No. _____

IN THE

Supreme Court of the United States

DAVID KELSEY SPARRE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

STACY R. BIGGART - *Counsel of Record*
CANDACE RECHTMANN
Capital Collateral Regional Counsel – Northern Region
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Stacy.Biggart@ccrc-north.org
Candace.Rechtmann@ccrc-north.org

QUESTIONS PRESENTED

1. Whether trial counsel's failure to investigate and execute the defense trial strategy, which would have significantly undermined the State's case for first-degree murder, results in prejudice?

2. Given the advancements in the scientific understanding of late adolescent brain development since *Roper*, should this Court consider whether the age cutoff established in *Roper v. Simmons* is consistent with the modern scientific consensus regarding late adolescent brain development?

3. Whether the Florida Supreme Court's harmless-error approach to *Hurst v. Florida* error is constitutional in light of *Caldwell v. Mississippi*?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

No. _____

IN THE

Supreme Court of the United States

DAVID KELSEY SPARRE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, **DAVID KELSY SPARRE**, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee below. Mr. Sparre respectfully urges this Honorable Court issue its writ of certiorari to review the judgment and decision of the Florida Supreme Court.

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at 289 So. 3d 839 (Fla. 2019), and is attached to this Petition as Exhibit 1 of the Appendix. Mr. Sparre's motion for hearing was denied on February 26, 2020, and is attached to this petition as Exhibit 2 of the Appendix.

STATEMENT OF JURISDICTION

Mr. Sparre invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No persons … shall … be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury … and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

PROCEDURAL HISTORY[1]

I. Introduction

David Kelsey Sparre was born on July 7, 1991, to a father who did not want him and a mother who used illicit drugs during her pregnancy and would go on to remarry at least eight times to men who verbally, emotionally, and physically abused

[1] The abbreviation "T." will be used to refer to Petitioner's trial, and "R." will be used to refer to the record on appeal as compiled for Petitioner's direct appeal in *Sparre v. State*, 164 So. 3d 1183 (Fla. 2015). The abbreviation "PCR." will be used to refer to the record on appeal as compiled for Petitioner's state postconviction proceeding in *Sparre v. State*, 289 So. 3d 839 (Fla. 2019).

her young son. (PCR.1418). Mr. Sparre suffered chronic severe trauma and abuse throughout a childhood "full of rejection and broken promises." (PCR.1417). As a young child and developing adolescent, Mr. Sparre endured constant verbal abuse, threats of violence, physical abuse, abandonment, neglect, domestic violence, drug and alcohol abuse, mental illness, and his mother's numerous separations, divorces and remarriages that disrupted his development and kept a constant cast of shady and violent characters shifting in and out of his life. Mr. Sparre's adverse childhood experience ("ACE") score is 9/10. (PCR.3748-49).

Mr. Sparre's mother always chose herself or the relationship with her current man over her child. (PCR.1417). When he was only eleven years old, Mr. Sparre experienced profound maternal rejection when his mother abandoned him at the Tara Hall Home for Boys because her current husband did not want him around. According to Dr. James Garbarino, who testified at Mr. Sparre's postconviction evidentiary hearing, maternal rejection is the worst kind of parental rejection and results in a doubting of your essential worth as a human being. (PCR.3755). For almost two years, he had minimal contact with his family. His mother never participated in family counseling sessions, never appeared for scheduled visits with her young child, and never bothered to answer the phone for his scheduled calls. Young Mr. Sparre spent holidays and long weekends with counselors so he would not be the only boy left at school. (PCR.1416). The "massive psychological neglect" was so profound that the professionals at the Tara Hall Home for Boys reported Mr. Sparre's mother to the

South Carolina Department of Social Services and recommended the termination of her parental rights. (PCR. 3752).

As a young adolescent, Mr. Sparre suffered night terrors and severe stomach aches. (PCR.1419). He would yell "no, no, turn me loose" until the night terrors would subside. He was diagnosed with an anxiety disorder, separation anxiety, depression, and post-traumatic stress disorder. (PCR.1419-20). Although he was prescribed medication and counseling sessions to treat his conditions, his family failed to follow up with his treatment. *Id.* According to this childhood treating physician, Mr. Sparre had "suffered terrible catastrophes" and without the necessary medical treatment, he "festered in a toxic environment for years." (PCR.1418-19).

Mr. Sparre was one day past his nineteenth birthday when he killed the victim. He was "an untreated traumatized child inhabiting a young adult's body and mind." (PCR.3814). His immaturity and impulsiveness was more akin to a juvenile offender than a mature adult "whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons*, 543 U.S. 554, 568 (2005). These characteristics that distinguish juvenile offenders from their adult counterparts do not just evaporate when a person turns eighteen years old. On the day after his nineteenth birthday, Mr. Sparre did not exhibit factors that this Court has found to indicate maturity.

The scientific community recognizes that human brains do not mature until age twenty-five or twenty-six. (PCR.3669, 3769). The frontal lobe, which controls executive functioning and emotional regulation, is the last area to develop in young adults. (PCR.3669). Executive functioning is decision making, problem solving,

impulse control, inhibition, and weighing consequences and risks. (PCR.3668, 3769). Children and young adults with immature brains have a disability in understanding consequences, giving equal value to negative and positive outcomes, and long-term effects versus short-term effects. (PCR.3770). While normal eighteen, nineteen, or twenty-year-olds make bad decisions, kids like Mr. Sparre "have sort of a double whammy of being young and then being doubly young because of their traumatic experiences." *Id*.

Normal nineteen-year-olds that have not experienced the severe trauma experienced by Mr. Sparre still have difficulty managing intense emotions. (PCR.3772). According to Dr. Garbarino, Mr. Sparre's immature brain makes the crime make "developmental sense." *Id*. Mr. Sparre was a very vulnerable child and his behavior was always erratic. *Id*. Mr. Sparre was "a kid on the edge" and was still on the edge at age nineteen and "not playing with a full deck." *Id*.

This nineteen-year-old traumatized adolescent was represented by Refik Eler, twice found ineffective by the Florida Supreme Court in capital cases[2], and a team of unseasoned capital attorneys who joined Mr. Sparre's defense team for professional development. They were concerned about getting death qualified, rather than the zealous representation of an abused and traumatized teenager. Although Alphonse Perkins had previous capital experience, this was the first death penalty trial for Michael Bateh, Shawn Arnold, and John Leombruno. The *quantity* of Mr. Sparre's

[2] Mr. Eler was found ineffective in *State v. Morrison*, 236 So. 3d 204 (Fla. 2017), and *Shellito v. State*, 121 So. 3d 445 (Fla. 2013). (PCR.3534).

attorneys is irrelevant. The *quality* of his defense team reflects an incompetent and dysfunctional group. Among their many deficiencies, they failed to consult with and hire the necessary experts to further their defense strategy, failed to actually execute and argue their defense strategy, and failed to object to improper arguments by a prosecutor who capitalized on and amplified the defense team's errors.

II. Factual and Procedural Background

A. Trial, Conviction, and Death Sentence

Mr. Sparre was indicted for first-degree murder on March 25, 2010. (R.20-22). His trial began on November 28, 2011, and the jury found him guilty of premeditated and felony (burglary) murder on December 2, 2011. The jury also found that he carried, displayed, used, or attempted to use a weapon. (R.592-93). The penalty phase was held on December 13, 2011. (T.1231). No mitigation testimony was presented. The jury recommended death by a vote of 12 to 0. (R.628; T. 1410).

On March 30, 2012, the court sentenced him to death. The court found two aggravating factors and assigned each great weight: (1) the murder was especially heinous, atrocious, or cruel (HAC); and (2) was committed during a burglary. (R. 700-03). The court found one statutory mitigating circumstance and assigned it moderate weight: the defendant's age at the time of the crime. (R.705-06).

The court found thirteen non-statutory mitigating circumstances: (1) accepts responsibility (little weight); (2) neglect (some weight); (3) emotional deprivation and abuse (some weight); (4) physical abuse (some weight); (5) lacked a good support system (little weight); (6) absent father (some weight); (7) good at fixing things (slight

weight); (8) dropped out of high school but obtained a GED (little weight); (9) participated in ROTC in high school and served in the United States military (slight weight); (11) has a child (some weight); (12) loves his family (some weight); and (13) his family loves him (some weight). (R.706-11). The court rejected the following mitigators: (1) Mr. Sparre's judgment was impaired; (2) Mr. Sparre was under the influence of drugs; and (3) the incident was situational. (R.707, 709).

Mr. Sparre appealed his conviction and sentence to the Florida Supreme Court. The following issues were raised in his direct appeal: (1) the trial court erred in not calling as its own witnesses four mental health experts and other witnesses who were available to testify to extensive mental health mitigation, in violation of the Eighth and Fourteenth Amendments; (2) the Florida Supreme Court should recede from *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), and require the appointment of independent public counsel to present whatever mitigation reasonably can be discovered in all cases where the defendant seeks the death penalty or waives the presentation of mitigation evidence; and (3) Florida's capital sentencing proceedings are unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona.*

The Florida Supreme Court affirmed Mr. Sparre's conviction and sentence. *Sparre v. State*, 164 So. 3d 1183 (Fla. 2015). This Court denied certiorari review on November 2, 2015. *Sparre v. Florida*, 136 S. Ct. 411 (2015).

B. State Collateral Proceedings

After his sentencing, Mr. Sparre unsuccessfully sought state postconviction relief pursuant to Fla. R. Crim. P. 3.851. An evidentiary hearing was held on March

15, 16, and 19, 2018. (PCR.3254-841). The court issued a final order denying his Rule 3.851 motion. (PCR.2845-2911). The Florida Supreme Court affirmed the denial of Mr. Sparre's postconviction claims. *Sparre v. State*, 289 So. 3d 839 (Fla. 2019).

FACTS RELEVANT TO QUESTIONS PRESENTED

I. THE TRIAL

A. The State's Case

In July 2010, the victim lived and attended school in Jacksonville, Florida. Her husband was deployed at sea with the United States Navy and their children were with his family in Bonifay, Florida. (T.551). On July 12, her body was found in her bedroom by a friend after she failed to attend class that week. (T.442). She had been stabbed to death and there were approximately eighty-eight sharp-force injuries. (T.1014).

Law enforcement discovered calls and texts to several men on the victim's cell phone, including flirtatious and sexually explicit text messages to and from Mr. Sparre between July 6 and July 8. (T.563). In the July 8 texts, the victim and Mr. Sparre made plans to meet at St. Vincent's Hospital in Jacksonville. (T.572-76). The last texts from Mr. Sparre to the victim were on July 8 at 5:21 p.m., saying, "don't bother coming," and at 6:14 p.m., saying, "guess you're mad at me." (T.577).

Detectives traveled to Mr. Sparre's home in Waynesville, Georgia on July 14 for an interview. (T.579). They saw a PlayStation 3 on his living room floor. (T.721). He agreed to accompany them to the local Sheriff's Office for an interview that was recorded and played for the jury. (T.586).

Mr. Sparre recognized a picture of the victim and told investigators he met her on Craigslist. (T.594; 596). They met up at St. Vincent's Hospital on July 8 when his grandmother was having a procedure, and they went to the victim's home in her car and had sex. (T.608). Afterwards, she took him back to the hospital (T.598-99), and he had not heard from her since that day. (T.608). Mr. Sparre denied that he had been drinking or had taken any drugs on July 8. (T.599-600). Mr. Sparre gave them the clothes he claimed he was wearing when he was with the victim. (T.644).

Investigators downloaded information from the victim's computer and subpoenaed records from Craigslist. (T.578). She posted on Craigslist on July 1 and Mr. Sparre responded to the post on July 5. (T.579). Investigators recovered video surveillance from St. Vincent's Hospital from July 8 that showed Mr. Sparre and the victim together in the admissions lobby around 2:30 p.m. The video also showed Mr. Sparre again at 5:58 p.m. carrying a large dark-colored shopping bag. (T.726-27). He was wearing different clothing from the clothing he gave to investigators. (T.722).

Based on inconsistencies between Mr. Sparre's statement on July 14 and the phone records and surveillance videos, he was arrested on July 24. (T.816).

Mr. Sparre gave multiple accounts about what happened on July 8 and eventually admitted he killed the victim. He initially told investigators the same thing he had told them in the July 14 interview, that the victim picked him up from the hospital, they went to her home, had sex, and she took him back to the hospital. (T.843-48). He deposited a bag with a gift from the victim in his car in the garage and

returned to his grandmother's room. (T.858). He texted her when he returned to the hospital but she did not answer so he figured she was mad at him. (T.879).

After investigators told Mr. Sparre the phone records, video, and lab records were going to "hang [him] out to dry," he said he left the victim's apartment to get cigarettes and when he returned, there was blood everywhere, and he freaked out and left. (T.913). When investigators did not believe him, Mr. Sparre said he was in the shower and the victim tried to stab him. He freaked out, blacked out, and before he knew what would happen, it was already done. He thought no one would believe it was self-defense, so he wiped everything down. (T.918). He took the victim's PlayStation to a pawn shop in Waynesville. (T.923). He told investigators that his stepdad "beat the fuck out of [him] every day for a year and a half" and that his mom "beat the fuck out of [him]" but his grandma "doesn't touch [him]." (T.933-35).

When investigators told Mr. Sparre the victim was attacked on the bed, not in the bathroom, and that it was not self-defense, he said he did not know why he did it, that he got a really bad headache and did not remember anything from the time he got out of the shower until he got to the car. (T.941; 945). He then told investigators he got out of the shower and grabbed a blue towel out of the closet. He went to the kitchen to get something to drink, and she ran at him, angry. (T.945-47).

When investigators told him that it did not start in the kitchen, Mr. Sparre said he did not know how he got the knife, but he remembered opening the bedroom door and giving the victim a massage on the bed. (T.947-52). He did not remember if he had the knife then and did not remember the actual stabbing. He knew he stabbed

her because when he was done, he freaked out and dropped the knife, and he was "flipping," was "tripping, balling." (T.950-52). He took eight Hydrocodone pills from the victim's purse. When he was asked if he took the pills afterwards, he said, yes, he was tripping out. He did not know why he went through her purse or why he took the PlayStation. He grabbed all the Hydrocodone in the purse and wiped everything off, including the car. He burned the clothes he was wearing in a burn pile at his home. (T.955). He told investigators he learned how to clean up crime scenes from watching C.S.I. on television. Mr. Sparre reiterated that he did not remember stabbing the victim, and doing it did not make him feel good, and he was "freaked out like shit" afterwards. (T.962-63). He also described episodes where "I'll be one place whenever – whenever I just like – and then I'll be another." (T.965).

Mr. Sparre told investigators he did not know why he killed the victim. He did not do it for a thrill or a rush. It was bothering him and he knew law enforcement would be coming eventually. (T.970-72). He also told investigators that his mother abandoned him in a boys' home when he was a child. He had kept it in for a long time and was surprised he told them. "I mean who wants to-who wants to tell somebody that they-(unintelligible)-oh, my mom didn't give a fuck about me and she let her husband-she chose her husband over me, over her own flesh and blood." (T.973).

Investigators recovered denim material from a burn barrel and green and white striped cloth from a burn pile at Mr. Sparre's home. (T.800; 805). They also obtained pawn tickets from a pawn shop in Waynesville, Georgia, where Mr. Sparre pawned a PlayStation 3 and some games. (T.807-08).

Mr. Sparre's girlfriend Ashley Chewning testified that approximately one week after Mr. Sparre's grandmother had surgery in Jacksonville, he told her he killed a black woman at her home in Jacksonville. (T.996). Ms. Chewning did not believe him. (T.996-97). Mr. Sparre told her he stole a PlayStation from the woman he killed. (T.997). Ms. Chewning gave law enforcement a letter he sent on September 26, 2011, where he admitted killing the victim. (T.998).

Dr. Jesse Giles, the medical examiner, testified that the victim's injuries were inconsistent with a frenzy based on the pattern of the blade and the number of wounds. (T.1034-35). Dr. Giles testified many of the wounds have the same pattern, but in other wounds the pattern goes the other direction, which indicated the knife direction changed, the victim moved, or the attacker moved. *Id*. To Dr. Giles, this implied a passage of time between the wounds. (T.1055). He also opined there were too many wounds to have been done in a frenzy. According to Dr. Giles, "[i]t would just tire a person out just trying to do these until they are all done." (T.1034-35).

B. The Defense's Case

The defense theory at trial was that Mr. Sparre killed the victim, but he killed her in a frenzied state and was guilty of the lesser charge of second-degree murder. In opening statements, Mr. Bateh told the jury:

> They're on the bed. They're talking and then something occurs, ladies and gentlemen. The fact that Sparre liked her, didn't like her, that's not the point. What matters is at that moment in time when they were on the bed after the shower Tiara Pool told Sparre who she really was, husband in the military, not separated. Married, not divorced. Kids at grandparent's house. The scene was set up nicely for her. This was not the person Sparre contacted through Craigslist. This is not the person that was spoke to or texted on the phone. This is not the person that he

> drove back to her apartment with. This isn't the person that he just had an intimate relationship with. This is a person that deceived David Sparre as to who she was or what she really wanted. **When he heard this, he snapped. Something in his mind snapped.** He couldn't believe what he just heard. He had been through so much turmoil and so much pain being lied to, neglected, things of that nature, it all came together right then and there.

(T.430-31) (emphasis added). Mr. Bateh asked the jury to find Mr. Sparre guilty of second-degree murder, not first-degree murder. (T.435).

The defense did not call any witnesses or present any evidence, and Mr. Sparre did not testify. (T.1071). Closing argument was the opportunity for the defense to argue evidence from the State's case that supported their theory that Mr. Sparre's past experiences caused him to snap. Mr. Sparre's interrogation video was played for the jury during the State's case-in-chief, and he spoke to law enforcement about his childhood, which was chaotic, abusive, and painful to him. The following facts were in evidence and available for Mr. Perkins to argue in his closing statement:

- The detective who interrogated Mr. Sparre acknowledged the nineteen-year-old had a bad family life. (T.915).
- The victim's children were living with their grandmother. (T.844). Mr. Sparre was also sent away numerous times by his mother to live with his grandmother and other relatives.
- He was raised off and on by his grandmother. (T.933). When he was "off" with grandma, he lived with his mother and stepfather who both physically abused him. (T.934-35).
- Mr. Sparre did not have a relationship with his biological father. (T.938).
- He was a lonely and isolated nineteen-year-old who did not have any friends (T.967), or a real relationship with any of his siblings. He reached out to them to try to be a family, but they rejected him. (T.934).

- His mother sent him off to live in a boys' home to placate his stepfather. This was so painful to him that he does not talk about it. He does not want to tell people that his mother "did not give a fuck" about him. He told the police officers interrogating him because they were actually nice to him. (T.973-74).

- Mr. Sparre told the police officers he suffered from PTSD. (T.971).

This wealth of information was buried throughout Mr. Sparre's interrogation video, which was played during Detective Childers' trial testimony. During cross-examination, Mr. Perkins did not ask Detective Childers any questions about Mr. Sparre's statements. (T.982-93). In fact, trial counsel never explained to the jury—through witnesses, exhibits, or argument—how these statements were relevant, how Mr. Sparre's background impacted him at the time of the offense, and how Mr. Sparre's childhood was directly linked to the defense's theory, as stated to the jury by Mr. Bateh, that Mr. Sparre "snapped" and killed the victim in a frenzied state.

C. Closing arguments and verdict

Instead of discussing the evidence that could give the jury some basis for why Mr. Sparre "snapped" and killed the victim, during closing argument Mr. Perkins maligned, attacked, and blamed the victim:

> Now the prosecutor just asked a few minutes ago why I am asking these questions about the victim, what I am trying to imply. Well, I'll tell you point-blank what I'm trying to imply. I'm trying to imply maybe this woman was bipolar. We know there's bipolar in her family. Mom is bipolar and there was a suggestion that maybe she was, also. It helps you get a better idea as to what kind of person—yes she's dead and we're not challenging that and it's a horrible death. Not anything you would want to wish on anybody or anything, but that comment that the State made, what they want to know and I want you to know is maybe she was bipolar. She has some issues herself. Not saying Sparre doesn't himself, but let's look at what this case is about. (T.1130-31).

So you're going to meet a total stranger on Craigslist and you're going to invite them over to your house. Is that normal? (T.1133).

[Y]ou will see that this lady was posting all the time, texting, day in, day out. You name the hour of the morning she—and these are just the communications she's having with him, not anyone else. These are just the ones between him and her. (T.1134).

It says I'm in love with white men. Don't talk to anything outside of them. Big dicks, and this is what I'm reading, are just a bonus. That's what she said. (T.1134).

[Nichelle Edwards] made it very clear that Ms. Pool preferred white men. She preferred not to date African Americans, not that she never would and never did, and that she told us that Ms. Pool's mom was bipolar. I am not saying Ms. Pool is bipolar herself. Things can be hereditary, ladies and gentlemen. (T.1136).

Now is she bipolar? It ain't for me to say, ladies and gentlemen. (T.1137).

No one else was supposed to be living in the house—[Mr. Pool's] house while he was gone unless maybe his wife's friend who had come in for a few days. He had no idea that his wife had one man living there for several weeks while he was out in Persian Gulf and after that man moved out another guy moved in. That guy has no job, no car, no place to live and he has a dog. Does this woman have problems? You going to move a guy in that has zero going for him and then come to find out, I don't want to do call him trash, but he comes over, he gets a ride with his buddy who's got a little red pick-up truck with piss on Ford sticker and redneck sticker? Something ain't right with this woman. (T.1137).

Her other ads talked about her being a single black female, talked about her being someone who wanted a long-term relationship because she's a black—single black female and it says I love black men. However, I am open to any good man between the age of 32 and 42. Now that is totally inconsistent with her real life because Nichelle Edwards says no, she didn't deal with black men. She preferred white men only. Her husband's white.

****

The other Craigslist ad she talks about a long-term relationship she wants and she had—she tells people I have kids. Yes, I have kids. You have to be cute and she says I'm not racist but please no black men. I'm a white guy type of woman. Now that—that's the real her. That's the

> real her because she's looking for a long-term relationship and she tells them I've got kids.
>
> ****
>
> But then the other Craigslist ad. Hey, I'm new in town. Looking to have some fun. I'm a plus size girl. Now, ladies and gentlemen, you know that is not true. She is 5-foot-3, 111 pounds. She ain't no plus size. She ain't even close. She's misrepresenting in these ads as to who she is and in another one she says I'm short and spunky and 25 years old. She is not 25. She's 21. Again looking for long-term relationship. Is that her? No, it's not her. (T. 1142-43).
>
> In fact, if anyone was a racist it was Ms. Pool herself because of her associations, but that's just my thoughts. (T.1147).

The prosecutor's guilt phase closing argument was peppered with improper statements that were simply intended to inflame the passions and prejudices of the jury, which were not based in evidence or law. These statements include:

> And it would be great if, you know, while a person is killing somebody, while a person is brutally killing a person as he did in this manner they would stop and say, okay, hold on. Write down here why you're doing this. Is this injury enough, ma'am? Are you suffering enough? Are you in pain enough? Are you screaming enough? Are you in pain enough? Are you screaming enough? Okay. I'm going to stop. Okay, Let me write down. I want her to suffer. Okay. Let me go back to stabbing. (T.1088).
>
> Is there any dispute that she wanted to live? That or she gave up and she just said please stab me over and over and over. I'm not enjoying this enough. (T.1102).
>
> Was he just kind of having fun with her? Is he just enjoying—was it just a thrill kill and then he just kind of got a little carried away? (T.1092).
>
> Well, God help the bipolar people because apparently that must be some type of mitigation to be allowed to have your head cut off. (T.1150).
>
> I would submit to you because they're hoping if you think about the fact that Tiara Pool had committed an affair, if you focus on that then maybe you might not focus on the choices he made when he butchered her that day. (T.1151).

Mr. Perkins did not object to any of the prosecutor's inflammatory and prejudicial comments.

After hearing Mr. Perkins's closing argument, during which he maligned the victim without explaining why the element of premeditation was not met or otherwise linking the defense's theory of second-degree murder to the evidence, and after the prosecutor's inflammatory closing argument, intended to ignite the passions and prejudices of the jury, Mr. Sparre's jury immediately retired to deliberate. The jury found Mr. Sparre guilty as charged.

D. The Penalty Phase

At the beginning of the penalty phase, trial counsel informed the court that Mr. Sparre wished to waive the presentation of mitigation testimony. (T.1236). Counsel presented an abbreviated proffer of the mitigation witnesses that were prepared to testify. (T.1236-46).

The court conducted a colloquy under *Koon v. Dugger*, 619 So. 2d 246 (Fla. 2007). Mr. Sparre told the court he was prescribed Thorazine and Celexa but he threw them in the toilet because the medication gave him the shakes. (T.1256). He told the court that those medications were simply sleep aids. (T.1257). Mr. Sparre's attorneys did not request a competency hearing, and neither the court nor counsel expressed any concerns about Mr. Sparre making critical life-or-death decisions during a period when he was not taking his prescribed antipsychotic medication. The court found Mr. Sparre's waiver was knowing, freely, and voluntarily made. (T.1259).

The State and defense waived penalty phase opening statements. (T.1260). The State introduced eight photographs and three victim impact statements. (T.1275-87). Mr. Sparre confirmed he did not want his attorneys to put on any live mitigation testimony and did not testify. (T.1290-91; 1338). However, Mr. Sparre allowed Mr. Eler to deliver a closing argument that argued mitigation from the guilt phase record and asked the jury to spare Mr. Sparre's life. (T.1373).

The advisory jury recommended death by a vote of 12 to 0. (T.1410).

II. THE POSTCONVICTION EVIDENTIARY HEARING

Mr. Sparre asserted numerous postconviction claims based on ineffective assistance of counsel, but the claims relevant to this Petition are claims of ineffective assistance of counsel for failing to consult with and retain a forensic pathologist, failing to utilize and argue evidence that supported the defense strategy of second-degree murder, and failing to object to the prosecutor's improper guilt phase closing argument. He also raised a postconviction claim that *Roper v. Simmons* should be extended to prohibit the execution of a late adolescent, like Mr. Sparre, who was nineteen on the date of the crime. Mr. Sparre also raised a claim that his death sentence is unconstitutional under *Hurst v. Florida* and *Caldwell v. Mississippi.*

A. Ineffective assistance of counsel for failing to conduct a reasonable investigation and consult with/retain a forensic pathologist

Mr. Eler did not consider consulting with or hiring a forensic pathologist to support his defense of second-degree murder. He justified his decision by "concession of guilt, 89 stab wounds, like I just read wasn't a whodunit. I think the only thing to

explore was time of death, but I didn't really see that as significant for the guilt or penalty phase really." (PCR.3564).

At the evidentiary hearing, Mr. Sparre presented the testimony of Dr. John Marraccini, a forensic pathology consultant and family practice physician from Miami, Florida. (PCR.3619). He is board-certified in pathology, clinical pathology and forensic pathology and served as chief medical examiner in Palm Beach County. (PCR.3620). Dr. Marraccini disagreed with Dr. Giles' trial testimony that the changes in the orientation of the knife make the attack inconsistent with a frenzy "because just moving the arm up or down or bending the elbow can change the orientation of the sharp and blunt corners of the skin wound, so if the knife is arcing—held underhand and arcing or even if it's held underhand and arcing then the hole in the skin will change its orientation." (PCR.3624).

According to Dr. Marraccini the attack was consistent with a frenzy because "all these injuries could have been inflicted within two minutes without stopping by an assault who's in an agitated state, especially an individual such—this individual he's young. He's healthy. There's no reason why he could not have completed the assault in a very rapid period of time." (PCR.3624-25).

B. Ineffective assistance of counsel for failing to utilize and argue evidence to the jury that supported the defense of second-degree murder

The defense theory was that Mr. Sparre had snapped when he learned that the victim was a mother who left her children elsewhere, which reminded Mr. Sparre of being constantly abandoned by his mother as a child, and Mr. Sparre acted without

premeditation. (PCR.3427). Mr. Perkins accurately described the defense theory; however, the closing argument as actually presented devolved into a verbal attack on the victim's morals and immodest lifestyle. At the evidentiary hearing, Mr. Perkins could not recall how he prepared for his guilt phase closing argument in Mr. Sparre's trial, but he did describe his general practice for preparing for closing arguments.

> Well, I can't do it until I've heard all the evidence and generally—hopefully there's a major break or break between the—the trial and having time to go through all the notes and sum up everything and do bullet points if I've got the time. Sometimes depends on the case. Certainly a murder case I'm sure there was time to get everything done, go home overnight and come back in the morning. I'm not sure what the circumstances were in this case, but I don't type out a closing argument. I just do bullet points because I know what the facts are, especially if you've been in trial for about a week and I sum it up there. You know what your elements are. You know what you want to talk about. You want to hit some of the high points of the case.

(PCR.3425-26).

Mr. Perkins's approach sounds a lot like "winging it," and that appears to be how he approached his closing argument in Mr. Sparre's trial. Mr. Perkins recalled lots of salacious facts about the victim, but he failed to argue any facts that supported the defense strategy.

Despite his performance at Mr. Sparre's trial, Mr. Perkins also agreed at the evidentiary hearing that it is generally a good idea to discuss a victim of homicide respectfully in front of a jury. (PCR.3429). Mr. Perkins continued to speak negatively of the victim at the evidentiary hearing:

> I'm not sure if we blamed the victim. I mean I don't know you would blame the victim, no, but I'm not sure if we blamed the victim in the crime. We talked about the victim being places—the victim lied about a lot of things because she introduced herself over the internet, whether

> its Craigslist or some other things. I remember specifically one of the things she stated that she was a plus-sized person when she wasn't. She said she was a single black female and she wasn't single because she had two children and her husband's in the Navy if I remember correctly. I want to say if it was three, four, five different social media type ads, whatever she had placed out there were not true representations of what she was, and we did talk about that in trial. But its kind of like she put herself in a bad spot, not saying its her—necessarily her fault that she's dead, but something she said or something she did set him off and because her lifestyle and her activities, you know, and his upbringing and what happened between the two of them . . . .

(PCR.3428).

The only trial strategy was to draw on favorable evidence elicited from cross-examination of the State's witnesses. It should be noted that counsel defaulted to this strategy because they believed the client has ultimate authority over what witnesses to call, and they were limited by Mr. Sparre's desire not to present certain witnesses. As the record shows, however, counsel failed to even execute this second-choice plan.

C. Ineffective assistance of counsel for failing to object to the prosecutor's numerous improper statements during the guilt phase closing arguments

Trial counsel could not give a strategic reason for why no objections were made to the prosecutor's numerous improper statements made during closing arguments. that were simply meant to inflame the passions and prejudices of the jury, and which were not based in evidence or law.

Trial counsel testified that if he felt something was improperly argued he would have objected. (PCR.3526). Counsel could not give a strategic reason for his failure to object to the prosecutor's improper argument that Mr. Sparre enjoyed

killing the victim and sought her out as "easy prey" or his improper statements denigrating the defense. Trial counsel said that he did not feel the need to object. *Id*.

FLORIDA SUPREME COURT'S RULINGS

Regarding Mr. Sparre's claim that trial counsel was ineffective for failing to consult with and retain a forensic pathologist to testify in support of the theory that Mr. Sparre killed the victim in a frenzied state, the Florida Supreme Court affirmed the circuit court's denial of this claim because "competent, substantial evidence supports the circuit court's finding that trial counsel's decision was the result of reasonable trial strategy." *Id*. at 849.

As to Mr. Sparre's claim that trial counsel was ineffective for extensively attacking the victim during closing argument and for failing to explain how the evidence supported Mr. Sparre's defense that he "snapped" and committed the killing in a frenzy, the Florida Supreme Court agreed that trial counsel was deficient but affirmed the circuit court's denial of relief because Mr. Sparre had not established prejudice. *Id*. at 850.

Regarding Mr. Sparre's claim that trial counsel was ineffective for failing to object to several improper comments by the prosecutor during his guilt phase closing arguments, the Florida Supreme Court disagreed with the circuit court's ruling that trial counsel was not deficient for failing to object to the prosecutor's guilt phase closing argument that "crossed the line into misrepresenting and then mocking Sparre's defense by, for example, suggesting that Sparre's rebuttal to the premeditation of the first-degree element was a claim that he was 'kind of just having

fun with her' and was just committing a 'thrill kill and then he just kind of got carried away' and the "the knife just kept slipping.'" *Id*. at 852. The Florida Supreme Court still affirmed the circuit court's denial of relief because the court found Mr. Sparre could not establish prejudice. *Id*. at 853.

Regarding Mr. Sparre's claim that *Roper v. Simmons* should be extended to prohibit Mr. Sparre's execution, the Florida Supreme Court relied on its precedent in *Branch v. State*, 236 So. 3d 981, 987 (Fla. 2018), in which the court held that "unless the United States Supreme Court determines the age of ineligibility for the death penalty should be extended, we will continue to adhere to *Roper*." *Sparre v. State,* 289 So. 3d at 853.

Regarding Mr. Sparre's claim that Mr. Sparre's death sentence is unconstitutional under *Hurst v. Florida* and *Caldwell v. Mississippi*, the court held its precedent foreclosed relief. *Sparre v. State*, 289 So. 3d at 853.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE ISSUES SURROUNDING TRIAL COUNSEL'S FAILURE TO INVESTIGATE, PREPARE AND EXECUTE THE DEFENSE STRATEGY AT MR. SPARRE'S CAPITAL TRIAL

In concluding that there was no cumulative error, the Florida Supreme Court conducted an improper prejudice analysis which overlooked the impact of Mr. Perkins' deficient performance in conjunction with the prosecutor's statements which capitalized on the Defense's inadequate and inflammatory closing argument. Mr. Sparre agreed to pursue a defense strategy that he killed the victim in a frenzied state and was guilty of second-degree murder, not first-degree murder as charged.

Defense counsel did not retain a forensic pathologist or take any other proactive measure to support Mr. Sparre's defense, so it was absolutely critical for Mr. Perkins to argue evidence admitted during the State's case-in-chief that supported Mr. Sparre's defense, and for counsel to hold the prosecutor to task to deliver a proper closing argument that did not step outside the bounds of the law or ethics.

Unfortunately, Mr. Perkins made no meaningful argument to support Mr. Sparre's defense. The Florida Supreme Court's prejudice analysis under *Strickland v. Washington*, 466 U.S. 668 (1984), overlooks that Mr. Sparre's trial team failed to investigate and subject the State's guilt phase case to any adversarial testing. The only strategy was to draw on the evidence elicited from the State's witnesses (a strategy which was chosen by default). Mr. Sparre's counsel then failed to do anything to execute this trial strategy, and Mr. Perkins wasted their only shot to argue the evidence from the State's case-in-chief that supported their defense. *See Herring v. New York*, 422 U.S. 853, 862 (1975) ([F]or the defense, closing argument is the last clear chance to persuade the trier of fact . . . . [N]o aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."). The Florida Supreme Court takes the position that if the trial record includes *some* evidence of Mr. Sparre's guilt, notwithstanding counsel's abysmal performance, that it is acceptable to disregard the degree to which the verdict itself was a product of the deficient performance. The *Strickland* court surely did not envision a system of justice where "he is guilty

anyway" justifies the violation of an individual's Sixth Amendment right to competent counsel, especially when the penalty is death.

Prejudice cannot be assessed fairly without assessing the totality of counsel's performance and the cumulative effect of the deficient performance. It is unreasonable for the Florida Supreme Court to conclude the jury's guilt phase deliberations were not affected by counsel's misconduct, or that a reasonable juror who was presented with an effective defense closing argument that discussed the facts in evidence supporting the defense theory, and a prosecutor who played fair and did not cross the line into seeking victory at all costs, could not have concluded that Mr. Sparre was guilty of second-degree murder. As this Court noted in *Buck v. Davis*, "[s]ome toxins can be deadly in small doses." 580 U.S. __ (2017).

II. THIS COURT SHOULD EXERCISE JURISDICTION OVER MR. SPARRE'S *ROPER* CLAIM

This Court has jurisdiction to grant a writ of certiorari here. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court held that when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of the any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-41. Here, although the Florida Supreme Court's decision includes a state-law procedural bar discussion, the decision rests primarily on the Florida Supreme Court's view of federal constitutional law, or at least is interwoven with federal law.

The Florida Supreme Court based the denial of Mr. Sparre's *Roper* claim on its prior precedent, *Branch v. State*, 236 So. 3d 981, 987 (Fla. 2018). *Sparre v. State,* 289 So. 3d at 853. There are clear indications in the Florida Supreme Court's opinion in *Branch* that the state court would afford Mr. Branch relief if it did not feel bound by its view of this Court's current Eighth Amendment jurisprudence. *See Branch v. State*, 236 So. 3d at 987 (explaining that the Florida Supreme Court "will continue to adhere to *Roper*" unless this Court expands the protections of *Roper*). In sum, the Florida Supreme Court declined to grant relief in *Sparre* because of its understanding of this Court's Eighth Amendment precedent.[3]

"The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction." *Caldwell v. Mississippi*, 472 U.S. 320 (1988). Here, the Florida Supreme Court's decision does not prevent this Court from granting a writ of certiorari and deciding the question presented by this petition. This Court has jurisdiction.

[3] This same approach is found in other decisions of the Florida Supreme Court articulating its view of the merits of *Roper* arguments while referencing state procedural law. This further highlights that state law procedural considerations would be inapplicable if this Court were to refine its Eighth Amendment jurisprudence. *See, e.g.*, *Davis v. State*, 142 So. 3d 867 (Fla. 2014); *Carroll v. State*, 114 So. 3d 883 (Fla. 2013); *Barwick v. State*, 88 SO. 3d 845 (Fla. 2011); *Morton v. State*, 995 So. 2d 233 (Fla. 2008); *Farina v. State*, 937 So. 2d 612 (Fla. 2006).

III. THIS COURT SHOULD CONSIDER WHETHER THE AGE CUTOFF ESTABLISHED IN *ROPER V. SIMMONS* IS CONSISTENT WITH THE MODERN SCIENTIFIC CONSENSUS REGARDING LATE ADOLESCENT BRAIN DEVELOPMENT

A. *Roper* prohibited the death penalty for juveniles under eighteen because they differ from adults in three distinct way relevant to sentencing determinations, all of which apply to Petitioner.

The Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002); *see also Enmund v. Florida*, 458 U.S. 782, 788 (1982). "Capital punishment must be limited to those offenders who commit a 'narrow category of the most serious crimes' and who extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 554, 568 (2005) (quoting *Atkins*, 536 U.S. at 319).

Based on findings from the medical and scientific community, this Court held in *Roper* that it is cruel and unusual punishment to impose death sentences on juveniles under eighteen. Given the information then available, this Court's cutoff at eighteen made sense at that time. However, as Dr. Laurence Steinberg and Dr. Elizabeth Scott, leading researchers in the field, have explained, at the time of the Court's decision in *Roper*, researchers understood "[y]oung adults between the ages of eighteen and twenty-one constitute a less well-defined category." *See* Elizabeth S. Scott, Richard J. Bonnie, & Laurence Steinberg, *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 643 (2016) (hereinafter "*Young Adulthood*"). While the beginnings of the idea previously existed that "psychological and neurobiological development that

characterizes adolescence continues into the midtwenties, [] the research [had] not yet produced a robust understanding of maturation in young adults age eighteen to twenty-one." *Id*. at 653. After *Roper*, mental health professionals turned their attention to older adolescents, like Mr. Sparre, and found that many of the traits possessed by juveniles under eighteen—traits that make them ineligible for the death penalty—are possessed by older adolescents in their late teens and early twenties.

The scientific studies available to this Court fifteen years ago showed that the behavioral and decision-making abilities of juveniles were affected in three main areas relevant to criminal sentencing: (1) immaturity and a lack of responsibility leading to greater impetuousness and ill-considered decisions; (2) increased susceptibility to negative influences and peer pressure and a lesser ability to control their environment; and (3) transitory personality traits making the character of a juvenile less fixed. *Id*. at 569-70; *see also Miller v. Alabama*, 567 U.S. 460, 472 (2012) (observing that the lack of brain development in juveniles causes "transient rashness, proclivity for risk, and inability to access consequences").

Because of these considerations, imposing death sentences on juveniles failed to accomplish the constitutionally permissible aims of capital punishment: retribution and deterrence. *See, e.g., Kennedy v. Louisiana*, 554 U.S 407, 520 (2008); *see also Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (noting that a death sentence must serve the "two principal social purposes" of retribution and deterrence). It is not enough to meet just one of these goals, as "[a] punishment might fail the test on either ground." *Kennedy*, 554 U.S. at 441 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

Retribution is unconstitutionally excessive where "the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Because of their immaturity, susceptibility, and transitory personalities, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id*. at 569. Nor does deterrence apply:

> The same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.

Id. at 571. *Roper* therefore approved a constitutional prohibition at age eighteen. But even then, this Court acknowledged that the "qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen." *Roper*, 543 U.S. at 574. In the 15 years since this Court decided *Roper*, the scientific and medical community has greatly expanded the relevant research. The scientific consensus today is that the same considerations that led to *Roper* apply to the late adolescence stage. As a result, a number of courts and legislatures today recognize that late adolescents—like juveniles—need protection and special treatment.

B. Current research in adolescent brain development since *Roper* establishes that late adolescents resemble juveniles under eighteen in ways relevant to the Eighth Amendment

While previous studies focused on brain development in juveniles under eighteen, since *Roper* researchers have increasingly examined youths in their late teens and early twenties. This research shows that people in this age group bear a

strong resemblance to juveniles under eighteen when it comes to their decision-making and behavioral abilities.

Medical science now understands that the primary reason late adolescents resemble juveniles when it comes to decision-making and behavior is that the frontal lobes, "home to key components of the neural circuitry underlying 'executive functions' such as planning, working memory, and impulse control, are among the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life." Sara Johnson, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolesc. Health 216, 216 (2009). The prefrontal lobe and the cerebellum, the regions "involved in emotional control and higher-order cognitive function," are also still developing during late adolescence. Robin Martantz Henig, *Why Are So Many People in their 20s Taking so Long to Grow Up?*, N.Y. Times (Aug. 18, 2010).

This continued development affects the behavior of late adolescents in the three areas this Court described in *Roper*. First, late adolescents are still immature and impulsive. *See Roper*, 543 U.S. at 569. This is because the prefrontal cortex is one of the last areas of the brain to mature. This part of the brain is "responsible for the complex processing of information, ranging from making judgments, to controlling impulses, foreseeing consequences, and setting goals and plans. An immature prefrontal cortex is thought to be the neurobiological explanation for why [young people] show poor judgment and too often act before they think." Ken C. Winter,

Adolescent Brain Development and Drug Use, Treatment Research Inst., at 2 (2004) (hereinafter "*Adolescent Brain Development*").

Consequently, late adolescents, like Mr. Sparre, engage in more risk-seeking behavior. Research has found that "an immature nucleus accumbens increase the [] tendency to seek out activities that are exciting but require little effort." *Id*. at 2.

In fact, older adolescents are especially prone to risky behaviors. *See* Alexandra O. Cohen, et. Al, *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 Psych. Sci 549, 549 (2016). Rather than decreasing at age eighteen, the desire to seek risk actually *increases* between the ages of eighteen and twenty-one before starting to taper off later. So, "individuals in the young adult period (*i.e.* ages eighteen-twenty-one)" are even more likely to engage in risky behavior than younger adolescents. *See* M.D. Rudolph, *At Risk of Being Risky: The Relationship Between 'Brain Age' under Emotional States and Risk Preference*, 24 Dev. Cognitive Neurosci. 93, 102 (2017). Older adolescents are even more prone than their younger counterparts to "act before they think." *Adolescent Brain Development*, at 2. The National Institute of Medicine reported in 2015 that "young adults (aged eighteen to twenty-four) experience higher rates of morbidity and mortality than either adolescents or older adults from a wide variety of preventable causes, including automobile crashes, physical assaults, gun violence, sexually transmitted diseases, and substance abuse." *Young Adulthood*, at 645-46.

This risk-seeking behavior also supports the second difference between older and fully matured adults. Multiple studies have found that especially through age

twenty-two, adolescents are still motivated by what their peers think of them. In general, people take "more risks, focus[] more on the benefits than the costs of risky behavior, and ma[k]e riskier decisions when in peer groups than alone." Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 589, 625 (2005). The continued susceptibility to peer pressure in adolescents in their late teens and early twenties explains activities such as hazing and binge drinking on college campuses, which are populated by students in this age range.[4]

Finally, personality traits are just as transient in late adolescents as they are in juveniles. The personality or character of late adolescents are not yet formed:

> The major developmental tasks of adolescence are to create a stable and secure identity and begin the process of becoming a complete and productive adult. As the understanding of complex transition from adolescence to adulthood has deepened, there continues to be general consensus about these developmental tasks—coupled with an understanding that they now take longer to achieve.

Madelyn Freundlich, *The Adolescent Brain: New Research and its Implications for Young People Transitioning from Foster Care*, Jim Casey Youth Opportunities Initiative, at 17 (2011) (footnotes omitted). Immature and impulsive personality

---

[4] *See, e.g.*, Brian Borsari, Kate B. Carey, *How the Quality of Peer Relationships Influences College Alcohol Use*, 25 Drug Alcohol Rev. 361, 361 (2006); Erik Ortiz, Bernie Lubell, *Penn State Fraternity Death: Why Did No One Call 911 after Pledge Timothy Piazza got Hurt?*, NBC News (May 9, 2017), *available at* https://www.nbcnews.com/news/us-news/penn-state-fraternity-death-why-did-no-one-call-911-n756951.

traits dissipate as a person lives through his or her twenties. *See, e.g.*, *Risk Taking in Adolescence*, at 57.

Based on these findings, the scientific community has recognized that older adolescents are similar to juvenile peers in ways relevant to the criminal justice system. Dr. Laurence Steinberg and Dr. Elizabeth Scott, whose research was extensively relied upon by this Court in *Roper*, *Miller*, and *Graham*, recently concluded that today's "research supports a regime that recognizes that young adults as a transitional category between juveniles and older adult offenders." *Young Adulthood*, at 644.

C. Society treats adolescents under the age of twenty-one like teenagers

Under our current Eighth Amendment precedent, we allow eighteen year olds to be executed, but we also have laws and regulations that limit their ability to do "adult" things, because as any parent of an older adolescent will tell you, brain development is not complete by age eighteen.

> For example, all 50 states and the District of Columbia impose a minimum age restriction of twenty-one years for the consumption, purchase, or possession of alcohol, while many impose a similar restriction for recreational marijuana. Over 530 cities and counties in 31 states now prohibit the sale of tobacco to people under twenty-one, and in May 2019, Senators Mitch McConnell and Tim Kaine introduced a bipartisan bill that would federalize the prohibition on tobacco sales to people under twenty-one. Forty-one states impose a minimum age of twenty-one to obtain a concealed carry permit for firearms, and federal law prohibits licensed gun dealers from selling handguns and ammunition to people under the age of twenty-one. Federal immigration law permits a parent of a U.S. citizen to petition for an immigrant visa for any unmarried children under the age of twenty-one, but a child can only petition for an immigrant visa for his or her parents if the child is at least twenty-one.

> Further recognizing brain development continues into the twenties, most rental car companies will not rent to drivers under the age of twenty-one and apply added fees for drivers under the age of twenty-five. The Affordable Care act authorizes children to stay on their parents' health insurance plans until age twenty-six. State and federal laws impose categorical age-of-candidacy requirements for individuals seeking public office. For example, the U.S. Constitution prohibits individuals under the age of twenty-five from running for the House of Representatives, and twenty-seven states prohibit individuals from running for lower-house office before the age of twenty-one.

John H. Blume, Hannah L. Freeman, Lindsay S. Vann, & Amelia Courtney Hritz, *Death by Numbers: Why Evolving Standards Compel Extending* Roper's *Categorical Ban Against Executing Juveniles From 18 to 21*, Texas Law Review, Vol. 98:921, 935-36 (2020). It is time for our Eighth Amendment jurisprudence regarding capital punishment to catch up with the rest of American society.

D. Other changes in the criminal justice system reflect the understanding that late adolescents are different from fully matured adults

Examples from the American criminal justice system today reflect an understanding that late adolescents are more akin to teenagers than to adults in ways relevant to sentencing and punishment. When considering the excessiveness of a punishment, this Court looks to these types of "objective indicia" that a punishment is becoming disfavored in society. *Roper*, 543 U.S. at 609. There is a growing disfavor of executing individuals who were in late adolescence at the time of their offense.

On February 5, 2018, the American Bar Association House of Delegate passed a resolution calling for jurisdictions still practicing capital punishment to prohibit death sentences for defendants under the age of twenty-one at the time of their

offenses. App. 036. This decision was supported by "a growing medical consensus that key areas of the brain relevant to decision-making and judgment continue to develop into the early twenties." App. 037.

Some rulings have accepted that eighteen is no longer an appropriate cutoff for "adulthood" in the death penalty context. In *Commonwealth v. Bredhold*, a Kentucky circuit court ruled that the death penalty is unconstitutional for defendants under twenty-one. *Commonwealth v. Bredhold*, No. 14-CR-161, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional (Fayette Circuit Court, Aug. 1, 2017) (Scorsone, J.)[5]. This decision was based largely on expert testimony explaining that the lack of brain development in late adolescents affects them in ways similar to juveniles under eighteen. *Id.*; *see also Commonwealth v. Diaz*, No. 15-CR-584-001, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional (Fayette Circuit Court, 7th Div. Sept. 6, 2017) (Scorsone, J.) (same).

Other areas of the criminal justice system similarly no longer treat eighteen as the line between adolescence and adulthood. In *State v. Norris*, a New Jersey court ordered resentencing for a defendant who was twenty-one at the time of the offense and had received a 75-year sentence for murder and attempted murder. *State v. Norris*, No. A-3008-15T4, 2017 WL 2062145 (N.J. Super Ct. App. Div. May 15, 2017). The court's decision was based in part on "the United States Supreme Court's recognition of 'the mitigating qualities of youth' and the need for courts to consider at

[5] *See Commonwealth v. Brehold*, 599 S.W.3d 409 (Ky. 2020) (vacated on other grounds).

sentencing a youthful offender's 'failure to appreciate risks and consequences' as well as other factors often peculiar to young offenders." *Id*. at *5 (quoting *Miller*, 567 U.S. at 476-77). The District Court of Connecticut granted a hearing to a defendant who was eighteen at the time of his crime to "present evidence, both scientific and societal" to show whether his sentence of life without parole was unconstitutional. *Cruz v. United States*, No. 11-CV-878, 2017 WL 3638176, at *10 (D. Conn. Apr. 3, 2017). The Supreme Court of Washington remanded a case for resentencing after the trial court declined to consider late adolescence as a factor in non-capital sentencing because "studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *State v. O'Dell*, 358 P.3d 359, 365 (Wash. 2015). The Illinois Court of Appeals has also applied the protections of *Roper* and *Miller* to nineteen-year-old defendants. *See People v. Harris*, 70 N.E. 3d 718 (Ill. App. Ct. 2016); *People v. House*, 72 N.E. 3d 357, 388 (Ill. App. Ct. 2015).

Given the better scientific understanding of human brain development since *Roper* and society's shifting views of late adolescents, the *Roper* cutoff at eighteen "disregard[s] . . . current medical standards." *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017). In the capital punishment context, consideration of new scientific findings and the consensus of the medical community supplements judicial understanding of Eighth Amendment excessiveness. Today's science teaches that the age eighteen cutoff creates an unacceptable risk that the death penalty will be imposed against those who lack the requisite culpability. The failure to recognize that late adolescents

are more like juveniles than they are like adults for purposes of capital sentencing disregards the reality described by the scientific community today. This Court should review whether the death sentence of Mr. Sparre, a late adolescent at the time of the offense, creates an "unacceptable risk" that a youth who is not sufficiently morally culpable may be executed in violation of the Eighth Amendment.

IV. MR. SPARRE'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST* AND *CALDWELL*

Mr. Sparre's death sentence was obtained in violation of the United States Constitution for the reasons described in *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hurst*, this Court held that Florida's capital sentencing scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. *Id.* at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation.

Mr. Sparre's advisory jury unanimously recommended death, but made none of the findings of fact required for a death sentence under Florida law. Mr. Sparre's trial judge made the required state-law findings: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify death; and (3) whether the aggravators were outweighed by the mitigation. *See* Fla. Stat. 921.141(3); *see also Hurst*, 136 S. Ct. at 623.

The only issue here is whether the *Hurst* error was "harmless." This Court has explained that constitutional errors may only be deemed harmless where there is no

reasonable possibility that they contributed to the result. *See Chapman v. California*, 386 U.S. 18, 21 (1967). Harmless error review must also include consideration of the entire record. *See, e.g.*, *Rose v. Clark*, 478 U.S. 570, 583 (1986). Here, the whole record reveals a possibility that the *Hurst* error at Mr. Sparre's sentencing contributed to his death sentence. An average rational jury instructed in compliance with *Hurst* and the Sixth Amendment could have voted for a life sentence in Mr. Sparre's case.

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact take on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence is rested elsewhere). The jury's role was diminished when the court instructed that the jury's role was advisory and that the judge would ultimately determine the sentence. In addition, the prosecutor repeatedly emphasized to the jury that the judge "is the one that actually imposes the sentence." (T.192, 193, 217, 218, 219, 222-23, 233).

Trial counsel also consistently diminished the jury's role in sentencing. Counsel minimized "the jury's sense of responsibility for determining the appropriateness of death" in violation of the Eighth Amendment. *Caldwell*, 472 U.S. at 341. During voir dire, trial counsel stated, "the Judge sentences defendants in penalty phases." (T.297). Trial counsel continued to refer to the jury's penalty phase verdict as simply a "recommendation" on approximately twenty other occasions. (T.297, 298, 300-01, 304, 305, 306, 307, 311-12, 314, 319, 323). This point was not lost

on the jury. During voir dire, one juror stated, "I thought the state representative had said that no matter what we say in the second section that, of course, the Judge makes the ultimate decision on that." (T.302).

At least three Justice of the United States Supreme Court have urged this Court to revisit the state's decisional law on *Caldwell*, particularly in light of *Hurst*. *See, e.g.*, *Guardado v. Jones*, 138 S. Ct. 1131 (2017) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from the denial of certiorari); *Reynolds v. Florida*, 139 S. Ct. 27, 32-36 (2018) (Sotomayor, J., dissenting from the denial of certiorari).

Mr. Sparre's advisory jurors were led to believe their role in sentencing was diminished when the jurors were repeatedly instructed that their recommendation was advisory and the final sentencing decision rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for imposing Mr. Sparre's death sentence, the Florida Supreme Court's per se harmless error rule cannot be squared with the Eighth Amendment. Under *Caldwell*, no court can be certain beyond a reasonable doubt that a jury would have made the same unanimous *recommendation* absent the *Hurst* error, let alone that a jury that properly grasped its critical role in determining a death sentence would have unanimously found all of the elements for the death penalty satisfied.

Furthermore, a finding of harmlessness based solely on the advisory jury's recommendation ignores the Supreme Court's explicit statement that the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S. Ct. at 622. However, this is precisely what occurred on review here: the advisory jury's recommendation was retroactively transformed into a dispositive factual finding.

The Florida Supreme Court's per se harmless error rule cannot ensure that a jury with full awareness of the gravity of its role in the sentencing process would have unanimously found or rejected any specific aggravators or mitigators. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same). In this case, the Florida Supreme Court engaged in no semblance of individualized review: it merely noted that Mr. Sparre's *Hurst* claim was foreclosed, citing to case law which indicated the court was referring to the jury's recommendation. The court's failure to consider Mr. Sparre's mitigation in its harmless-error analysis is also inconsistent with *Parker v. Dugger*, where this Court rejected the Florida Supreme Court's cursory harmless-error analysis in a jury-override case. 498 U.S. 308, 319-20 (1991).

In light of *Caldwell* and *Hurst*, Mr. Sparre's death sentence is unconstitutional and should be vacated.

CONCLUSION

Petitioner, David Kelsey Sparre, requests that certiorari review be granted.

Respectfully submitted,

/s/ Stacy Biggart
STACY BIGGART - *Counsel of record*
CANDACE RECHTMANN
Capital Collateral Regional Counsel – Northern Region
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Stacy.Biggart@ccrc-north.org
Candace.Rechtmann@ccrc-north.org

JULY 2020