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No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2020

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**JUSTIN SMITH, Petitioner**

v.

**COMMONWEALTH OF KENTUCKY, Respondent**

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**APPENDIX**

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RENDERED: MARCH 26, 2020  
TO BE PUBLISHED

# Supreme Court of Kentucky

2017-SC-000436-TG

## COMMONWEALTH OF KENTUCKY

**APPELLANT**

ON TRANSFER FROM COURT OF APPEALS  
CASE NO. 2017-CA-001327-MR  
FAYETTE CIRCUIT COURT NO. 14-CR-00161  
HONORABLE ERNESTO SCORSONE

## TRAVIS M. BREDHOLD

**APPELLEE**

AND

2017-SC-000536-TG  
AND  
2017-SC-000537-TG

## COMMONWEALTH OF KENTUCKY

**APPELLANT**

ON TRANSFER FROM COURT OF APPEALS  
CASE NOS. 2017-CA-001541-MR AND 2017-CA-001542-MR  
FAYETTE CIRCUIT COURT NOS. 15-CR-00584-001-002  
HONORABLE ERNESTO SCORSONE

EFRAIN DIAZ, JR.  
JUSTIN SMITH

## APPELLEES

**OPINION OF THE COURT BY JUSTICE HUGHES**

## **VACATING INTERLOCUTORY ORDERS AND REMANDING**

These three consolidated cases present the issue of whether evolving standards of decency are such that the Eighth Amendment to the United States

Constitution prohibits imposition of the death penalty as to a defendant under twenty-one (21) years of age at the time of his offense. In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court concluded that the Eighth Amendment, applied to the states through the Fourteenth Amendment, proscribes the execution of juvenile offenders over fifteen (15) but under eighteen (18) years of age. *Roper* overruled *Stanford v. Kentucky*, 492 U.S. 361 (1989), a case which had rejected that very age-based argument sixteen years earlier. Citing changes in the national consensus with respect to the death penalty and then-recent psychological and neurobiological research, the *Roper* Court concluded that the social purposes allegedly served by the death penalty, retribution and deterrence, were not justified in the case of offenders under age eighteen (18) due to their youth and immaturity. Appellees Travis Bredhold, Efrain Diaz, Jr., and Justin Smith successfully persuaded the Fayette Circuit Court that the current national consensus and more recent scientific research now support raising the age for death-penalty eligibility to twenty-one (21). After careful consideration, we conclude that this significant constitutional issue was not a "justiciable cause"<sup>1</sup> before the circuit court and is not properly before this Court. 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.

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<sup>1</sup> Ky. Const. § 113(6).

Accordingly, we are compelled to vacate the interlocutory orders and remand to the trial court for further proceedings.

**FACTUAL AND PROCEDURAL BACKGROUND**

A Fayette County grand jury indicted Travis M. Bredhold and charged him with one count of murder, first-degree robbery, theft by unlawful taking over \$10,000, trafficking in less than eight ounces of marijuana, possession of drug paraphernalia, and carrying a concealed deadly weapon. Bredhold allegedly robbed a Marathon gas station and fatally shot Mukeshbhai Patel, an employee, on December 17, 2013. Bredhold was eighteen (18) years and five (5) months old at the time of the offenses. 2017-SC-000436-TG.

Efrain Diaz, Jr., and Justin Smith, co-defendants, are charged with the robbery and fatal shooting of Jonathan Krueger on April 17, 2015.<sup>2</sup> A Fayette County grand jury indicted and charged Diaz with one count of murder and two counts of first-degree robbery. Diaz was twenty (20) years and seven (7) months old at the time he allegedly committed the offenses. The same grand jury indicted and charged Smith with one count of murder, two counts of first-degree robbery, and one count each of tampering with physical evidence and first-degree fleeing or evading police. Smith was eighteen (18) years and five (5) months old at the time of the alleged offenses. 2017-SC-000536-TG, 2017-SC-000537-TG.

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<sup>2</sup> Aaron Gillette, walking with Krueger, was also robbed at gunpoint.

All three Appellees pled not guilty and in all three cases the Commonwealth gave notice of its intent to seek the death penalty. Each Appellee moved the trial court to exclude the death penalty as a sentencing option at trial, specifically asking the trial court to extend the holding of *Roper*, 543 U.S. 551. As noted, *Roper* holds that capital punishment is an unconstitutional penalty for juvenile offenders less than eighteen (18) years old at the time of the offense. Each Appellee requested the trial court to extend the death penalty prohibition to include persons under the age of twenty-one (21) at the time of the offense.

Bredhold and Smith supplemented their respective motions to remove the death penalty with an affidavit of Dr. Ken Benedict, a clinical psychologist and neuropsychologist. Dr. Benedict found Bredhold was about four years behind his peer group in multiple capacities, including the capacity to regulate his emotions and behavior, and that he suffered from a number of mental disorders. As for Smith, Dr. Benedict concluded his executive functions related to planning, anticipating the consequences of his actions, and impulse control are below those of an adult and he too exhibited a number of mental disorders.<sup>3</sup>

The trial court conducted an evidentiary hearing on Diaz's and Smith's motions, hearing Dr. Laurence Steinberg's testimony. Dr. Steinberg, a

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<sup>3</sup> Diaz had given notice of potential evidence as to mental defect, but it appears evaluations were not complete prior to entry of the trial court's orders declaring Kentucky's death penalty statute unconstitutional.

nationally recognized expert in adolescent development, explained current scientific knowledge regarding brain development and its impact on behavior, comparing the maturational differences between individuals less than twenty-one (21) years of age and those twenty-one (21) and older. Dr. Steinberg also supplemented his testimony with a written report. The Commonwealth did not submit any proof. Although the testimony was presented in the Diaz/Smith case, the trial court supplemented Bredhold's record with the Steinberg testimony.

The trial court later entered a separate but similar order in each case declaring Kentucky's death penalty statute unconstitutional under the Eighth Amendment insofar as it permits capital punishment for offenders under twenty-one (21) years of age at the time of their offense. In addition to this general legal conclusion, the court made specific findings regarding Bredhold's and Smith's individual psychological assessments. The trial court concluded that those individual findings provided further support for the exclusion of the death penalty as to Bredhold and Smith individually.

The Commonwealth filed interlocutory appeals and this Court granted the Commonwealth's motions to transfer the appeals from the Court of Appeals pursuant to Kentucky Rule of Civil Procedure (CR) 74.02, finding that the issues raised are of great and immediate public importance and arose during capital litigation, an area exclusively within this Court's appellate jurisdiction. *Skaggs v. Commonwealth*, 803 S.W.2d 573, 577 (Ky. 1990); *Commonwealth v. Guernsey*, 501 S.W.3d 884, 887 (Ky. 2016).

## ANALYSIS

In these consolidated appeals we are asked to review the Fayette Circuit Court's decision finding Kentucky's death penalty statute unconstitutional as to defendants who were between the ages of eighteen (18) and twenty-one (21) at the time of their offense. Before reaching this significant inquiry, it is incumbent that we consider whether the issue is properly before us.

"Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of [the legislature] unless obliged to do so in the proper performance of our judicial function . . . ." *Blair v. United States*, 250 U.S. 273, 279 (1919); accord *Louisville/Jefferson Co. Metro Gov't v. TDC Group, LLC*, 283 S.W.3d 657, 660 (Ky. 2009) (recognizing this Court's "practice of avoiding constitutional questions" unless judicially necessary). See also *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (listing rules used to avoid constitutional questions). As a threshold matter, Kentucky courts do not have constitutional jurisdiction to adjudicate a question raised by a litigant who does not have standing to have the issue decided.

*Commonwealth Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 195 (Ky. 2018). Because the Appellees have yet to be adjudicated guilty and the Commonwealth's power to punish has yet to be invoked, we conclude the question whether Kentucky's death penalty is unconstitutional as to the age-based group identified by Appellees is currently not justiciable. For context, we

discuss briefly the parties' positions on the constitutional issue raised before turning to the mandatory considerations of standing and ripeness.

Under Kentucky law, a person convicted of a capital offense, may be sentenced to death pursuant to Kentucky Revised Statute (KRS) 532.030. Imposition of the death penalty, however, is subject to the Eighth Amendment to the United States Constitution which, via the Fourteenth Amendment, prohibits states from imposing cruel and unusual punishments.<sup>4</sup> *Roper*, 543 U.S. at 560 (citations omitted). "While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The Eighth Amendment's prohibition of "cruel and unusual punishments" "reaffirms the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 560. Recognizing that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," *Weems v. United States*, 217 U.S. 349, 378 (1910), the United States Supreme Court has adopted "evolving standards of decency that mark the progress of a maturing society" as a measure to enforce the Constitution's protection of human dignity and to determine which punishments are so disproportionate as to be cruel and unusual. *Trop*, 356 U.S. at 100-01.

A trio of United States Supreme Court decisions, *Thompson v. Oklahoma*, 487 U.S. 815 (1988), *Stanford*, 492 U.S. 361, and *Roper*, 543 U.S. 551, have

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<sup>4</sup> The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

applied society's evolving standards of decency to address the question of whether the Eighth Amendment prohibits imposition of the death penalty on juveniles of a certain age. In *Thompson*, the Supreme Court determined that society's standards of decency do not permit the execution of any offender under the age of sixteen (16) at the time of the crime. Soon afterward, in *Stanford*, the Supreme Court declined to extend that age range, holding that standards of decency did not prohibit the execution of juvenile offenders who were over fifteen (15) but under eighteen (18) years old at the time of their offense. In *Roper*, decided only sixteen years after *Stanford*, the Supreme Court determined that standards of decency had evolved to proscribe execution of juvenile offenders under eighteen (18) years of age.

Appellees contend that contemporary standards of decency are now such that the Eighth Amendment prohibits the imposition of Kentucky's death penalty on individuals under the age of twenty-one (21) at the time of their offense. The Commonwealth counters that *Roper*, 543 U.S. at 574, designates age eighteen (18) as the bright line for separating adults from juveniles for Eighth Amendment purposes, and thus the trial court erred by declaring Kentucky's death penalty statute unconstitutional when applied to offenders between eighteen (18) and twenty-one (21) years of age.

Presently, by interlocutory appeal, the Commonwealth seeks to vacate the Fayette Circuit Court's orders that declare Kentucky's death penalty statute unconstitutional insofar as it permits capital punishment for a defendant under twenty-one (21) years of age at the time of his offense. Although the

Commonwealth noticed its intent to seek the death penalty as to all three Appellees, at the point their motions were heard by the circuit court (and even now), the cases remained untried and no jury had recommended the death penalty. While death penalty trials are unquestionably more involved than typical felony trials, requiring both group and individual voir dire and presenting issues and procedures unique to the gravity of the penalty sought, the focus of Eighth Amendment analysis is not the trial, but rather the actual penalty imposed. Despite no penalty having been imposed and the clear possibility that death would not be recommended by the jury in any of these cases, the trial court declared prior to trial that Kentucky's death penalty statute is unconstitutional as to these Appellees based on their age. This preemptive ruling was legally inappropriate under controlling precedent.

Constitutional challenges to statutes generally fall within one of two categories: a facial challenge or an as-applied challenge. In order to declare a statute unconstitutional on its face, a court must find that the law is unconstitutional in all its applications. *Commonwealth of Kentucky v. Claycomb by & through Claycomb*, 566 S.W.3d 202, 210 (Ky. 2018) (citations omitted); *Sabri v. United States*, 541 U.S. 600, 609 (2004). "It is a well-established principle that '[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Harris v. Commonwealth*, 338 S.W.3d 222, 229 (Ky. 2011) (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). On the other hand, in order to declare a

statute unconstitutional as applied, a court must find the law unconstitutional as applied to the challenger's particular circumstances. *See United States v. Salerno*, 481 U.S. 739, 745 n.3 (1987).

No matter the type of constitutional challenge brought, the person(s) bringing the challenge must first demonstrate standing in order for the challenge to be justiciable. *Sexton*, 566 S.W.3d at 196. Otherwise, the trial court does not have jurisdiction to hear and decide the constitutional challenge, whether raised by declaratory judgment action or, as in these cases, by motion. *See id.*; *In re Summers*, 325 U.S. 561, 566-67 (1945); *Flast v. Cohen*, 392 U.S. 83, 101 (1968).<sup>5</sup> It follows that an appellate court does not have jurisdiction to review on its merits an interlocutory appeal arising from a circuit court judgment entered in such circumstances. *Sexton*, 566 S.W.3d at 196-97.

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<sup>5</sup> As *In re Summers*, 325 U.S. at 566-67 explains:

A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treatise or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.' *Osborn v. Bank*, 9 Wheat. 738, 819, 6 L. Ed. 204. The Court was then considering the power of the bank to sue in the federal courts. A declaration on rights as they stand must be sought, not on rights which may arise in the future, *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 69, 53 L. Ed. 150, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. *Muskrat v. United States*, 219 U.S. 346, 361, 31 S. Ct. 250, 255, 55 L. Ed. 246; *Fairchild v. Hughes*, 258 U.S. 126, 129, 42 S. Ct. 274, 275, 66 L. Ed. 499. The form of the proceeding is not significant. It is the nature and effect which is controlling. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 346, 77 L. Ed. 730, 87 A.L.R. 1191.

Kentucky's constitutional standing doctrine, adopted from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), wherein several organizations sought declaratory judgment and an injunction, is outlined in *Sexton*.

[A]t bottom, for a party to sue in Kentucky, the initiating party must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability. In other words, "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."<sup>6</sup> "[A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent . . ."<sup>7</sup> "The injury must be . . . 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.'"<sup>8</sup> "The injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision."<sup>9</sup>

566 S.W.3d at 196.

*Sexton* dealt with initiation of a civil suit; nevertheless, the "standing" principles apply with equal force to this interlocutory motion raised in a criminal proceeding. "In 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." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing is one of the five major justiciability doctrines which assure that the courts do not

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<sup>6</sup> *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed.2d 556 (1984), *overruled on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

<sup>7</sup> *Massachusetts v. EPA*, 549 U.S. 497, 517, 127 S. Ct. 1438, 167 L. Ed.2d 248 (2007) (citing *Lujan*, 504 U.S. at 578, 112 S. Ct. 2130).

<sup>8</sup> *Allen*, 468 U.S. at 751, 104 S. Ct. 3315.

<sup>9</sup> *Id.*

address non-existent issues or provide advisory opinions. *Sexton*, 566 S.W.3d at 192-97.<sup>10</sup> In federal constitutional parlance a “case or controversy” is required, Art. III, § 2, Clause 1, while in Kentucky the circuit courts (and consequently the Court of Appeals and this Court exercising appellate jurisdiction) are constitutionally required to address “justiciable causes.” Ky. Const. §113(6). Upon review of the standing requirements, it is evident that Appellees’ motions are not justiciable at this time.

A litigant must satisfy all prongs of the standing inquiry to invoke a court’s jurisdiction in a constitutional challenge. In this case, we need only consider whether Appellees meet the first prong, the injury requirement: whether the litigant “has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged statute or official conduct.” *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). It is well-settled that “[a]llegations of possible future injury do not satisfy the requirements of [standing].” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). “A threatened injury must be ‘certainly impending’ to constitute injury in fact.” *Id.* (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)). These principles regarding the injury necessary to establish standing are incorporated in the United States Supreme Court’s jurisprudence explaining the context within which an Eighth Amendment claim may be properly raised. “Eighth Amendment scrutiny is

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<sup>10</sup> The United States Supreme Court has identified the five major justiciability doctrines as: “(1) the prohibition against advisory opinions, (2) standing, (3) ripeness, (4) mootness, and (5) the political-question doctrines.” 566 S.W.3d at 193.

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." *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671-72, n.40 (1977)).

In the cases before this Court, if one or more of the Appellees is convicted of a capital offense, the sentencing options are numerous. KRS 532.030(1) provides:

When a person is convicted of a capital offense, he shall have his punishment fixed at death, or at a term of imprisonment for life without benefit of probation or parole, or at a term of imprisonment for life without benefit of probation or parole until he has served a minimum of twenty-five (25) years of his sentence, or to a sentence of life, or to a term of not less than twenty (20) years nor more than fifty (50) years.

Thus, assuming conviction, the sentencing range for the Appellees would extend from a twenty (20) year-sentence to death. To reiterate, the Appellees have yet to be tried, convicted, or sentenced. "It is just not possible for [the Appellees] to prove in advance that the judicial system will lead to any particular result in [their] case." *Whitmore*, 495 U.S. at 159-60. With the Appellees having not yet suffered a concrete and particularized injury by

having the death sentence imposed, no actual or imminent injury exists.<sup>11</sup> At this point, imposition of the death sentence can only be viewed as hypothetical.

Although we approach the justiciability of these cases under the standing doctrine, application of the related ripeness doctrine has likewise resulted in courts dismissing premature claims and vacating premature decisions in the context of an Eighth Amendment challenge.<sup>12</sup> For example, in *18 Unnamed "John Smith" Prisoners v. Meese*, 871 F.2d 881, 882-83 (9th Cir. 1989), the Ninth Circuit Court of Appeals vacated a summary judgment in favor of the government in a case involving an Eighth Amendment challenge to a proposed double bunking plan as cruel and unusual punishment. The Ninth Circuit, finding the inmates' claims were not sufficiently concrete to warrant judicial

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<sup>11</sup> Requiring the litigant to prove "actual injury" "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The gist of the question of standing is has the litigant "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

<sup>12</sup> The line between standing and ripeness is not readily drawn. The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *W.B. v. Com., Cabinet for Health & Family Servs.*, 388 S.W.3d 108, 115 (Ky. 2012) (quoting *National Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08, 123 S. Ct. 2026, 155 L. Ed.2d 1017 (2003) (citations omitted)). The overlap between standing and ripeness concepts has led some legal scholars to suggest that the there is little benefit in having a distinct ripeness doctrine. See, e.g., Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677, 682-83 (1990) ("The standing determination demands that the plaintiff demonstrate that he or she has been or imminently will be injured. Ripeness focuses primarily on whether the matter is premature for review and asks whether the plaintiff has suffered or imminently will suffer an injury. In light of this overlap, little seems to be gained by having a distinct ripeness doctrine.").

intervention, explained that the effects of the proposed double bunking, such as overcrowding, deprivation of essential food, and lack of sanitation, were only speculative, involving “contingent future events that may not occur as anticipated, or indeed not occur at all.” *Id.* at 883 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (quoting 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532 (1984))).

In *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995), the Eleventh Circuit Court of Appeals upheld the trial court’s dismissal of an Eighth Amendment pre-enforcement challenge to a statute that allegedly imposed excessive fines. The Eleventh Circuit described the ripeness doctrine as “ask[ing] whether there is sufficient injury to meet Article III’s requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by the court.” *Id.* at 1524 (citation omitted). More particularly, the *Cheffer* court concluded “Eighth Amendment challenges are generally not ripe until the imposition, or immediately impending imposition, of a challenged punishment or fine.” *Id.* at 1523 (citing *Meese; Askins v. District of Columbia*, 877 F.2d 94, 97–99 (D.C. Cir. 1989) (challenge to proposed transfer to another prison facility not ripe)).

In *Johnson v. Missouri*, 142 F.3d 1087 (8th Cir. 1998), a case involving the constitutionality of a statute that imposed sanctions on inmates who file frivolous claims, the Eighth Circuit recognized likenesses in the standing and ripeness doctrines: “Although we realize that standing and ripeness are

technically different doctrines, they are closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention. . . . Thus, whether this principle is labeled ‘standing’ or ‘ripeness’, [the inmates’] claim [is not justiciable].” *Id.* at 1090, n.4 (internal quotations, original alterations, and citations omitted). See also *People v. Stark*, 400 P.2d 923, 928 (Colo. 1965) (“With reference to the argument that the several offenses defined in the statute are punishable by ‘cruel and unusual punishments’ we hold that until some person has been convicted of a crime and a sentence has been imposed which is then asserted to be ‘cruel and unusual’ there is no justiciable question presented.”); *Floyd v. Filson*, 940 F.3d 1082 (9th Cir. 2019) (challenge to lethal injection protocol not ripe when state has no implementable protocol at the time of the challenge; injury speculative and may never occur); *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370 (11th Cir. 2019) (challenge to ordinance penalty provision not ripe when no allegations that fine has been imposed or imposition immediately forthcoming).<sup>13</sup>

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<sup>13</sup> We note cases exist which hold an Eighth Amendment challenge is justiciable prior to the litigant’s adjudication of guilt. In *United States v. Jones*, 731 F. Supp. 2d 1275 (M.D. Fla. 2010), the defendant challenged the constitutionality of a statute imposing a minimum mandatory prison sentence of five years. The defendant was indicted on three counts of distributing crack cocaine, a conviction on any one count subjecting him to the minimum mandatory sentence. The *Jones* court concluded that if an injury in fact may be found “where the law has yet to be enforced against the party so long as he can show a well-founded fear of enforcement or imminent threat of prosecution, then surely an injury in fact shall be found where, as here, the party invoking the court’s authority has already been indicted and is facing trial.” *Id.* at 1280. *United States v. Sanders*, 731 F. Supp. 2d 1261 (M.D. Fla. 2010), contains the same question and analysis. These outlier cases relied primarily (and incorrectly in our view) on *Virginia v. American Booksellers Ass’n*, 484 U.S. 383 (1988), a case involving a First Amendment pre-enforcement facial challenge (providing “well-founded

The Commonwealth has not raised the issue of standing directly,<sup>14</sup> but *Sexton* is clear that “all Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only justiciable causes proceed in court, because the issue of constitutional standing is not waivable.” *Sexton*, 566 S.W.3d at 192. Thus, while the Appellees have raised a serious question as to whether the death penalty is a disproportionate punishment for offenders in the eighteen (18) to twenty-one (21) year-old range, it is not currently justiciable whether viewed as a lack of standing or a matter of ripeness.

Rather recently, in *Guernsey*, 501 S.W.3d 884, this Court addressed a challenge similar to that raised in this case and decided that prior to trial the circuit court could not adjudicate the defendants’ motion to preclude the Commonwealth from seeking the death penalty as a constitutionally disproportionate penalty. In *Guernsey*, as here, the Commonwealth sought review of a Fayette Circuit Court’s pretrial order granting the defendants’

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fear” language and explaining danger of challenged statute is largely self-censorship), and *Younger v. Harris*, 401 U.S. 37 (1971), a case involving allegations that both the existence and the enforcement of a criminal statute impaired the plaintiff’s First Amendment rights. Unlike an Eighth Amendment claim, a First Amendment claim, particularly a facial challenge, is subject to a relaxed ripeness standard because of the special need to protect against the chilling of the right of free expression. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002).

<sup>14</sup> The Commonwealth cited *Commonwealth v. Guernsey*, 501 S.W.3d 884 (Ky. 2016), discussed *infra*, for the premise that statutorily the trial court was prohibited from prematurely (prior to trial) removing the death penalty as a sentencing option. The trial court considered *Guernsey*, but as reflected in its orders, believed it could address Appellees’ constitutional argument.

motion to exclude death as a sentencing option in the event of conviction. The case was noticed as a death penalty case because the murder was allegedly committed in the course of a first-degree robbery, which occurred in the context of drug-trafficking. The circuit court concluded that, based on its knowledge of the facts following a pretrial hearing, capital punishment would be constitutionally disproportionate in that particular case and perhaps also comparatively disproportionate pursuant to KRS 532.075(3). *Id.* at 887.

This Court, in a unanimous decision, clarified that the KRS 532.075(3) comparative proportionality review is a function assigned to the Supreme Court, but that the circuit court may determine whether a death sentence would be inherently disproportionate. *Id.* at 888-90. As this Court explained, however, the circuit court may only properly exercise this authority once the Commonwealth has had the opportunity to present all of its evidence at trial and a death sentence has actually been recommended. *Id.* at 892.

We concluded:

While Guernsey and Jones correctly note that the death penalty has fallen into disfavor in recent years, it remains a viable penalty in Kentucky authorized by our legislature in specific types of cases, including those in which the defendant is charged with committing murder in the course of the commission of first-degree robbery. The Fayette County Grand Jury indicted the Appellees for those very offenses, and the Commonwealth, as is its statutory right, subsequently noticed its intent to seek the death penalty. Although at the conclusion of trial, should the jury recommend the death penalty for either of the Appellees, the circuit court will have discretion to determine whether that sentence is constitutionally proportionate, there is no authority for exercising that discretion pretrial before all relevant evidence is actually heard. Accordingly, the Fayette Circuit Court's Order Excluding the Death Penalty is vacated . . . .

*Id.* at 894.<sup>15</sup>

Even though *Guernsey* involved a disproportionality argument that focused on the particular facts of a case that had not yet been tried to verdict while the cases currently before this Court raise a purely legal issue, judicial determination of Appellees' age-based challenge to the death penalty is still not appropriate prior to trial. Regardless of the merits of the circuit court's Eighth Amendment analysis (about which we express no opinion), as in *Guernsey* the lower court erred by treating the Appellees' pretrial motions as justiciable and removing from the jury's consideration a penalty that is currently viable under Kentucky law.

Consistent with our conclusion regarding the current non-justiciability of the Appellees' constitutional challenge, none of the cases they cite support this Court addressing pretrial whether Kentucky's death penalty is constitutionally inappropriate for an offender in the eighteen (18) to twenty-one (21) year old range.<sup>16</sup> All cases cited involving Eighth Amendment death or other penalty

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<sup>15</sup> On remand, the co-defendants in *Guernsey* reached plea agreements with the Commonwealth. Robert Guernsey was sentenced to twenty-three (23) years for second-degree manslaughter and first-degree robbery, and Trustin Jones was sentenced to forty (40) years for murder and first-degree robbery.

<sup>16</sup> This is also true of other cases not included in Appellees' list: *Melton v. Secretary, Florida Dep't of Corrs.*, 778 F.3d 1234 (11th Cir. 2015); *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007); *In re Garner*, 612 F.3d 533 (6th Cir. 2010); *In re Phillips*, No. 17-3729, 2017 WL 4541664 (6th Cir. July 20, 2017); *In re Cathey*, 857 F.3d 221 (5th Cir. 2017); *Tercero v. Stephens*, 738 F.3d 141 (5th Cir. 2013); *State v. Myers*, 114 N.E.3d 1138 (Ohio 2018); *Foster v. State*, 258 So. 3d 1248 (Fla. 2018); *People v. Powell*, 425 P.3d 1006 (Cal. 2018); *People v. Gamache*, 227 P.3d 342 (Cal. 2010); *Williams v. State*, 67 S.W.3d 548 (Ark. 2002); *State v. Christeson*, 50 S.W.3d 251 (Mo. 2001); *Samra v. State*, 771 So. 2d 1108 (Ala. Crim. App. 1999), aff'd 771 So. 2d 1122 (Ala. 2000); *Butts v. State*, 546 S.E.2d 472 (Ga. 2001); *Wilson v. State*, 525 S.E.2d 339 (Ga. 1999).

challenges, inclusive of United States Supreme Court, federal circuit and state cases, are appeals by individuals who had already been convicted and sentenced:<sup>17</sup> *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Stanford v. Kentucky*, 492 U.S. 361 (1989), abrogated by *Roper v. Simmons*, 543 U.S. 551 (2005); *Penry v. Lynaugh*, 492 U.S. 302 (1989), abrogated by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Johnson v. Texas*, 509 U.S. 350 (1993); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *United States v. Marshall*, 736 F.3d 492 (6th Cir. 2013); *Branch v. State*, 236 So. 3d 981 (Fla. 2018); *Otte v. State*, 96 N.E.3d 1288 (Ohio 8th Dist. App. 2017); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016); *Thompson v. State*, 153 So. 3d 84 (Ala. Crim. App. 2012); *Romero v. State*, 105 So. 3d 550 (Fla. 1st Dist. App. 2012); *Mitchell v. State*, 235 P.3d 640 (Okla. Crim. App. 2010); *Morton v. State*, 995 So. 2d 233 (Fla. 2008);

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<sup>17</sup> Within the cited cases, *United States v. Lopez-Cabrera*, No. S5 11Cr.1032, 2015 WL 3880503 (S.D.N.Y. June 23, 2015), is one case that does not precisely follow this guiding principle. Prior to sentencing, three defendants convicted of murder in aid of racketeering sought relief from the statutory mandatory minimum sentence of life imprisonment. As Appellees note, *Lopez-Cabrera*, an unpublished opinion, is not a death penalty case.

*Hill v. State*, 921 So. 2d 579 (Fla. 2006); *Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006).<sup>18</sup>

Undoubtedly, the death penalty's unique "severity and irrevocability," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (citations omitted), weighs heavily on a defendant who has been notified by the Commonwealth of its intent to seek the death penalty. However, when a defendant is tried and convicted of a capital crime, the principle that capital punishment must be limited to those whose extreme culpability makes them the most deserving of execution is implemented through a carefully designed capital sentencing process. *Roper*, 543 U.S. at 568 (citation omitted). The sentencing phase allows the defendant the opportunity to present mitigating evidence to convince the jury that death is not the appropriate punishment. KRS 532.025(1)(b). "[W]here sentencing discretion is granted, it generally has been agreed that . . . 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant-if not essential-[to the] selection of an appropriate sentence . . . .'" *Lockett v. Ohio*, 438 U.S. 586, 602-03 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949) (emphasis added in *Lockett*)); see also *Furman*

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<sup>18</sup> *New Jersey ex rel. D.B.*, No. A-353-84T5 (N.J. Super. App. Div. Feb. 19, 1985) (unpublished), a juvenile death penalty case, is similar to the case before this Court. By interlocutory appeal, the defendant argued that application of the capital punishment statute to a juvenile was unconstitutional. The New Jersey appellate court refused to decide the issue because the defendant had yet to be convicted and the imposition of the death penalty at that point was merely speculation. See also *State v. Smith*, 495 A.2d 507, 510 (N.J. Super. Law. Div. Apr. 19, 1985) (applying *New Jersey ex rel. D.B.* to a juvenile defendant's pretrial motion challenging New Jersey's death penalty statute as cruel and unusual punishment as to a juvenile and declining to decide the speculative constitutional question).

*v. Georgia*, 408 U.S. 238, 245-46 (1972) (Douglas, J., concurring); *id.* at 297-98 (Brennan, J., concurring); *id.* at 339 (Marshall, J., concurring); *id.* at 402-03 (Burger, C. J., dissenting); *id.* at 413 (Blackmun, J., dissenting). Thus, as reflected in KRS 532.025(2) which allows the jury to consider any mitigating circumstances otherwise authorized by law and in KRS 532.025(2)(b)'s delineated mitigating circumstances, which includes the youth of the defendant at the time of the crime, wide latitude is given to capital defendants to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604.<sup>19</sup>

As to this case, if the Appellees go to trial and are convicted, the jury would presumably hear the age-based arguments made before this Court, along with each Appellee's individual circumstances when determining the

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<sup>19</sup> The death penalty remains relatively rare in the Commonwealth. Currently, twenty-seven individuals are on death row in Kentucky. Kentucky Department of Corrections, *Death Row Inmates*, <https://corrections.ky.gov/Facilities/AI/Pages/deathrowinmates.aspx>. The sentencing dates for these individuals range between March 1980 and October 2014. *Id.*; Death Penalty Information Center, *Sentencing Data*, <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year>. Between 1976 and 2019, Kentucky executed three individuals (in 1997, 1999, and 2008) with two of those waiving further challenges to their sentence. Death Penalty Information Center, *Executions*, <https://deathpenaltyinfo.org/ executions/execution-database?filters%5Bstate%5D=Kentucky>. Of those currently on death row, three are sentenced to death for crimes committed when they were over eighteen (18) but under twenty-one (21) years of age: Ronnie Lee Bowling, date of birth 12/05/1968, date of first of two murders 01/20/1989; Karu Gene White, date of birth 11/18/1958, date of three murders 02/12/1979; William (Bill) Harry Meece, date of birth 10/18/1972, date of three murders 02/26/1993. Kentucky Department of Corrections, *supra*; *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011) (Meece committed the murders Feb. 26, 1993, but was not indicted until Feb. 2003). (Websites last viewed Feb. 8, 2020.)

Appellee's sentence. If the jury recommends the death penalty for any of the three Appellees, the Appellee will have review of the appropriateness of that sentence by both the trial judge, KRS 532.070, and this Court, KRS 532.075(3), through direct appeal and post-conviction review. We reiterate that KRS 418.075 requires notice to the Attorney General in order to preserve for our review a constitutional challenge to a statute. *Craft v. Commonwealth*, 483 S.W.3d 837, 840 (Ky. 2016); *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) (compliance with the notification provisions of KRS 418.075 is mandatory even in criminal cases). Thus, in the event a jury recommends death, a defendant challenging that sentence on constitutional grounds must give notice to the Attorney General so he or she can participate at the trial court level as provided by KRS 418.075.

In summary, only when, if ever, one or more of these Appellees is convicted and a jury recommends the death penalty will the circuit court be confronted with an Eighth Amendment issue presented by an individual with standing to raise it. Should that occur, this Court anticipates that the evidentiary record regarding the psychological and neurobiological characteristics of offenders under twenty-one (21) years old generally, as well as of the Appellee specifically, will be fully developed by all parties and both the

trial court and this Court will have the scientific evidence necessary to address a truly justiciable constitutional issue.<sup>20</sup>

### **CONCLUSION**

Because none of the Appellees has standing to present the issue of whether Kentucky's death penalty constitutes "cruel and unusual" punishment under the Eighth Amendment as to defendants ages eighteen (18) to twenty-one (21) at the time of their offense, neither the circuit court nor this Court is presented with a justiciable cause. Accordingly, the Fayette Circuit Court's orders declaring Kentucky's death penalty statute unconstitutional as applied to these Appellees are vacated and these cases are remanded to the circuit court for further proceedings consistent with this Opinion.

All sitting. All concur.

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<sup>20</sup> Additionally, Appellees will have the opportunity to present this evidence to the jury in the penalty phase for their consideration as they debate the propriety of the death penalty for a particular offender under age twenty-one (21).

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COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
SEVENTH DIVISION  
CASE NO. 15-CR-584-002

ENTERED  
ATTEST, VINCENT RIGGS, CLERK  
SEP 12 2017  
FAYETTE CIRCUIT CLERK  
BY *[Signature]* DEPUTY

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

JUSTIN SMITH

DEFENDANT

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**AMENDED ORDER DECLARING KENTUCKY'S DEATH PENALTY  
STATUTE AS UNCONSTITUTIONAL**

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This matter comes before the Court on Defendant Justin Smith's Motion to declare the Kentucky death penalty statute unconstitutional insofar as it permits capital punishment for those under twenty-one (21) years of age at the time of their offense. Mr. Smith argues that the death penalty would be cruel and unusual punishment, in violation of the Eighth Amendment, for an offender under twenty-one (21) at the time of the offense. The defense claims that recent scientific research shows that individuals under twenty-one (21) are psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty, in *Roper v. Simmons*, 543 U.S. 551 (2005). The Commonwealth in turn argues that Kentucky's death penalty statute is constitutional and that there is no national consensus with respect to offenders under twenty-one (21). Having the benefit of memoranda of law, expert testimony, and the arguments of counsel, and being otherwise sufficiently advised, the Court sustains the Defendant's motion.

*[Signature]*

## FINDINGS OF FACT

Justin Smith was indicted on the charges of Murder, two counts of First Degree Robbery, Tampering with Physical Evidence, and First Degree Fleeing or Evading Police for events which occurred on April 17, 2015, when Mr. Smith was eighteen (18) years and six (6) months old.

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty-one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."<sup>1</sup> Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.<sup>2</sup>

The Court finds Mr. Smith to fall well within this framework. On January 5, 2017, an individual assessment of Mr. Smith was conducted by Dr. Kenneth Benedict, a clinical psychologist and neuropsychologist. A final report was provided to the Defendant's counsel and

<sup>1</sup> Hearing July 17, 2017 at 9:02:31.

<sup>2</sup> Affidavit of Kenneth B. Benedict, July 14, 2017.

the Commonwealth and has been filed under seal. After reviewing the record, administering multiple tests, and conducting the interview with Mr. Smith, Dr. Benedict found Mr. Smith had numerous learning and psychological disorders that impaired his cognitive processes, including: Attention Deficit Hyperactivity Disorder ("ADHD"), impairment in reading, writing, and math, sleep disorder, and Dysthymia.<sup>3</sup> Mr. Smith's social development has been similarly stunted from early adolescence due to an abusive parent as well as gang-related influences.<sup>4</sup> This resulted in a high degree of social anxiety and low self-esteem with an eagerness to please those around him and, similarly, to follow the direction of his older, more dominant male peers. Furthermore, Dr. Benedict concluded that Mr. Smith's executive functions relating to planning, anticipating the consequences of his actions, and impulse control are all below those of an adult.<sup>5</sup> Without a well-formed identity at the time of his offense, Mr. Smith was highly susceptible to influence and, thus, does not meet the scientific and constitutional criteria to act as an adult under similar circumstances.<sup>6</sup>

### CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. This provision is applicable to the states through the Fourteenth Amendment. The protection flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen

<sup>3</sup> *Id.* at 3-4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.*

the consistent reference to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the "evolving standards of decency" test are: (1) objective indicia of national consensus, and (2) the Court's own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551 (2005).

### I. Objective Indicia of National Consensus Against Execution of Offenders Younger than 21

Since *Roper*, six (6) states<sup>7</sup> have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states<sup>8</sup> have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven<sup>9</sup> (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

<sup>7</sup> The states that have abolished the death penalty since *Roper* and year of abolition: Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007).

<sup>8</sup> The governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively. The governor of Oregon extended a previously imposed moratorium in 2015. The governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013.

<sup>9</sup> Kansas and New Hampshire have not executed anyone since 1977. Montana and Wyoming have never executed anyone who was under twenty-one (21) years of age at the time of their offenses, and they currently have no such offenders on death row. Utah has not executed anyone who was under twenty-one (21) years of age at the time of their offense in the last fifteen (15) years, and no such offender is currently on Utah's death row. Idaho and Kentucky have not executed anyone who was under twenty-one (21) years old at the time of their offense in the last fifteen (15) years.

Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.<sup>10</sup> Those nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011 – nineteen (19) of which have been in Texas alone.<sup>11</sup> Considering Texas an outlier, there have only been fourteen (14) executions of defendants under the age of twenty-one (21) between 2011 and 2016, compared to twenty-nine (29) executions in the years 2006 to 2011, and twenty-seven (27) executions in the years 2001 to 2006 (again, excluding Texas).<sup>12</sup> In short, the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods.

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.<sup>13</sup> Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20).

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven

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<sup>10</sup> Chart of Number of People Executed Who Were Aged 18, 19, or 20 at Offense from 2000 to Present, By State [current as of February 29, 2016]

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to twenty-one (21. “[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles … as ‘categorically less culpable than the average criminal.’” *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

## **2. The Court’s Independent Judgment**

As the Supreme Court in *Roper* heavily relied on scientific studies to come to its conclusion, so will this Court. On July 17, 2017, this Court heard expert testimony on this topic. Dr. Laurence Steinberg testified and was also allowed to supplement his testimony with a written report. The report cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable. It is based on those studies that this Court has come to the conclusion that the death penalty should be excluded for defendants who were under the age of twenty-one (21) at the time of their offense.

If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late teens.<sup>14</sup> Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.<sup>15</sup>

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.<sup>16</sup> First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.<sup>17</sup> Second, they are more likely to engage in "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).<sup>18</sup> Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because

<sup>14</sup> B. J. Casey, et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104-110 (2005).

<sup>15</sup> N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358-1361 (2011); D. Fair, et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); A. Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies*, 33 HUM. BRAIN MAPPING 1987-2002 (2012); A. Pfefferbaum, et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176-193 (2013); D. Simmonds, et al., *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*, 92 NEUROIMAGE 356-368 (2014); L. Somerville, et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124-133 (2010).

<sup>16</sup> For a recent review of this research, see: LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* (2014).

<sup>17</sup> T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).

<sup>18</sup> E. Cauffman, et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc.12532. (2017).

gains in impulse control continue to occur during the early twenties (20s).<sup>19</sup> Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.<sup>20</sup> As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.<sup>21</sup> The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.<sup>22</sup> In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).<sup>23</sup>

Recent neurobiological research parallels the above psychological conclusions. This research has shown that the main cause for psychological immaturity during adolescence and the early twenties (20s) is the difference in timing of the maturation of two important brain systems. The system that is responsible for the increase in sensation-seeking and reward-seeking—

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<sup>19</sup> L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28-44 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

<sup>20</sup> L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583-594 (2009).

<sup>21</sup> A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583-594 (2009).

<sup>22</sup> D. Albert, et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114-120 (2013).

<sup>23</sup> B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

sometimes referred to as the “socio-emotional system”—undergoes dramatic changes around the time of puberty, and stays highly active through the late teen years and into the early twenties (20s). However, the system that is responsible for self-control, regulating impulses, thinking ahead, evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the “cognitive control system”—is still undergoing significant development well into the mid-twenties (20s).<sup>24</sup> Thus, during middle and late adolescence there is a “maturational imbalance” between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual’s twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.<sup>25</sup>

There are considerable structural changes and improvements in connectivity across regions of the brain which allow for this development. These structural changes are mainly the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, allowing for more efficient transmission of information) and myelination (insulation of neuronal connections, allowing the brain to transmit information more quickly). While synaptic pruning is mostly complete by age sixteen (16), myelination continues through the twenties (20s).<sup>26</sup> Thus, while the development of the prefrontal cortex (logical reasoning, planning, personality) is largely finished by the late teens, the maturation of connections between the prefrontal cortex and regions

<sup>24</sup> B. J. Casey, et al., *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEV. PSYCHOL. 225-235 (2010); L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78-106 (2008); L. Van Leijenhorst, et al., *Adolescent Risky Decision-making: Neurocognitive Development of Reward and Control Regions*, 51 NEUROIMAGE 345-355 (2010).

<sup>25</sup> D. Albert & L. Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211-224 (2011); S-J Blakemore & T. Robbins, *Decision-Making in the Adolescent Brain*, 15 NAT. NEUROSCIENCE 1184-1191 (2012).

<sup>26</sup> S-J. Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397-406 (2012); R. Engle, *The Teen Brain*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).

which govern self-regulation and emotions continues into the mid-twenties (20s).<sup>27</sup> This supports the psychological findings spelled out above which conclude that even intellectual young adults may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

Perhaps one of the most germane studies to this opinion illustrated this development gap by asking teenagers, young adults (18-21), and mid-twenties adults to demonstrate impulse control under both emotionally neutral and emotionally arousing conditions.<sup>28</sup> Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen- (18) to twenty-one- (21) year-olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens.<sup>29</sup> Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty- (20) year-old functions similarly to a sixteen- (16) or seventeen- (17) year-old.

In addition to this maturational imbalance, one of the hallmarks of neurobiological development during adolescence is the heightened plasticity—the ability to change in response to experience—of the brain. One of the periods of the most marked neuroplasticity is during an individual's late teens and early twenties (20s), indicating that this group has strong potential for behavioral change.<sup>30</sup> Given adolescents' ongoing development and heightened plasticity, it is difficult to predict future criminality or delinquent behavior from antisocial behavior during the

<sup>27</sup> L. Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NAT. REV. NEUROSCIENCE 513-518 (2013).

<sup>28</sup> A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOL. SCI. 549-562 (2016).

<sup>29</sup> *Id.*

<sup>30</sup> LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* (2014).

teen years, even among teenagers accused of committing violent crimes.<sup>31</sup> In fact, many researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.<sup>32</sup>

Justin Smith was eighteen (18) years and six (6) months old at the time of the alleged crime. According to recent scientific studies, Mr. Smith fits into the group experiencing the "maturational imbalance," during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses. He also fits into the group described in the study above which was found to act essentially like a sixteen- (16) to seventeen- (17) year-old under emotionally arousing conditions, such as, for example, robbing a store. Most importantly, this research shows that eighteen- (18) to twenty-one- (21) year-olds are categorically less culpable for the same three reasons that the Supreme Court in *Roper* found teenagers under eighteen (18) to be: (1) they lack maturity to control their impulses and fully consider both the risks and rewards of an action, making them unlikely to be deterred by knowledge of likelihood and severity of punishment; (2) they are susceptible to peer pressure and emotional influence, which exacerbates their existing immaturity when in groups or under stressful conditions; and (3) their character is not yet well formed due to the neuroplasticity of the young brain, meaning that they have a much better chance at rehabilitation than do adults.<sup>33</sup>

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<sup>31</sup> T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, 3(2) DEV. & PSYCHOPATHOLOGY (2016).

<sup>32</sup> K. Monahan, et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093-1105 (2013); E. Mulvey, et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453-475 (2010).

<sup>33</sup> *Roper*, 543 U.S. at 569-70.

Further, the Supreme Court has declared several times that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("the death penalty must be reserved for 'the worst of the worst'"). Given Mr. Smith's young age and development, it is difficult to see how he and others his age could be classified as "the most deserving of execution."

Given the national trend toward restricting the use of the death penalty for individuals under the age of twenty-one (21), and given the recent findings by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age. Accordingly, Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense.

It is important to note that, even though this Court is adhering to a bright-line rule as promoted by *Roper* and not individual assessment or a "mental age" determination, the conclusions drawn by Dr. Kenneth Benedict in his individual evaluation of Mr. Smith are still relevant. This evaluation substantiates that what research has shown to be true of adolescents and young adults as a class is particularly true of Mr. Smith. These findings further support the exclusion of the death penalty for this Defendant.

15CR2584-2

So ORDERED this the 11 day of September, 2017.

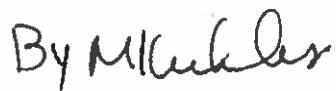
  
JUDGE ERNESTO SCORSONE  
FAYETTE CIRCUIT COURT

**CERTIFICATE OF SERVICE**

The following is to certify that the foregoing was served this the 12 day of September, 2017, by mailing same first class copy, postage prepaid, to the following:

Lou Anna Red Corn  
Commonwealth Attorney  
116 North Upper Street, Suite 300  
Lexington, KY 40507

Kim A. Green  
Assistant Public Advocate  
163 W. Short Street  
Lexington, KY 40507



COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
SEVENTH DIVISION  
CASE NO. 15-CR-584-001

ENTERED  
ATTEST, VINCENT RIGGS, CLERK  
SEP 12 2017  
FAYETTE CIRCUIT CLERK  
BY *[Signature]* DEPUTY

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

EFRAIN DIAZ

DEFENDANT

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**AMENDED ORDER DECLARING KENTUCKY'S DEATH PENALTY  
STATUTE AS UNCONSTITUTIONAL**

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This matter comes before the Court on Defendant Efrain Diaz's Motion to declare the Kentucky death penalty statute unconstitutional insofar as it permits capital punishment for those under twenty-one (21) years of age at the time of their offense. Mr. Diaz argues that the death penalty would be cruel and unusual punishment, in violation of the Eighth Amendment, for an offender under twenty-one (21) at the time of the offense. The defense claims that recent scientific research shows that individuals under twenty-one (21) are psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty, in *Roper v. Simmons*, 543 U.S. 551 (2005). The Commonwealth in turn argues that Kentucky's death penalty statute is constitutional and that there is no national consensus with respect to offenders under twenty-one (21). Having the benefit of memoranda of law, expert testimony, and the arguments of counsel, and being otherwise sufficiently advised, the Court sustains the Defendant's motion.

### FINDINGS OF FACT

Efrain Diaz was indicted on the charges of Murder and two counts of First Degree Robbery for events which occurred on April 17, 2015, when Mr. Diaz was twenty (20) years old.

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty-one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."<sup>1</sup> Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.<sup>2</sup>

### CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. This provision is applicable to the states through the Fourteenth Amendment.

<sup>1</sup> Hearing July 17, 2017 at 9:02:31.

<sup>2</sup> Affidavit of Kenneth B. Benedict, July 14, 2017.

The protection flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen the consistent reference to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be “cruel and unusual.” *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the “evolving standards of decency” test are: (1) objective indicia of national consensus, and (2) the Court’s own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551 (2005).

### **I. Objective Indicia of National Consensus Against Execution of Offenders Younger than 21**

Since *Roper*, six (6) states<sup>3</sup> have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states<sup>4</sup> have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven<sup>5</sup> (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of

<sup>3</sup> The states that have abolished the death penalty since *Roper* and year of abolition: Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007).

<sup>4</sup> The governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively. The governor of Oregon extended a previously imposed moratorium in 2015. The governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013.

<sup>5</sup> Kansas and New Hampshire have not executed anyone since 1977. Montana and Wyoming have never executed anyone who was under twenty-one (21) years of age at the time of their offenses, and they currently have no such offenders on death row. Utah has not executed anyone who was under twenty-one (21) years of age at the time of their offense in the last fifteen (15) years, and no such offender is currently on Utah’s death row. Idaho and Kentucky have not executed anyone who was under twenty-one (21) years old at the time of their offense in the last fifteen (15) years.

twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.<sup>6</sup> Those nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011 – nineteen (19) of which have been in Texas alone.<sup>7</sup> Considering Texas an outlier, there have only been fourteen (14) executions of defendants under the age of twenty-one (21) between 2011 and 2016, compared to twenty-nine (29) executions in the years 2006 to 2011, and twenty-seven (27) executions in the years 2001 to 2006 (again, excluding Texas).<sup>8</sup> In short, the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods.

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.<sup>9</sup> Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20).

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants

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<sup>6</sup> Chart of Number of People Executed Who Were Aged 18, 19, or 20 at Offense from 2000 to Present, By State [current as of February 29, 2016]

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to twenty-one (21). “[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles … as ‘categorically less culpable than the average criminal.’” *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

## **2. The Court’s Independent Judgment**

As the Supreme Court in *Roper* heavily relied on scientific studies to come to its conclusion, so will this Court. On July 17, 2017, this Court heard expert testimony on this topic. Dr. Laurence Steinberg testified and was also allowed to supplement his testimony with a written report. The report cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable. It is based on those studies that this Court has come to the conclusion that the death penalty should be excluded for defendants who were under the age of twenty-one (21) at the time of their offense.

If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late teens.<sup>10</sup> Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.<sup>11</sup>

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.<sup>12</sup> First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.<sup>13</sup> Second, they are more likely to engage in "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).<sup>14</sup> Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because

<sup>10</sup> B. J. Casey, et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104-110 (2005).

<sup>11</sup> N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358-1361 (2011); D. Fair, et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); A. Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies*, 33 HUM. BRAIN MAPPING 1987-2002 (2012); A. Pfefferbaum, et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176-193 (2013); D. Simmonds, et al., *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*, 92 NEUROIMAGE 356-368 (2014); L. Somerville, et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124-133 (2010).

<sup>12</sup> For a recent review of this research, see: LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* (2014).

<sup>13</sup> T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).

<sup>14</sup> E. Cauffman, et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc.12532. (2017).

gains in impulse control continue to occur during the early twenties (20s).<sup>15</sup> Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.<sup>16</sup> As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.<sup>17</sup> The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.<sup>18</sup> In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).<sup>19</sup>

Recent neurobiological research parallels the above psychological conclusions. This research has shown that the main cause for psychological immaturity during adolescence and the early twenties (20s) is the difference in timing of the maturation of two important brain systems. The system that is responsible for the increase in sensation-seeking and reward-seeking—

<sup>15</sup> L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28-44 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

<sup>16</sup> L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

<sup>17</sup> A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

<sup>18</sup> D. Albert, et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114-120 (2013).

<sup>19</sup> B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

sometimes referred to as the “socio-emotional system”—undergoes dramatic changes around the time of puberty, and stays highly active through the late teen years and into the early twenties (20s). However, the system that is responsible for self-control, regulating impulses, thinking ahead, evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the “cognitive control system”—is still undergoing significant development well into the mid-twenties (20s).<sup>20</sup> Thus, during middle and late adolescence there is a “maturational imbalance” between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual’s twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.<sup>21</sup>

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<sup>21</sup> D. Albert & L. Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211-224 (2011); S-J Blakemore & T. Robbins, *Decision-Making in the Adolescent Brain*, 15 NAT. NEUROSCIENCE 1184-1191 (2012).

<sup>22</sup> S-J. Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397-406 (2012); R. Engle, *The Teen Brain*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).

which govern self-regulation and emotions continues into the mid-twenties (20s).<sup>23</sup> This supports the psychological findings spelled out above which conclude that even intellectual young adults may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

Perhaps one of the most germane studies to this opinion illustrated this development gap by asking teenagers, young adults (18-21), and mid-twenties adults to demonstrate impulse control under both emotionally neutral and emotionally arousing conditions.<sup>24</sup> Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen- (18) to twenty-one- (21) year-olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens.<sup>25</sup> Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty- (20) year-old functions similarly to a sixteen- (16) or seventeen- (17) year-old.

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<sup>26</sup> LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* (2014).

teen years, even among teenagers accused of committing violent crimes.<sup>27</sup> In fact, many researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.<sup>28</sup>

Efrain Diaz was twenty (20) years old at the time of the alleged crime. According to recent scientific studies, Mr. Diaz fits into the group experiencing the "maturational imbalance," during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses. He also fits into the group described in the study above which was found to act essentially like a sixteen- (16) to seventeen- (17) year-old under emotionally arousing conditions, such as, for example, robbing a store. Most importantly, this research shows that eighteen- (18) to twenty-one- (21) year-olds are categorically less culpable for the same three reasons that the Supreme Court in *Roper* found teenagers under eighteen (18) to be: (1) they lack maturity to control their impulses and fully consider both the risks and rewards of an action, making them unlikely to be deterred by knowledge of likelihood and severity of punishment; (2) they are susceptible to peer pressure and emotional influence, which exacerbates their existing immaturity when in groups or under stressful conditions; and (3) their character is not yet well formed due to the neuroplasticity of the young brain, meaning that they have a much better chance at rehabilitation than do adults.<sup>29</sup>

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<sup>27</sup> T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, 3(2) DEV. & PSYCHOPATHOLOGY (2016).

<sup>28</sup> K. Monahan, et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093-1105 (2013); E. Mulvey, et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453-475 (2010).

<sup>29</sup> *Roper*, 543 U.S. at 569-70.

Further, the Supreme Court has declared several times that “capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (“the death penalty must be reserved for ‘the worst of the worst’”). Given Mr. Diaz’s young age and development, it is difficult to see how he and others his age could be classified as “the most deserving of execution.”

Given the national trend toward restricting the use of the death penalty for individuals under the age of twenty-one (21), and given the recent findings by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age. Accordingly, Kentucky’s death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense.

So ORDERED this the 11 day of September, 2017.

  
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JUDGE ERNESTO SCORSONE  
FAYETTE CIRCUIT COURT

15CR584-1

CERTIFICATE OF SERVICE

The following is to certify that the foregoing was served this the 12 day of September 2017, by mailing same first class copy, postage prepaid, to the following:

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