No. 19-8873
CAPITAL CASE

IN THE SUPREME COURT
OF THE UNITED STATES

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

v.

COMMONWEALTH OF KENTUCKY **RESPONDENT**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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FACTS AND OPINIONS BELOW

In Lexington, Kentucky on April 17, 2015, Jonathan Krueger, a student at the University of Kentucky, and his friend, Aaron Gillette, were walking home. After observing a van heading down a one-way street in the wrong direction, Krueger and Gillette attempted to alert the driver. The van stopped and two assailants exited and brandished firearms. Krueger and Gillette were approached and robbed at gunpoint. When Gillette began to resist, the gunmen opened fire. While Gillette escaped unharmed, Krueger was shot and killed.

Co-defendants Efrain Diaz, Jr. and Justin Smith were both indicted for the murder of Krueger as well as other related charges. The Commonwealth of Kentucky gave notice of an aggravating circumstance (first-degree robbery) that made Diaz and Smith eligible for enhanced penalties–including the death penalty.

Diaz and Smith were over 18 at the time of their offense conduct (Diaz – 20 years and seven months; Smith – 18 years and five months). Prior to trial, defense counsel for both defendants filed a motion seeking to exclude the death penalty as a sentencing option–asking the trial court to extend this Court's decision in *Roper v. Simmons*[1] to prohibit defendants under age 21 from being eligible for the death penalty. The primary basis for the motion was that brain development continues into the mid-twenties, therefore, defendants that commit murder between ages 18 and 21 should get the same protections that juveniles received in *Roper*. The Commonwealth

[1] 543 U.S. 551 (2005). In *Roper*, this Court declared it unconstitutional under the Eighth Amendment for a state to execute any individual who was under the age of 18 at the time of the offense.

countered with a purely legal argument: that clearly established precedent from this Court (*Roper*) was determinative. Despite this Court drawing a clear line at age 18 and no state legislature or court having ever expanded *Roper* in the manner suggested by Diaz and Smith, the trial court agreed and granted the motion.

The Commonwealth filed an interlocutory appeal and on March 26, 2020, a unanimous Kentucky Supreme Court vacated the trial court's order and remanded the case to the trial court for further proceedings consistent with its opinion. *Commonwealth v. Bredhold*, 599 S.W.3d 409 (Ky. 2020).[2] The court noted that because Smith and Diaz had not been tried, convicted, and sentenced to death, the preemptive ruling contradicted controlling precedent–their claims were not justiciable[3] due to lack of standing and ripeness. *Bredhold*, at 415. In particular, without a sentence of death there was no "injury" to invoke constitutional jurisdiction. *Id.*

Diaz and Smith then petitioned this Court for review. After the Commonwealth initially filed a waiver, a response was ordered.

[2] The Petitioners' individual cases below were styled as *Diaz v. Commonwealth*, 2017-SC-536-TG and *Smith v. Commonwealth*, 2017-SC-537-TG. However, the cases of Smith, Diaz, and a third defendant (Bredhold) from a separate case were consolidated before the Kentucky Supreme Court because they all benefitted from identical pretrial rulings from the same trial court judge. Therefore, the Petitioners' case below is identified in legal reporting systems as *Commonwealth v. Bredhold*, 599 S.W.3d 409 (Ky. 2020).

[3] The Kentucky Constitution, Section 112(5), vests the trial court with jurisdiction over "justiciable causes" not vested in some other court.

REASONS TO DENY THE PETITION

I. Petitioners have not successfully established this Court's jurisdiction.

In the petition, the first claim raised by Diaz and Smith concerns whether a litigant is required to show an "actual or imminent" injury in a criminal case in order to invoke standing, and if so, whether the pretrial prospect of being sentenced to death is sufficient to meet that requirement. Petition, pp. 8-22. Petitioners' argument ignores the finality requirement necessary to establish jurisdiction in this Court.

The applicable jurisdictional statute for this Court invites review of "[f]inal judgments or decrees," 28 U.S.C. § 1257(a), which have been "rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." In a criminal prosecution, finality is defined generally as "a judgment of conviction and the *imposition of a sentence*." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989) (emphasis added). The insistence on finality and prohibition against piecemeal review seek to discourage "undue litigiousness and leaden-footed administration of justice" which is viewed as particularly damaging to the conduct of criminal cases. *Di Bella v. United States*, 369 U.S. 121, 124 (1962).[4] The Kentucky Supreme Court

[4] In *Florida v. Thomas*, 532 U.S. 774, 777 (2001), this Court noted there are four very narrow exceptions to the finality rule, however, it is easily discernable that none are applicable to Smith and Diaz. Three of the four finality exceptions require that the state's highest court have "finally" decided the underlying claim. *Id*. As previously explained, because a lack of constitutional jurisdiction correctly halted consideration of the underlying Eighth Amendment claim (lack of standing because no injury exists until a death sentence is imposed), those exceptions are inapplicable.

identified this underlying principle, indicating that the state does not acquire the power to impose a criminal penalty with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. *Bredhold*, 599 S.W.3d at 417 (citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983)). Kentucky's highest court also noted that although "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." *Id*. at 415. Indeed, it is the penalty that is the subject of Eighth Amendment criminal jurisprudence, not the burdens of preparing for trial.

The Commonwealth's position is solidified by looking at prior Eighth Amendment challenges seeking to disqualify certain classes of defendants from the death penalty based on age. The seminal age-related Eighth Amendment cases that have come to define the excluded classes involved claims that were made after the petitioners had been convicted and the death penalty was imposed. *See Roper v.*

The remaining exception involves cases in which there are further proceedings—even entire trials—yet to occur in the state courts, but for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. To illustrate this exception, this Court gave the example of *Mills v. Alabama*, 384 U.S. 214 (1966). In *Mills,* the defendant conceded his guilt and his only defense to the state criminal charge was his federal constitutional claim that he was entitled under the First Amendment to print an offending editorial. This Court found that case was "final" because the determination of the federal claim would ultimately decide the case, i.e., it would create a valid, insurmountable defense or a certain, undeniable conviction. *But see Di Bella*, at 124 (1962) (denial of suppression motion insufficiently final to warrant immediate pre-conviction review).

Here the Petitioners' request for review is based on a theory that the Kentucky Supreme Court misconstrued this Court's standing jurisprudence and the underlying claim should have been addressed. The Petitioners' prayer for relief asks this Court to grant review, vacate the opinion of the Kentucky Supreme Court, and order the Kentucky Supreme Court to decide their Eighth Amendment claim on the merits. This Court's review process would not address the underlying claim or ultimately decide the case, merely send it back for a merits review. Therefore, this finality exception also does not apply.

Simmons, 543 U.S. 551 (2005) (successive state post-conviction proceeding); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (two petitioners, both on direct appeal); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (direct appeal). Similarly, although not imposing death, in *Miller v. Alabama*, 567 U.S. 460 (2012), two juvenile petitioners were both convicted and sentenced to mandatory terms of life without parole, and they raised their Eighth Amendment claims after sentencing (one on direct appeal and the other via a state habeas proceeding). In all of the aforementioned cases the focus of the Eighth Amendment claim was the actual imposition of the penalty as a precursor to making a claim.

The reason review is inappropriate at the pretrial stage of a criminal case is evident. The Kentucky Supreme Court's decision is not plainly final, it is subject to further proceedings in the state courts, and is dependent on a significant number of conditions that have the potential to render this case moot. Specifically, the Commonwealth will need to succeed in gaining a murder conviction and prove the existence of an aggravating circumstance for Diaz and Smith just to be eligible for a death sentence. *Bredhold*, 599 S.W.3d at 422. During the sentencing phase, in which youth is a proper mitigating factor, the jury will undoubtedly hear the Petitioners' evidence regarding brain development and how those concepts specifically relate to Petitioners. *Id.* At that point, the jury would need to recommend a death sentence– an appropriately tall order since the ultimate penalty is reserved for a specific class of convicted criminals that have committed the most heinous crimes.[5] *Id.* Should the

[5] A majority of states, as well as the federal government, impose capital punishment as a sentence for the worst murders. *See Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion). For perspective, it has

jury recommend a death sentence, the trial judge could negate a death verdict for a number of reasons, such as that the penalty is deemed to be inherently disproportionate. *Id.; Commonwealth v. Guernsey*, 501 S.W.3d 884, 888 (Ky. 2016). Finally, if the death penalty were imposed at final sentencing, the Kentucky Supreme Court would address any alleged direct appeal errors and conduct a statutorily mandated comparative proportionality review (pursuant to Kentucky Revised Statute 532.075(3)). *Id.* Smith and Diaz would be able to raise their Eighth Amendment claim during their direct appeal (among other attacks on the potential sentence), and as noted by the Kentucky Supreme Court in its opinion, review of the Eighth Amendment claim at that time would occur with a fully developed record. *Bredhold*, 599 S.W.3d at 423.

To permit the Petitioners to pursue this claim pretrial will add to the "proliferation of labyrinthine restrictions on capital punishment." *See Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring). Extensive litigation over every element of capital litigation has frustrated, delayed, or halted executions throughout the United States. "Courts should police carefully against attempts to use [death-penalty litigation] as tools to interpose unjustified delay." *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).[6] This Court's finality jurisprudence serves to

been over six years since a Kentucky jury recommended a death sentence. *See White v. Commonwealth*, 600 S.W.3d 176 (Ky. 2020).

[6] Justice Thomas has noted that he is "unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari). Indeed, the built-in delay that necessarily comes with capital litigation serves to highlight the importance of not

avoid advisory opinions and the waste of time and judicial resources to settle an issue that may never impact the Petitioners.

II. The Kentucky Supreme Court did not violate due process considerations by failing to request supplemental briefing.

Petitioners' second claim asserts that the Kentucky Supreme Court committed a procedural due process violation by failing to request supplemental briefing before concluding that the Petitioners were not properly before that court. Petition, pp. 22-28. To the contrary, because deficient threshold matters that upset the very nature of a court's jurisdiction can and should be addressed *sua sponte*, the Petitioners' claim of error is without merit.

The Kentucky Constitution, Section 112(5), states that trial courts are required to address "justiciable causes." In *Commonwealth v. Hughes*, 873 S.W.2d 828, 829 (Ky. 1994), the Kentucky Supreme Court recognized that it has repeatedly reaffirmed the proposition that Kentucky courts have "no jurisdiction to decide issues which do not derive from an actual case or controversy." *See also Veith v. City of Louisville*, 355 S.W.2d 295, 297–98 (Ky.1962) (courts do not have the jurisdiction to decide questions that lack justiciable controversies involving the rights of specific parties). Recently, in *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,

adding to it with claims that are not final. Justice Thomas's concerns underscore the position of the Commonwealth in this case.

195 (Ky. 2018), the Kentucky Supreme Court held that, 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. This rule was applicable, and in fact was applied, when the Kentucky Supreme Court decided the Petitioners' case. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."); *Whittle v. Commonwealth*, 352 S.W.3d 898, 906 (Ky. 2011); *Taylor v. Commonwealth*, 63 S.W.3d 151, 156 (Ky. 2001); *Jackson v. Commonwealth*, 487 S.W.3d 921, 929 (Ky. App. 2016). There was nothing inappropriate about the Kentucky Supreme Court making a threshold determination on a matter than served as an initial requirement to the establishment of jurisdiction.

Petitioners' primary complaint is that they did not get the opportunity to weigh in via supplemental briefing. The Petitioners' contention is baseless, however, as the Kentucky Supreme Court's opinion is consistent with its own prior jurisprudence–it has routinely determined threshold matters without input from the parties. *See Commonwealth v. Steadman,* 411 S.W.3d 717, 721 (Ky. 2013) (an alleged lack of subject-matter jurisdiction may be raised at any time, even by the court itself)*; Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005) (jurisdiction is a threshold consideration for any court at any level of the Kentucky court system and "[i]t is fundamental that

a court must have jurisdiction before it has authority to decide a case").[7] For example, in *Kentucky High School Athletic Ass'n v. Edwards*, 256 S.W.3d 1, 4 (Ky. 2008), it was noted that even if neither of the parties has objected on the basis of a lack of jurisdiction, the Kentucky Supreme Court is still required to address the issue *sua sponte*. *See also Hook v. Hook*, 563 S.W.2d 716, 717 (Ky. 1978) ("Although the question is not raised by the parties or referred to in the briefs, the appellate court should determine for itself whether it is authorized to review the order appealed from."); *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459–60 (Ky. App. 2011) ("While the parties did not raise the issue of appellate jurisdiction in their briefs, we are the guardians of our jurisdiction and thus are obligated to raise a jurisdictional issue *sua sponte* if the underlying order appears to lack finality." (citations omitted)).

Unilateral consideration of threshold matters does not raise due process concerns. The aforementioned language from Kentucky case law is consistent with the holdings of this Court, which has also rendered similar findings in cases where the parties do not raise a threshold issue. *See Foster v. Chatman*, 136 S.Ct. 1737, 1745 (2016) ("[b]efore turning to the merits of Foster's *Batson* claim, we address a threshold issue . . . Neither party contests our jurisdiction to review Foster's claims, but we 'have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.'" (citations omitted)); *Thomas*, 532 U.S. at 777 (2001) ("[a]lthough the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction

[7] Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

to decide this case."); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178 (1988) ("[a]lthough neither party contests our appellate jurisdiction over this case, we must independently determine as a threshold matter that we have jurisdiction."). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869). As a result, cases cannot be decided on any question, no matter how simple, without first examining jurisdiction, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998), because it "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884).

As previously stated, Eighth Amendment claims in the criminal context hinge on the imposition of a penalty. Therefore, until a penalty is imposed, a justiciable cause (or in the federal parlance a "case or controversy") does not exist. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III – it is an "irreducible constitutional minimum" when invoking federal jurisdiction). In order to establish subject matter jurisdiction, a party must show, among other things, that he has standing to litigate a particular claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("Standing to sue is part of the common understanding of what it takes to make a justiciable case."). Standing is a "threshold determinant of the propriety of judicial intervention." *Warth v. Seldin*, 422

U.S. 490, 518 (1975).

Due process is concerned with fundamental fairness, and here the courts have a strong interest in the avoidance of advisory opinions or wasting judicial resources on a matter that is not ripe for adjudication and ultimately may become moot. All of the support provided by the Petitioners concerning party participation and the like did not involve a threshold issue. Given the importance of threshold determinations, *sua sponte* decisions do not unfairly affect a defendant whose claim lacked constitutional jurisdiction to bring the claim in a particular court. The process due in any given context depends on the interests at stake and the costs of safeguarding the accuracy of the tribunal's factual and legal determinations. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Should either Petitioner eventually receive a death sentence, the underlying Eighth Amendment claim would be properly available to them at that time. The Petitioners' constitutional rights were not violated by the Kentucky Supreme Court deciding a threshold matter without supplemental briefing, when the underlying claim remains if and when it becomes a justiciable issue.

CONCLUSION

The Petitioners do not present compelling reasons for this Court to grant the petition. None of the considerations highlighted in Supreme Court Rule 10 exist or create a legal basis for review by this Court.

Based on the foregoing, the petition should be denied.

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FILING/PROOF OF SERVICE

The foregoing Brief in opposition was filed electronically this day, November 16, 2020, and also was mailed to the Clerk of this Court.

Further, I, Matthew R. Krygiel, a member of the Bar of this Court, hereby certify that on the 16th day of November, 2020, a copy of this Brief was mailed via United States Postal Service, postage prepaid, and emailed to Hon. Timothy G. Arnold (tim.arnold@ky.gov) and Emily Holt Rhorer (emily.rhorer@ky.gov), Assistant Public Advocates, 5 Mill Creek Park. Frankfort, Kentucky 40601 - Counsel for Petitioner.

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