it is a private association comprised of lawyers, not scientists, and a very selected group of lawyers at that. Relying on such a resolution is equivalent to putting the Eighth Amendment up for a private, highly-restricted vote.

Nor is there any compelling reason to extend the prohibition to young adults. Age and cognitive immaturity may be presented as mitigation by young adults regardless of *Roper*. Any capital defendant is constitutionally entitled to present any type of mitigation, including these brain development studies, to argue that the death penalty should not be imposed on him due to his cognitive immaturity. *Lockett v. Ohio*, 438

U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 107 (1982) (reversing a death sentence because the trial court refused to consider as a matter of law mitigating evidence including evidence that his mental and emotional development were several years below his chronological age); *Miller v. Alabama*, 567 U.S. 460, 476 (2012) (stating that a sentencer must have the ability to consider "the mitigating qualities of youth" citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Capital defendants who are over 17 years old may argue to their jury that they are cognitively immature relying on these brain development studies and presenting experts to testify regarding human brain development. It is only the absolute prohibition on executions that is limited to minors.

Any young adult capital defendant is entitled under this Court's long standing precedent to present brain development testimony in mitigation. *State v. Tucker*, 181 So. 3d 590, 627 (La. 2015) (observing that, although the defendant cannot benefit from the categorical prohibition of *Roper*, he had the opportunity to present his immaturity to the jury in the penalty phase as a mitigating circumstance). This Court has long required individualized sentencing in capital cases and continues to do so in the wake of *Roper*.

Opposing counsel is not actually seeking an individualized determination of cognitive maturity; rather, he seeks a categorical prohibition on executions of all defendants under the age of 26 or 27 due to their cognitive immaturity. But the justification for imposing a categorical prohibition must be overwhelming and possible cognitive immaturity is not. It is more reasonable to make a truly individual determination regarding cognitive immaturity on a case-by-case basis at sentencing, which is the current law. The merits of the claim is a third reason to deny review.

This claim is procedurally barred as a matter of state law and presents an issue that there is no conflict among the courts regarding. There is no basis for granting certiorari review of this issue. This Court should deny the petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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