No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JUSTIN SMITH and EFRAIN DIAZ, Jr., *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

1. Does the requirement in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), that a litigant have suffered an "actual or imminent" injury apply to a motion filed by a defendant in a criminal case? If so, where the state has given notice of its intent to seek the death penalty, is the prospect of a death penalty sentencing trial a sufficiently concrete injury that the defendant's contention that he is categorically ineligible for the death penalty under the Eighth Amendment a justiciable claim that can be decided prior to trial?
2. Does procedural due process, and the related principles of party presentation, permit a state court to deny review of a federal constitutional claim based on a jurisdictional principle which did not exist at the time of briefing, which was not raised by the parties, and which the Court did not seek briefing or argument on?

LIST OF PARTIES

1. Petitioners Justin Smith and Efrain Diaz, Jr. are represented by Hon. Timothy G. Arnold (counsel of record) and Hon. Emily Holt Rhorer, Department of Public Advocacy, 5 Mill Creek Park, Frankfort, Kentucky 40601.

2. Commonwealth of Kentucky, Real Party in Interest, who is represented by Hon. Daniel Cameron, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601

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Justin Smith and Efrain Diaz, Petitioners, respectfully petition for a writ of certiorari to review the opinion of the Kentucky Supreme Court, vacating an order declaring Smith and Diaz ineligible for the death penalty.

OPINIONS BELOW

The published opinion of the Kentucky Supreme Court in *Commonwealth v. Bredhold et. al.*, ___ S.W.3d. ___, 2020 WL 1847082 (Ky. Mar. 26, 2020) is attached at Appendix A. The trial court's unpublished rulings in the case are attached at Appendix B and C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the final decision of the Kentucky Supreme Court on a matter of federal law. This Court has found that state courts are generally required to provide a forum for vindicating federal rights, and while a state court may decline to do so when applying a neutral rule of state law, that is not the case here.[1] Rather, the state court decision in this case is applied federal justiciability principles to find that the Petitioners did not have standing to litigate a claim that the state prosecution violates the federal constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution 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 provides in relevant part: "No State shall … deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Commentators and others have long believed that the mere act of seeking the death penalty confers certain inherent advantages to the prosecution, both in terms

[1] *Haywood v. Drown*, 556 U.S. 729, 735 (2009).

of negotiating position in plea-bargaining,[2] and in terms of jury selection at trial.[3] While many jurisdictions, including the Federal Government, address this concern by requiring the decision to seek a death sentence be approved by a central body,[4] Kentucky has no such system. As a result, in evaluating Kentucky's death penalty system, the American Bar Association has opined that "the large number of instances in which the death penalty is sought, as compared to the number of instances in which a death sentence is actually imposed, raises an issue as to whether current charging

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[2] Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 Am. L. & Econ. Rev. 116, 141 (2006)(finding that the death penalty increased the harshness of plea agreements); Sherod Thaxton, *Leveraging Death*, 103 J. Crim. L. & Criminology 475, 552 (2013)(examining data from Georgia, and concluding that seeking a death sentence increases the probability of a plea agreement by 20-25%); see also Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 Just. Sys. J. 313, 333 (2008)(concluding, after conducting interviews with prosecutors and defense attorneys involved in death penalty cases, that "that the death penalty is a plea-bargaining tool.")

[3] Brooke Butler and Gary Moran, *The Role of Death Qualification in Venireperson's Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 Law & Hum. Behav. 175, 183 (2002)(finding that as a result of death qualification "defendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances"); see also Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect* 8 Law & Hum. Behav. 133–151(1984)(finding that death qualified jurors may be more "conviction prone"); Brooke Butler and Gary Moran, *The Role of Death Qualification and Need for Cognition in Venirepersons' Evaluations f Expert Scientific Testimony in Capital Trials*, 25 Behav. Sci. and the Law 561 (2007)(Finding that death qualified jurors were more conviction-prone than those not exposed to death qualification.)

[4] United States Dept. of Justice Manual, Ch. 9 (Generally requiring approval or direction of Attorney General before notice of intent to seek a death sentence may be filed in a Federal Capital Case).

practices ensure the fair, efficient and effective enforcement of criminal law."[5] Fayette County, Kentucky, where this case originates, has been singled out as a jurisdiction far more likely to go "full tilt" on murder prosecutions, including filing notice of intent to seek the death penalty in nearly every eligible case. [6]

Justin Smith is presently charged with murder, two counts of robbery in the first degree, tampering with physical evidence, and first degree fleeing and evading after a robbery attempt that resulted in the death of Jonathan Krueger. The offenses occurred when Smith was eighteen (18) and five (5) months old.[7] Efrain Diaz is Smith's codefendant, charged with murder and two counts of robbery in the first degree. Diaz was twenty (20) and seven (7) months old at the time the offenses occurred.[8] Neither defendant had a significant criminal record.

Approximately four months after the indictment, the Commonwealth filed notice of its intention to seek the death penalty based on the statutory aggravator of a murder in the course of first degree robbery. In response, Smith and Diaz each filed a motion seeking to remove the option of a death sentence as punishment due to their young age. The Commonwealth in its response never made an argument that this matter was not yet justiciable. Instead it argued the bright-line rule of *Roper v.*

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[5] *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report*, American Bar Association (2011) at pg. 149 (hereinafter "ABA Report").
[6] ABA Report, pg. 150
[7] *Commonwealth v. Bredhold*, 2017-SC-000436-TG at 3 (Ky. Mar. 26, 2020)(Located at Appendix Tab A).
[8] *Id.*

Simmons[9] still stood, and there was no national consensus that with respect to offenders over eighteen (18) but less than twenty-one (21) years of age.

Smith and Diaz's motions were heard together on July 17, 2017. At that time, lawyers for the defendants presented the testimony of Dr. Laurence Steinberg, the director of the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Brain Development from 1997-2007 and the author or co-author or approximately 400 scientific articles and 17 books on the subject of Adolescent Brain Development. An article he co-wrote with Elizabeth Scott on the relationship between brain development and culpability was quoted repeatedly by the majority opinion in *Roper*, and again by the majority in *Miller v. Alabama*.[10]

The Commonwealth presented no proof on the issue at the hearing. Subsequently the Court gave the Commonwealth an opportunity to offer any additional information it wanted the Court to consider, but the Commonwealth declined.

After the close of the evidence, the trial court issued a ruling in which it found that it violated the Eighth Amendment to apply the death penalty to older adolescents, such as Smith and Diaz.[11] In support of this conclusion, the trial court

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[9] *Roper v. Simmons*, 543 U.S. 551 (2005).

[10] *See Id.*. at 569-573,; *Miller v. Alabama*, 567 U.S. 460, 471 (2012)(both quoting Steinberg, L. & Scott, E., Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 *Am. Psychologist* 1009 (2003).

[11] The trial court originally issued orders titled "Order Declaring Kentucky's Death Penalty Statute as Unconstitutional." Several days later it issued amended orders

first reviewed the evidence of national consensus that the death sentence was inappropriate for offenders in this age group. The trial court found that "it appears that 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."[12]

Further, the court found that "[i]f the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling."[13] The court in its order described how fMRI technology enabled scientists of the late 1990's and early 2000's to learn about the development of the juvenile brain, "[f]urther 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)", a conclusion that "is now widely accepted among neuroscientists."[14] The trial court made detailed and specific findings about the psychological and neurobiological deficiencies of older adolescents. [15]

Having found that both the scientific evidence and information concerning national consensus warranted prohibiting the death penalty on this population, the

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in both cases. As the amended orders were clearly intended to replace, rather than supplement, the original orders, all references are to the amended orders, and they are included in the Appendix to this petition. The orders are substantively identical, so page numbers are to the Smith order.

[12] Amended Order, page 6 at Appendix Tab B (Smith).

[13] *Id*.

[14] *Id.*, 7.

[15] *Id.,* 7-11.

trial court excluded the death penalty as a punishment for Smith and Diaz at trial.

Faced with the court's decision that the trials of Smith and Diaz would proceed with death off the table, the Commonwealth filed an interlocutory appeal.[16] While the case initially went to the Kentucky Court of Appeals, the Kentucky Supreme Court granted transfer pursuant to Ky. CR 74.02 as the issue was "of great and immediate public importance" and arose during capital litigation, which in Kentucky is exclusively within the Supreme Court's realm.[17] The Commonwealth, the Appellant in the action, never made an argument to the Court that the issue was not justiciable.

After hearing oral argument, the Supreme Court rendered an Opinion holding that there was no "justiciable cause" before the circuit court so the case was not properly before it. Acknowledging that "the Commonwealth has not raised the issue of standing directly"[18], the Court nevertheless found that:

> At this stage of the criminal proceedings, none of the Appellees has been convicted, much less sentenced, and thus none has standing to raise an Eighth Amendment challenge to the death penalty. Accordingly, we are compelled to vacate the interlocutory orders and remand to the trial court for further proceedings.[19]

The Kentucky Supreme Court acknowledged that death penalty trials are more

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[16] In addition, the Commonwealth filed an interlocutory appeal in the unrelated case of *Travis Bredhold v. Commonwealth*, and the Kentucky Supreme Court considered all three cases at once.
[17] *Bredhold* at 5.
[18] *Id.,* 17.
[19] *Id.*, 2-3.

complex, but concluded "the focus of Eighth Amendment analysis is not the trial, but rather the actual penalty imposed."[20] As a result, the trial court's ruling was "preemptive" and "legally inappropriate under controlling precedent."[21] The Kentucky Supreme Court held that if Smith or Diaz were convicted and sentenced to death, the circuit court would then be confronted with an Eighth Amendment claim.[22] The Court vacated the order holding the death penalty unconstitutional as to Smith and Diaz, and remanded their cases to the circuit court.[23]

This petition follows.

REASONS FOR GRANTING THE WRIT

I. Whether a Criminal Defendant Challenging His Eligibility for the Death Penalty is Required to First Prove an Injury is a Vital Question Which Should Be Resolved by This Court Both to Resolve a Split of Authority and to Ensure that Future Claims Will Be Fully Litigated.

In the context of civil actions, this Court has recognized that the requirement that a litigant have standing to bring a claim is one of the "most important" aspects of the justiciability doctrine, because "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[24] When an appellate court finds that a litigant lacked standing to

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[20] *Id.*, 9.
[21] *Id.*
[22] *Id.*, 23.
[23] *Id.*, 24.
[24] *Allen v. Wright*, 468 U.S. 737, 750–51 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

bring a claim, it not only denies review of that claim, it prevents lower courts from attempting to take up similar issues in other cases, under circumstances that as a practical matter can never again be reviewed. As such, it is critical that decision denying standing be correctly made, as an incorrect decision would effectively bar review of claims that a litigant has a right to bring.

In this case, the Kentucky Supreme Court incorrectly applied the justiciability principles established by this Court to find that a criminal defendant lacks standing to bring a claim that he is not eligible for a particular punishment under the Eighth Amendment, until the jury recommends that he receive the prohibited punishment. The Kentucky Court's decision reflects confusion and disagreement among the lower courts in how the standing doctrine relates to different claims under the Eighth Amendment, most notably by failing to recognize that this Court has decided a claim in a nearly identical posture in *Bullington v. Missouri*.[25] This Court should accept review and reverse the judgment herein, lest the Kentucky Supreme Court's ruling become an immovable bar to properly litigating Eighth Amendment claims, especially in death penalty cases, not only in Kentucky, but in other jurisdictions that may choose to follow their lead.

A. The Kentucky Supreme Court Misconstrued this Court's Eighth Amendment and Justiciability Jurisprudence.

Interpreting the state constitutional requirement of a "justiciable" cause to incorporate the requirements of Article III of the United States Constitution, in 2018

[25] *Bullington v. Missouri*, 451 U.S. 430 (1981).

the Kentucky Supreme Court for the first time held that in a Kentucky civil action the court was required to establish standing to litigate an issue. In so doing, it specifically "adopted the United States Supreme Court's test for standing as espoused in *Lujan v. Defenders of Wildlife*" as the test for determining justiciability.[26] Less than two years later, the Kentucky Supreme Court in this case misapplied that doctrine by holding that a Kentucky trial court is "confronted with an Eighth Amendment issue presented by an individual with standing to raise it" ***only*** when the defendant "is convicted and a jury recommends the death penalty."[27] The effect of this ruling goes well beyond the current challenge. Rather, this means that a person who is categorically barred from the death penalty for almost[28] any reason – from being a juvenile,[29] to the crime not qualifying for the death penalty[30] – cannot raise that issue until after a full sentencing trial where the death penalty will have

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[26] *Commonwealth Cabinet for Health and Family Services, Department for Medicaid Services v. Sexton by and through Appalachian Regional Healthcare, Inc*., 566 S.W.3d 185, 188 (Ky. 2018), citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

[27] *Bredhold* at 23.

[28] Kentucky has a statutory procedure to raise intellectual disability prior to trial. KRS 532.135. In the recent case of *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018), the Kentucky Supreme Court declared the criterion for finding a defendant intellectually disabled unconstitutional under *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S.Ct. 1039 (2017). While it is probable that the Court would find that the statutory procedure remains viable and allows the matter to be raised pretrial and decided by the Court, the ruling in this case throws that into question.

[29] *Roper v. Simmons*, 543 U.S. 551 (2005).

[30] *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Enmund v. Florida,* 458 U.S. 782 (1987).

been considered and decided by the jury.

In other words, under the rule announced in this case, a seventeen year old charged with a capital offense would have to go through a full sentencing trial and see the jury instructed that they may consider capital punishment. Only if that jury recommends the death penalty will the Kentucky courts consider that seventeen year old to have standing to raise the categorical bar on capital punishment for juveniles to the Court. Indeed, the Kentucky Supreme Court specifically relied upon an unpublished New Jersey appellate court decision from 1985 that refused to consider whether the juvenile death penalty was unconstitutional in support of its decision.[31] As Kentucky law only permits the Commonwealth to take an interlocutory appeal in a criminal case,[32] unless this Court accepts review of this case, this ruling will be effectively unchallengeable moving forward.

The Kentucky Supreme Court based its decision on this Court's justiciability jurisprudence, finding that until the jury recommended a death sentence, a defendant lacks standing because he or she has not "sustained or is immediately in danger of

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[31] *Bredhold* at 21, n. 18, citing *New Jersey ex rel. D.B.,* No. A-353-84T5 (N.J. Super. App. Div. Feb. 19, 1985) (unpublished), referenced in *State v. Smith*, 495 A.2d 507, 510 (N.J. Super. Law. Div. Apr. 19, 1985).

[32] See KRS 22A.020(4), a statute which Kentucky has held "is uniquely for the benefit of the Commonwealth." *Commonwealth v. Nichols*, 280 S.W.3d 39, 42 (Ky. 2009). "[T]here is no comparable provision for an appeal by the defendant." *Evans v. Commonwealth*, 645 S.W.2d 346, 347 (Ky. 1982). The lack of a procedure for an interlocutory appeal by the defense means that if the trial court follows this ruling, it cannot be raised on appeal until after the jury has recommended death or a lesser punishment, effectively rendering the issue of standing moot.

sustaining some direct injury' as the result of the challenged statute or official conduct."[33] In support thereof, the Court relied upon this Court's statement in *City of Revere v. Massachusetts Gen. Hosp.* that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.... [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."[34] Based on this, the Kentucky Supreme Court found that "having not yet suffered a concrete and particularized injury by having the death sentence imposed, no actual or imminent injury exists."[35]

The Kentucky Supreme Court's ruling misconstrues both the nature of the injury in this case, and this Court's justiciability jurisprudence. With respect to the justiciability requirement of an injury, this Court has held that a potential injury is sufficient to create standing "if the threatened injury is certainly impending, ***or there is a substantial risk that the harm will occur***."[36] As to what constitutes a "substantial risk" of a sufficient injury, this Court has found that "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the

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[33] *Bredhold*, at 12 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).
[34] *Id*. at 13 (quoting *City of Revere v. Massachusetts Gen. Hosp*., 463 U.S. 239, 244 (1983)).
[35] *Id.,* at 13-14.
[36] *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)(emphasis added, internal citations and quotations omitted).

law."[37] Rather, "a credible threat of prosecution" is sufficient to establish an injury sufficient to satisfy the "case or controversy" requirement.[38] Likewise, this Court has found that the loss of an ability to litigate a potential future claim for damage is also a sufficiently concrete injury, because while "the lawsuit—like any lawsuit—might prove fruitless, . . . the mere possibility of failure does not eliminate the value of the claim or Petitioners' injury in being unable to bring it."[39]

The Kentucky Supreme Court relied only upon earlier cases from this Court which appeared to require the injury to be "certainly impending", and then compounded that error by stating that the only "injury" is the actual imposition of the death penalty.[40] However this Court has noted that the Eighth Amendment protects a number of distinct interests, including prohibiting inhumane conditions of confinement or punishment, limiting the punishments that can be imposed for certain offenses, and prohibiting punishments that are disproportionate to the crime charged.[41] While this case clearly relates to the proportionality thread of this Court's Eighth Amendment jurisprudence, the opinions primarily relied upon by the Kentucky Supreme Court related to Eighth Amendment claims regarding inhumane conditions of confinement or punishment, most particularly cases litigating method

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[37] *Id.*
[38] *Id.*, at 159.
[39] *Czyzewski v. Jevic Holding Corp.*, ___ U.S. ___, 137 S. Ct. 973, 983 (2017).
[40] *Bredhold* at 13-14.
[41] *See, e.g, Estelle v. Gamble*, 429 U.S. 97, 103 n.7 (1976)(discussing interest in avoiding cruel treatment in prison, and noting the other principles were not involved in that issue.).

of execution challenges, and other conditions of confinement issues, often on grounds of ripeness rather than a lack of a concrete injury.[42]

The Kentucky Supreme Court may have been led astray by this Court's opinion in *Whitmore v. Arkansas*,[43] a case that appears superficially to deal with the relationship between justiciability and the Eighth Amendment. This Court found that Whitmore lacked standing to raise an Eighth Amendment claim, not due to any deficiency in the claim itself, but due to the fact that the claim was not his own. Rather, Whitmore, a death row inmate, was seeking to litigate the appeal of a second inmate, Simmons, who had waived his right to appeal his conviction and sentence.[44] The Court found that Whitmore's stated injury – that Simmons' waiver of his appeal would undermine the Arkansas system of proportionality review – was too speculative to satisfy the requirements of standing.[45] This was because Whitmore's claim was that a favorable result in Simmons' appeal would benefit Whitmore in a

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[42] *Bredhold* at 14-16, (citing *18 Unnamed "John Smith" Prisoners v. Meese*, 871 F.2d 881, 882-83 (9th Cir. 1989)(challenge to double bunking system); *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995)(dismissing a pre-enforcement challenge to a criminal statute on ripeness grounds); *Askins v. District of Columbia*, 877 F.2d 94, 97–99 (D.C. Cir. 1989)(Dismissing prisoners' challenge to a transfer between facilities as unripe); *Johnson v. Missouri*, 142 F.3d 1087 (8th Cir. 1998)(Challenge to penalty on frivolous prisoner litigation); *People v. Stark*, 157 Colo. 59, 400 P.2d 923, 928 (1965)(in dictum, rejecting a challenge that a statute imposes cruel and unusual punishment as unripe); *Floyd v. Filson*, 940 F.3d 1082 (9th Cir. 2019)(Dismissing challenge to lethal injection protocol on ripeness grounds); *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370 (11th Cir. 2019)(Ordinance challenge unripe when no enforcement of the ordinance was yet possible).
[43] *Whitmore v. Arkansas*, 495 U.S. 149 (1990).
[44] *Id.*, at 153-154.
[45] *Id.*, at 156-161.

future habeas corpus petition. As the Court noted, Whitmore's appeals were concluded. This Court found that the series of fortuitous events and rulings that was needed for Whitmore to benefit from Simmons' appeal was too attenuated and speculative to constitute an "injury" for justiciability purposes.

The question of whether the claim in this case is justiciable was resolved as a practical matter by this Court's opinion in *Bullington v. Missouri*.[46] There, a defendant had been tried for a capital offense and convicted, and then sentenced to life imprisonment. His conviction was reversed, and on retrial, the state again sought the death penalty. Bullington argued that the state was barred by double jeopardy from pursuing the sentence a second time, and the trial court agreed. The prosecution took a writ, and the Missouri Supreme Court reversed. This Court accepted certiorari, and found that Bullington had a constitutional right not to face a second capital sentencing trial. After reviewing the ways in which a Missouri capital sentencing trial resembled a criminal trial, this Court concluded that "[t]he 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial."[47] As such, as the jury in the first trial had found that the state had not met it's burden to prove that Bullington deserved a death sentence, double jeopardy barred a capital retrial.

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[46] *Supra,* note 24, 451 U.S. 430 (1981).
[47] *Id*. 451 U.S. at 445, 101 S.Ct. at 1861.

Kentucky has found that Kentucky's capital sentencing procedure is very similar to the Missouri procedure which triggered due process protections in *Bullington*, in that both involved "(1) a bifurcated sentencing proceeding with (2) the burden on the state to prove beyond a reasonable doubt that death was the appropriate sentence, (3) with the state having produced evidence in an effort to meet that burden in the separate proceeding, and, finally, (4) guidance for the jury in its deliberations about penalty."[48] As such, where a jury find an aggravating circumstance but then imposes a less-than-death sentence, double jeopardy bars a capital retrial in Kentucky, just as it does elsewhere.[49]

Bullington's procedural posture – a pretrial appeal by the state from an adverse ruling holding the death penalty inapplicable – is identical to the procedural posture of the present case. While the constitutional basis for the claim may differ slightly, the injury – a sham trial over a penalty for which the defendant is ineligible – does not. If the mere threat of a criminal trial is a sufficient "injury" to permit a claim to be adjudicated, the virtual certainty of an unauthorized capital sentencing proceeding should as well.

The remaining elements of the traditional justiciability test – whether there is "a sufficient causal connection between the injury and the conduct complained of" and the "likelihood that the injury will be redressed by a favorable decision" were

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[48] *Brown v. Commonwealth*, 313 S.W.3d 577, 592 (Ky. 2010).
[49] *Id.*

disregarded by the Kentucky Supreme Court, due to their finding of the lack of a concrete injury.[50] However, if the injury element is met, there is no question that the other two prongs are met as well. The relief sought is to declare the death penalty inapplicable in this case, and therefore avoid the *sturm und drang* of a capital trial – relief which is both clearly within the power of the Court, and which would prevent the Petitioners from suffering the injury of a needless capital trial.

B. The Kentucky Supreme Court's Erroneous Ruling Deepens an Existing Split of Authority Within the Lower Courts.

The Kentucky Supreme Court recognized the split of authority in the lower courts on this issue, noting that "cases exist which hold that an Eighth Amendment challenge is justiciable prior to the litigant's adjudication of guilt."[51] The Court rejected the application of those cases upholding review of pretrial orders striking a penalty, finding that they tended to rely upon First Amendment cases, which in the Court's view, had a lower standard to prove standing. However, the Kentucky Supreme Court's review diminished the extent of the split. The power at issue here is the power of a trial court to prohibit the state from seeking a death sentence. The Kentucky Supreme Court's decision fails to include the jurisdictions that have found that a trial court has the authority to prohibit the state from seeking death in a particular case for Eighth Amendment reasons alone, [52] or to enforce other rights

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[50] *Susan B. Anthony List*, *supra*, 573 at 158.
[51] *Bredhold* at 16, n. 13 (collecting cases).
[52] *See People v. Superior Court (Vidal)*, 40 Cal. 4th 999, 155 P.3d 259 (2007)(intellectual disability); *State v. Williams*, 831 So. 2d 835, 858 n. 33 (La.

related to the death penalty.[53] For the same reason that the Kentucky Supreme Court felt comfortable reaching the issue without any argument from either side, these cases should be understood as an implicit rejection of the argument that a court lacks jurisdiction over an Eighth Amendment claim prior to trial.

Given that most of the cases the Kentucky Supreme Court relies upon relate conditions of confinement or the actual imposition of punishment, the Court is relying on a minority rule, rather than a majority one. However, a clear split remains between those jurisdictions that authorize a trial court to preclude a death sentence penalty trial under certain circumstances, and those who do not. Reading the Kentucky Supreme Court's decision leaves little doubt that there is nothing left to be gained by letting this split linger further. Review by this Court is necessary.

C. The Extension of this Court's "Injury in Fact" Requirement in to the Area of Criminal Law Threatens the Right of Criminal Defendants to Litigate Federal Claims.

While the idea of "standing" sometimes referenced in criminal matters, the contours of that concept have not been precisely defined. Criminal cases discussing

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2002)(same); *State v. Jimenez*, 188 N.J. 390, 908 A.2d 181 (2006)(same); *Blonner v. State*, 127 P.3d 1135 (Okla.Crim.App. 2006)(same); *State v. Agee*, 358 Or. 325, 338, 364 P.3d 971, 981 (2015)(same); *Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003)(same); *United States v. Hardy*, 644 F. Supp. 2d 749 (E.D. La. 2008)(same).

[53] *See, e.g. State v. Manck*, 385 Md. 581, 870 A.2d 196 (Md.Ct.App. 2005)(procedure unconstitutional); *Miller v. Eighteenth Judicial District Court*, 337 Mont. 488, 162 P.3d 121 (2007)(untimely notice); *Holmberg v. De Leon*, 189 Ariz. 109, 938 P.2d 1110 (1997)(untimely notice); *State v. Defoe*, 364 N.C. 29, 691 S.E.2d 1 (2010)(Finding trial court authorized to preclude state from seeking death penalty as sanction for violation of pretrial procedure).

"standing" have generally not evaluated the "injury in fact" requirement using the principles identified in *Lujack* and the cases that follow. Rather, when this Court has discussed whether a criminal defendant has "standing" to raise a claim, it has generally been in the nature of third party standing, such as in *Whitmore*, *supra*, or in *Powers v. Ohio*.[54]

This case is much different. In this case the Kentucky courts have found that the Petitioners have no right to challenge the Commonwealth's stated intention to try to secure a death penalty, because they cannot show that is an "injury in fact". This is a dangerous misuse of justiciability concepts, which were intended to limit civil actions, to try to limit the ability of a criminal defendant to protect themselves from excessive state authority. The requirement of an injury in fact was intended to describe when there is a "case or controversy" for the purposes of Article III jurisdiction.[55] This is a limit on what civil actions or claims can be brought. As such, it should come as no surprise that virtually all of the cases cited by the Court grew out of civil actions.

Criminal matters are different. This Court has found that the "injury to the interest in seeing that the law is obeyed" is the kind of "abstract" harm that lacks concrete specificity needed for civil litigation.[56] Yet, this Court has never required

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[54] *Whitmore, supra* note 42; *Powers v. Ohio*, 499 U.S. 400, 410 (1991).
[55] *See, e.g. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).
[56] *Federal Election Com'n v. Akins*, 524 U.S. 11, 24 (1998).

that the state prove that they have suffered any other kind of injury before initiating a criminal matter.[57]

Turning around and requiring the defendant – who is very much enmeshed in a "case or controversy" (i.e., the criminal prosecution) – to prove that the prosecutors action will cause him "injury in fact," is a distortion of the concepts of justiciability. Every time this Court has been asked to cross that line, it has refused.[58] This Court should accept review of this case and reverse, to make clear that whatever application a state wishes to give this Court's justiciability jurisprudence, it does not include creating an avenue to disentitle a defendant from raising an otherwise valid Constitutional challenge in a criminal prosecution.

D. Resolution of this Issue is Necessary to Protect Defendants from Inappropriate Capital Prosecutions.

As noted above, there are many reasons why a prosecutor would wish to formally seek a death penalty and demand a capital sentencing trial, even if they personally did not think that death was a likely outcome, or even that death was an appropriate penalty. Seeking death immediately changes the stakes in plea negotiations, resulting in more prosecution favorable pleas.[59] Moreover, in cases that

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[57] Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 Mich. L. Rev. 2239 (1999)(Noting that most Federal criminal prosecutions could not survive the current "injury in fact" requirement, because the United States has not suffered a tangible harm).

[58] *See, e.g., Bond v. United States*, 564 U.S. 211 (2011)(rejecting finding that defendant lacked standing to assert that law violated the Tenth Amendment).

[59] *Supra*, note 2 (collecting articles)

do not plea, a death qualified jury tends to be more prosecution friendly, because the cohort of potential jurors who are skeptical of state authority tend to be excluded for cause due to an unwillingness to impose the death penalty.[60] Allowing a defendant to avoid a death penalty trial in cases where the defendant cannot lawfully receive a death sentence, is necessary check on the system which helps ensure the quality of justice for all defendants.

The facts of this case speak to the need for this Court to clearly declare that a prosecution outside of the boundaries of the Eighth Amendment cannot proceed. Both Smith and Diaz were very young. The crime, while tragic, was appears to have been the product of immaturity and alcohol. The nature of the crime is an act of robbery gone wrong, resulting in the shooting death of the victim. Neither defendant was the shooter, and neither has a substantial criminal record. Clearly, these defendants are not the "worst of the worst", yet the Commonwealth has gone to extraordinary lengths to protect their right to prosecute them as a death penalty offense. Holding that the Commonwealth is free to pursue this prosecution – and others just like it – without fear of Eighth Amendment scrutiny until well after the die is cast, fails to ensure that all defendants receive the fair administration of justice from prosecutors.

[60] *Supra*, note 3 (collecting articles)

For all the foregoing reasons, this Court should grant certiorari, vacate the opinion of the Kentucky Supreme Court, and order the Court to render a decision on the merits of the Eighth Amendment claim.

II. The Kentucky Supreme Court Violated Due Process by Applying a New Jurisdictional Requirement to a Criminal Case Without Seeking Briefing or Argument from the Parties.

While the Kentucky Supreme Court's resolution of the standing issue was dubious, the process whereby the Kentucky Supreme Court came to that conclusion was deeply unfair. While the Kentucky Supreme Court's opinion placed a burden upon Diaz and Smith to "satisfy all prongs of the standing inquiry to invoke a court's jurisdiction," which included "prov[ing] 'actual injury," the requirements referenced by the Court all came into being after briefing in this matter was complete.[61] In short, the case was decided based upon Diaz and Smith's failure to meet a burden that they could not have known they had, because it did not even exist at the time the pleadings in the case were filed.

The timeline of events in the Petitioners' appellate cases is important to a consideration of this issue. On August 20, 2018, the Attorney General filed its brief in the Kentucky Supreme Court in Efrain Diaz's case. The Attorney General filed its brief in Justin Smith's case on October 3, 2018. Diaz filed his brief on October 19, 2018. Smith filed his original brief on December 3, 2018. The Attorney General's

[61] *Bredhold*, Appendix A at 12, 17 n. 14.

reply brief in Diaz's case was filed on November 21, 2018, while the reply brief in Smith's case was filed on December 10, 2018. On February 13, 2019, the Kentucky Supreme Court entered an order dispensing with oral argument in both cases. Both Petitioners filed a motion to reconsider the no oral argument order. While the Court did grant Petitioners' request for oral argument, no questions were asked of either party at the argument held on September 19, 2019, about the application of the standing requirement to a criminal case. Similarly, the Court never requested supplemental briefing on the matter.

Prior to 2018, Kentucky did not have a jurisdictional standing requirement.[62] Then, in September 27, 2018, the Kentucky Supreme Court held that "it is the constitutional responsibility of all Kentucky courts to consider, even upon their own motion, whether plaintiffs have the requisite standing, a constitutional predicate to a Kentucky court's adjudication of a case, to bring suit."[63] The Court adopted this Court's test for standing announced in *Lujan v. Defenders of Wildlife*."[64] The case did not become final, and therefore could not be cited in any Kentucky pleading, until February 14, 2019.[65] It was less than two years later in the case at bar that the Court in this case applied that doctrine to a criminal case, and held a Kentucky trial court

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[62] *Commonwealth Cabinet for Health and Family Services, Department for Medicaid Services v. Sexton by and through Appalachian Regional Healthcare, Inc*., 566 S.W.3d 185, 194(Ky. 2018)
[63] *Id.* at 199.
[64] *Id.*, 188, citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).
[65] See Kentucky Civil Rule 76.30.

is "confronted with an Eighth Amendment issue presented by an individual with standing to raise it" when the defendant "is convicted and a jury recommends the death penalty."[66]

The parties at bar agreed that there was an issue that was ripe—it was ready for consideration by the Kentucky Supreme Court. However the Court opted to punt the issue under the guise of the Petitioners' lack of standing. If the Court truly believed there was an issue of justiciability, it was incumbent on the Court to invite the parties to weigh in on the matter. This would seem to run afoul of the party participation principle that this Court recently considered in *U.S. v. Sineneng-Smith*.[67] In that case, the respondent was charged with violating 8 U.S.C. §1324, which makes it illegal to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law."[68] The penalty is enhanced if the crime is "done for the purpose of commercial advantage or private financial gain." At trial and on appeal to the district court, Sineneng-Smith argued her conduct was not covered by 8 U.S.C. §1324, or alternatively if it was, the law violated the petition and free speech clauses of the First Amendment.[69]

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[66] *Bredhold* at 23.
[67] *U.S. v. Sineneng-Smith*, __ U.S. __, 140 S.Ct. 1575, 1582 (2020).
[68] *Id.*, 140 S.Ct. at 1578.
[69] *Id.*

However, after oral argument in the Ninth Circuit, the Court *sua sponte* requested three *amici* to brief and then orally argue an issue never raised before by Sineneng-Smith: whether the statute was overbroad under the First Amendment. The Ninth Circuit then reversed the conviction, finding the statue violated the overbreadth doctrine.[70] This Court granted the Government's petition for writ of certiorari and reversed on the principle of party presentation. Specifically, this Court held, "our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'"[71] This Court observed that courts were a "passive instrument. . . [and] normally decide only questions presented by the parties."[72] This Court held, ". . . we vacate the Ninth Circuit's judgment and remand the case for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties."[73] As in *Sineneng-Smith*, the Kentucky Supreme Court opinion in *Bredhold* does not touch on the arguments shaped by either party in the case, but is instead a *sua sponte* decision on standing.

In the case at bar, Petitioners moved to exclude the death penalty prior to trial due to the status of being older adolescents. The Commonwealth of Kentucky never

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[70] *Id.*
[71] *Id.,* 140 S.Ct. at 1579, quoting *Castro v. United States*, 540 U.S. 375, 386 (2003).
[72] *Id.*, 140 S.Ct. at 1579, quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (CA8 1987).
[73] *Id.,* 140 S.Ct. at 1582.

made the argument that the matter was not justiciable. The Kentucky Supreme Court acknowledged that the Commonwealth never argued justiciability[74] yet it held that a substantive determination of the *Roper* extension could not be made because the Petitioners lacked standing.

The Kentucky Supreme Court found that jurisdiction was unwaivable, and therefore was not affected by the Commonwealth's failure to raise it.[75] This conclusion is dubious for a number of reasons. First, Kentucky courts have long held that "[s]ubject matter jurisdiction and particular case jurisdiction are related, but they are different in that the former concerns a more broad, general class; whereas, particular case jurisdiction focuses on a more limited or narrow fact-specific situation. While the former can never be waived by the parties, the latter can be waived if the error is not presented to the trial court."[76] In this case, the trial court undoubtedly had subject matter jurisdiction over the Commonwealth's prosecution of Diaz and Smith, and the appellate court undoubtedly had jurisdiction over the Commonwealth's statutorily authorized appeal.[77] Characterizing a procedural ruling in a trial court as a matter of unwaivable "subject-matter jurisdiction," rather than

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[74] *Bredhold* at 17.
[75] *Id*., citing *Sexton*, *supra* at 192.
[76] *Martin v. Cabinet for Health and Family Services*, 583 S.W.3d 12, 17 (Ky. App. 2019)(citing *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 429 (Ky. App. 2008), *Goodlett v. Brittain*, 544 S.W.3d 656, 660 (Ky. App. 2018))(citations and quotations omitted)
[77] See Ky.Const. § 112(5); KRS 22A.020(4).

as a procedural ruling, is a much more radical step than the Kentucky Supreme Court opinion might indicate.

Second, the Kentucky Supreme Court in *Sexton* found only that "*constitutional* standing is not waivable," recognizing that other standing issues often were waivable.[78] However, the cases the court relied upon looked both to unwaivable constitutional limitations on jurisdiction, and arguably waivable prudential limitations.[79] As such, the Kentucky Supreme Court's statements concerning the non-waivability of jurisdiction are not enough to conclusively establish that the principle of party presentation was not violated in this case. While the court may have some authority to raise jurisdiction *sua sponte* in clear cases, the concept of the court as a "passive instrument" does not support a judicial fishing expedition for jurisdictional defects. Rather, courts should limit cases where jurisdiction is questioned without involvement by the parties to those where the jurisdictional defect is apparent on the face of the record, such that the parties were on notice of the potential issue. As noted above, this was not one of those cases.

Moreover, even if the Kentucky Supreme Court did not violate the principle of party presentation, it clearly violated a closely associated principle, which might be

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[78] *Sexton, supra* at 192, declining to overrule language in *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010), that "any question regarding a lack of standing is waived if not timely pled." The *Sexton* court found that statutory standing was a waivable defense, but constitutional standing was not.

[79] See *Sexton*, *supra* at 192, finding only that "*constitutiona*l standing is not waivable." Many of the cases relied upon by the *Bredhold* court relied on prudential ripeness consideration, not constitutional ones. See, e.g.,

referred to as the "principle of party participation." The adversarial system "is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question."[80] Avoidance of this principle runs afoul of basic due process principles, as it essentially deprives the litigants of an opportunity to be heard on a critical matter. "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[81] This notice must be sufficient to provide a litigant with an "opportunity to be heard at a meaningful time and in a meaningful manner."[82] None of that occurred here.

In this case, the Kentucky Supreme Court acted *sua sponte*, without participation by the parties, to resolve a claim on dubious jurisdictional grounds. This Court should grant certiorari to consider whether the principle of party presentation or the principle of party participation was violated in this case by the Court's refusal to hear this case due to lack of standing when the issue was never raised by the parties, and the parties were never invited to brief the matter or argue the merits of justiciability.

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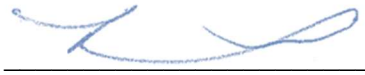
[80] *Penson v. Ohio*, 488 U.S. 75, 84 (1988)
[81] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)
[82] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioners Justin Smith and Efrain Diaz pray that this Court grant this Petition for a Writ of Certiorari, vacate the ruling of the Kentucky Supreme Court, and remand the matter for further proceedings.

Respectfully submitted,



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