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 Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

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

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I. Respondent Does Not Attempt to Rebut the *Michigan v. Long* Presumption, Which Allows this Court to Exercise Jurisdiction

As Petitioner explained, this Court may exercise jurisdiction here under *Michigan v. Long*, 463 U.S. 1032 (1983). Petition at 6-8. This Court's "*Long* presumption," *Florida v. Powell*, 559 U.S. 50, 56 (2010), provides that when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court may exercise jurisdiction. *Long*, 463 U.S. at 1040-41. Respondent's brief does not mention *Long*.

As the petition described, citing specific examples from the decision of the Florida Supreme Court, the state-law procedural ruling fairly appears to be secondary to, or at a minimum interwoven with, federal constitutional law, and the independence and adequacy of the ruling is unclear from the opinion. As the petition also described, the Florida Supreme Court plainly suggested that if this Court were to hold that the age eighteen discussed in *Roper v. Simmons*, 543 U.S. 551 (2005), is not in accord with the modern scientific consensus regarding late adolescent brain development, and/or that Petitioner should be allowed to present evidence regarding the new scientific consensus and his particular brain underdevelopment at a hearing, the Florida Supreme Court will apply no procedural bar. *See* Petition at 7-8.

Respondent makes no meaningful attempt to rebut the *Long* presumption or even to acknowledge any of the specific examples from the Florida Supreme Court's opinion that are cited in the petition. Respondent's cursory argument falls short by

relying on "[t]he mere existence of a . . . state procedural bar," which "does not deprive this Court of jurisdiction." *Caldwell v. Mississippi*, 472 U.S. 320 (1988).

II. Respondent Does Not Meaningfully Respond on the Merits

Respondent asserts that "there is no conflict with that of any federal appellate court or state supreme court." BIO at 20. While certiorari may be granted when there is a lower court split, such a split is not required. The Court may grant a petition for a writ of certiorari for *any* "compelling reason[]." *See* Rule 10, Rules of the Supreme Court of the United States.

Respondent misunderstands the underlying premise of Petitioner's argument: because the age-eighteen cutoff is an imprecise indicator of brain maturation, just like IQ score is an imprecise indicator of intellectual disability—there is a "clinically established range" where youth in their late teens and early twenties have underdeveloped brains that affect them in ways similar to juveniles under eighteen. *See Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017). In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), this Court held that because defendants might be intellectually disabled if they fall within the standard error of measurement on IQ testing, those defendants cannot be precluded from presenting other evidence of their intellectual disability. *Id.*

Today's scientific consensus shows similar imprecision in determining brain maturation. Recent research shows adolescents in their late teens and early twenties have the same symptoms of brain underdevelopment as juveniles under eighteen in ways that are relevant for Eighth Amendment consideration—late adolescents are reckless and irresponsible to the point of being less able to understand the

consequences of their actions, susceptible to peer pressure and more prone to engaging in risky behavior, and have less established personality traits so that their flaws may be rehabilitated. *See Roper*, 543 U.S. at 569-70; Petitioner's App. 42 (Report of Dr. Sultan). As a result, late adolescents may have "insufficient culpability" for the death penalty. In an effort to avoid the "unacceptable risk" that the death penalty is imposed on someone who lacks the requisite culpability—*i.e.*, this Court's concern in *Roper*, 543 U.S. at 572-73, *Hall*, 134 S. Ct. at 1990, and *Moore*, 137 S. Ct. at 1058—the Court should afford late adolescents falling within this "clinically established range" the opportunity to present other evidence demonstrating that they are ineligible for the death penalty.

Respondent does not appear to dispute that there is an emerging scientific consensus regarding the brain maturation process and its effect on the behavior and decision-making capabilities of late adolescents in their late teens and early twenties. Instead, Respondent suggests that this new consensus is irrelevant. This suggestion is inconsistent with this Court's precedent, which recognizes that "*the Court does not disregard these informed assessments*." *Hall*, 134 S. Ct. at 2000 (emphasis added). Under that precedent, defendants who fall into this range should be permitted to present evidence that their own brain underdevelopment renders them ineligible for the death penalty. We do not "disregard" the new consensus because "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 2001.

Respondent believes the science known at the time of *Roper* is the science this Court must rely on indefinitely. BIO at 16. However, Respondent does not explain how the information available at the time of *Roper*, now thirteen years old, adequately protects those whose brain underdevelopment produces the same impaired culpability as seen in juveniles under eighteen, given what science teaches us today.

Respondent also believes relief should be denied because defendants can present mitigation about their immaturity at a penalty phase. BIO at 24. However, this Court made clear in *Roper* that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 553-54.

In the end, Respondent misunderstands that *Hall* and *Moore* are relevant to Petitioner's lack of moral culpability in light of the developments in the scientific community regarding the brain underdevelopment of late adolescents, BIO at 17 n.8., and misunderstands the import of the case-specific expert reports Petitioner proffered.

The Court should stay Petitioner's execution and grant a writ of certiorari to review the decision below.

Respectfully submitted,

/s/ Billy H. Nolas

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