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

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PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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EXHIBIT 1

Supreme Court of Florida

No. SC18-1192

DAVID KELSEY SPARRE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC19-389

DAVID KELSEY SPARRE,
Petitioner,

vs.

MARK S. INCH, etc.,
Respondent.

December 19, 2019

PER CURIAM.

David Kelsey Sparre appeals the denial of his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus. We

have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons below, we affirm the denial of Sparre's postconviction motion and deny his habeas petition.

I. BACKGROUND

The facts of Sparre's case were fully set out in this Court's decision on direct appeal. *See Sparre v. State*, 164 So. 3d 1183, 1186-88 (Fla. 2015). In summary, after meeting Tiara Pool on Craigslist, Sparre stabbed her to death in her Jacksonville apartment and stole several items of her property, including her car. *Id.* at 1186-87. At trial, the State argued that Sparre committed first-degree murder under both premeditated and felony murder theories, with burglary as the underlying felony. Sparre conceded that he killed the victim but argued that he had "no prior plan to murder" her and thus had not committed premeditated murder, *id.* at 1189, and he further argued that he had not committed the underlying burglary.

In addition to Sparre's concession to killing the victim, both through his trial counsel and through the admission of Sparre's video-recorded interview with law enforcement during which Sparre admitted to killing the victim with her kitchen knife, *id.* at 1188, the evidence presented to Sparre's guilt-phase jury included testimony from Sparre's former girlfriend that "prior to his arrest Sparre had confessed to her that he had killed a black woman in the victim's Jacksonville apartment," *id.* at 1189; testimony from the medical examiner that the victim "was alive and conscious through at least 88 sharp-force injuries, which included thirty-

nine defensive wounds," *id.* at 1187; testimony from law enforcement "that the crime scene was 'cleaned' to such an extent that virtually no evidence of [the victim's] assailant was recoverable," *id.*; testimony from a DNA expert that although "he was able to rule out ninety-nine percent of the world's population . . . Sparre and [the victim] were possible contributors to the mixture of DNA material found on the murder weapon," *id.*; and testimony that several items of the victim's property were missing, *id.* After hearing the evidence presented at trial, Sparre's jury found him guilty of first-degree murder, finding both that the killing was premeditated and that it was done during the commission of a felony, namely burglary. *Id.* at 1189.[1]

During the penalty phase, Sparre waived the presentation of substantial mitigation evidence proffered by his defense counsel, and Sparre's jury unanimously recommended a death sentence. *Id.* at 1189-91. After holding a *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), hearing, at which Sparre again waived the presentation of substantial mitigation proffered by defense counsel, the trial court followed the jury's recommendation and sentenced Sparre to death. 164

1. In finding Sparre guilty of first-degree murder, Sparre's jury further found that Sparre carried, displayed, used, threatened to use, or attempted to use a weapon. *Sparre*, 164 So. 3d at 1189.

So. 3d at 1191-93.[2] We affirmed Sparre's conviction and sentence on direct appeal. *Id.* at 1202.[3]

Thereafter, Sparre filed the motion for postconviction relief at issue in this appeal. Following an evidentiary hearing on some of the claims, the circuit court entered an order denying relief as to all claims. Sparre appeals the circuit court's

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2. "The trial court found two aggravating circumstances to which both were assigned great weight: (1) HAC; and (2) the murder was committed during the course of a burglary." *Sparre*, 164 So. 3d at 1192. The trial court found and assigned moderate weight to the statutory mitigating circumstance that "Sparre was nineteen years old at the time of the murder" and also found and assigned weight to thirteen nonstatutory mitigating circumstances as follows: "(1) Sparre accepts responsibility for his actions (little weight); (2) Sparre has been neglected (some weight); (3) Sparre suffers from emotional deprivation and was emotionally abused (some weight); (4) Sparre was physically abused by his step-father and mother (some weight); (5) Sparre lacks a good support system (some weight); (6) Sparre's father was absent from his life (some weight); (7) Sparre is good at fixing things (slight weight); (8) Sparre dropped out of high school but obtained a GED (little weight); (9) Sparre participated in ROTC in high school and was in the U.S. military (slight weight); (10) Sparre is devoted to his grandmother (little weight); (11) Sparre has a child (some weight); (12) Sparre loves his family (some weight); and (13) Sparre's family loves him (some weight)." *Id.* at 1192-93 & n.9.

3. Sparre raised the following claims on direct appeal: (1) "the trial court erred by not calling its own witnesses who potentially had knowledge of mitigating factors against the imposition of the death penalty"; (2) this Court should recede from *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), which "subjects a trial court's judgment about whether to call its own mitigation witnesses or appoint special mitigation counsel to an abuse of discretion standard on review," *Sparre*, 164 So. 3d at 1199; and (3) Sparre's sentence of death violates *Ring v. Arizona*, 536 U.S. 584 (2002). 164 So. 3d at 1185-86, 1199. This Court also reviewed the sufficiency of the evidence supporting Sparre's conviction for first-degree murder under both premeditated and felony murder theories and the proportionality of his death sentence. *Id.* at 1200-02.

denial of his postconviction motion and also petitions this Court for a writ of habeas corpus.

II. POSTCONVICTION APPEAL

A. Ineffective Assistance of Trial Counsel

Sparre first argues that trial counsel was ineffective (1) for failing to request a continuance to investigate Sparre's competency to waive the presentation of mitigation to his penalty-phase jury; (2) for failing to file the defense sentencing memorandum with the clerk of court; (3) for failing to impeach the trial testimony of the medical examiner with his deposition testimony; (4) for failing to consult with and retain a forensic pathologist; (5) for extensively attacking the victim during closing argument and for failing to explain how the evidence supported Sparre's defense that he "snapped" and committed the killing in a frenzy, rather than with premeditation; and (6) for failing to object to improper statements by the prosecutor during the guilt- and penalty-phase closing arguments. Sparre further argues that the cumulative effect of trial counsel's errors entitles him to relief.

To prove a claim of ineffective assistance of counsel, a defendant must establish two prongs, deficient performance and prejudice, both of which are mixed questions of law and fact:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must

> show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also Bolin v. State*, 41 So. 3d 151, 155 (Fla. 2010).

Regarding deficiency, there is a strong presumption that trial counsel's performance was not ineffective but rather was sound trial strategy, and the defendant bears the burden to overcome it. *Strickland*, 466 U.S. at 690. A court must consider "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Darling v. State*, 966 So. 2d 366, 382 (Fla. 2007) (quoting *Howell v. State*, 877 So. 2d 697, 703 (Fla. 2004)).

Regarding the prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The postconviction court's factual findings are reviewed for competent, substantial evidence, while its legal conclusions are reviewed de novo. *Bolin*, 41 So. 3d at 155. Further, "because the *Strickland* standard requires establishment of

both prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." *Waterhouse v. State*, 792 So. 2d 1176, 1182 (Fla. 2001). Where trial counsel is deficient in more than one area, however, we must "consider the impact of these errors cumulatively to determine whether [the defendant] has established prejudice." *Parker v. State*, 89 So. 3d 844, 867 (Fla. 2011).

(1) Continuance

Sparre first argues that trial counsel was ineffective for failing to request a continuance to investigate Sparre's competency to waive the presentation of mitigation to his penalty-phase jury after Sparre disclosed that he had stopped taking his prescribed antipsychotic medication. We affirm the denial of this claim.

Although due process requires that a criminal defendant be competent to proceed at every material stage of a criminal proceeding, *see generally Caraballo v. State*, 39 So. 3d 1234, 1252 (Fla. 2010), "not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges," *Card v. Singletary*, 981 F.2d 481, 487 (11th Cir. 1992) (quoting *United States ex rel. Foster v. De Robertis*, 741 F. 2d 1007, 1012 (7th Cir. 1984)). In Sparre's case, competent, substantial evidence supports the circuit court's finding that trial counsel was not deficient.

This evidence includes the trial court's finding, during the penalty-phase waiver colloquy at which Sparre disclosed his medication stoppage, that Sparre was "lucid" and "answered appropriately" when questioned about his desire to waive mitigation. It also includes statements by trial counsel immediately prior to the colloquy that counsel had "no reason to believe that there's any incompetency issue" and that Sparre had "responded properly to questions" posed by his defense team and "articulated certain ideas for argument," but had elected to waive mitigation against the advice of counsel.[4]

Trial counsel's testimony from the postconviction evidentiary hearing also supports the circuit court's finding that trial counsel was not deficient. This includes testimony that the defense team had no concerns about Sparre's competency or any questions as to whether Sparre was validly waiving the presentation of mitigation. To the contrary, trial counsel testified that Sparre "was adamant" about not wanting mitigation presented on his behalf from the early stages of the case, when he was taking his medication, meaning that Sparre's desire to waive "wasn't last-minute," and that "it seemed as if [Sparre] was making a

4. Similarly, in finding that Sparre had validly waived mitigation during the *Spencer* hearing, the record shows that the trial court found that Sparre looked alert and that nothing appeared to be impacting his ability to understand or to make a decision.

conscious decision that he wanted . . . the jury recommendation to come back death."

Moreover, the "doubts" as to Sparre's competency raised by Sparre's postconviction expert, Dr. Harry Krop, were based on Sparre's diagnosed psychosis and Sparre's self-reporting that he had stopped taking the medication prescribed to treat it. However, Dr. Krop acknowledged that, based on Sparre's jail records and spotty medication-compliance history, it would be difficult to state definitively whether Sparre was medicated on the day he waived mitigation. Dr. Krop also testified that he was concerned—based on Sparre's prior self-reporting of hearing the voice of someone named "Tommy"—by Sparre's statement during the waiver colloquy that Sparre had discussed the waiver with himself in addition to discussing it with his defense team. However, nothing in the record indicates that Sparre equates himself with "Tommy" (rather, Dr. Krop testified that Sparre refers to "Tommy" as his "friend"), that Sparre was hearing "Tommy's" voice at the time of his waiver, or that "Tommy" had pressured Sparre to waive mitigation. To the contrary, the jail records from the day after the penalty-phase mitigation waiver indicate that Sparre was not experiencing hallucinations.

Accordingly, because competent, substantial evidence supports the circuit court's finding that, under the totality of the circumstances of this case, a reasonable trial counsel would not have had a reasonable ground to believe that

Sparre was incompetent, we affirm the circuit court's denial of relief. *See Brown v. State*, 258 So. 3d 1201, 1206 (Fla. 2018) ("As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' ") (quoting *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997))).

(2) Sentencing Memorandum

Sparre next argues that trial counsel was ineffective for failing to file the defense sentencing memorandum with the clerk of court to preserve mitigating evidence for Sparre's direct appeal. This claim, which was not included in Sparre's postconviction motion, is not properly before this Court on appeal. *See State v. Morrison*, 236 So. 3d 204, 223 (Fla. 2017) (holding claim not raised in postconviction motion procedurally barred). Moreover, because trial counsel filed the memorandum with the trial judge and because it is appellate counsel's duty to ensure that the record on appeal is complete, *see* Fla. R. App. P. 9.200(e), the crux of this claim is ineffective assistance of appellate counsel, which is "not cognizable in [a] postconviction motion[], and should be raised in a habeas petition." *Griffin v. State*, 866 So. 2d 1, 21 (Fla. 2003). Indeed, Sparre raises this claim in his habeas petition, and we address its merits in that proper context, below.

(3) Medical Examiner

Next, Sparre argues that trial counsel was ineffective for failing to impeach the trial testimony of the medical examiner, Dr. Jesse Giles, with his deposition testimony. Specifically, Sparre argues that trial counsel should have impeached Dr. Giles's trial testimony that the evidence is inconsistent with a frenzy due to the number and pattern of the wounds with Dr. Giles's deposition testimony that "there's no way to know . . . whether this is all within a very short time of frenzy." We affirm the circuit court's denial because Sparre failed to preserve this claim, which would nevertheless fail on the merits because trial counsel was not deficient.

To preserve an issue for appellate review, a litigant must present the issue to the trial court in a timely, specific manner and obtain a ruling. *See Corona v. State*, 64 So. 3d 1232, 1242 (Fla. 2011) (discussing the requirements of timeliness and specificity); *Rhodes v. State*, 986 So. 2d 501, 513 (Fla. 2008) ("To be preserved, the issue or legal argument must be raised *and* ruled on by the trial court."). This rule is based on fairness, *State v. Jones*, 377 So. 2d 1163, 1164 (Fla. 1979), and it serves the additional purposes of ensuring that the trial court has been apprised of the putative error and allowing for "intelligent review on appeal," *Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984) (quoting *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978)).

The record in this case establishes that Sparre did not timely present the specific issue raised on appeal to the trial court. Although Sparre mentioned the deposition and the concept of impeachment in claim 11 of his rule 3.851 motion, and although he moved the deposition into evidence at the postconviction evidentiary hearing, he did not point out the specific deposition testimony at issue until more than two months after the evidentiary hearing, when he filed his written closing arguments. By then, it was too late for the State to respond. The State had already filed its post-hearing memorandum; the parties' written closing arguments were due on the same day; and no answer or reply to written closing arguments is allowed under the rules of criminal procedure. *See* Fla. R. Crim. P. 3.851(f)(5)(E). In light of the preservation rule's timeliness requirement and goal of fairness, we hold that Sparre's challenge to trial counsel's failure to impeach Dr. Giles is not preserved for appeal.

But even if Sparre had preserved this claim, he would not be entitled to relief because trial counsel was not deficient. Both at trial and during his deposition, Dr. Giles acknowledged that there was no way to know how long the attack took, but ultimately concluded that the attack would have taken at least "several minutes," as he said in his deposition, or "some minutes," as he testified at trial. Failing to impeach Dr. Giles with deposition testimony that, in context, was consistent with his trial testimony, did not fall "below an objective standard of reasonableness"

under the "prevailing professional norms," *Strickland*, 466 U.S. at 688. Thus, even if Sparre had preserved this claim, he would not be entitled to relief because he cannot prove deficiency.

(4) Forensic Pathologist

In his fourth issue on appeal, Sparre argues that trial counsel was ineffective for failing to consult with and retain a forensic pathologist to testify in support of the theory that Sparre killed the victim in a frenzied state and, therefore, did not commit premeditated murder. Because competent, substantial evidence supports the circuit court's finding that trial counsel's decision was the result of reasonable trial strategy, we disagree.

This Court has identified three factors that must be considered when determining "whether trial counsel's decision not to call an expert to rebut the State's expert constitutes deficient performance":

> First among these are the attorney's reasons for performing in an allegedly deficient manner, including consideration of the attorney's tactical decisions. A second factor is whether cross-examination of the State's expert brings out the expert's weaknesses and whether those weaknesses are argued to the jury. The final factor is whether a defendant can show that an expert was available at the time of trial to rebut the State's expert.

Allen v. State, 261 So. 3d 1255, 1283 (Fla. 2019) (citations omitted) (quoting *State v. Riechmann*, 777 So. 2d 342, 354 (Fla. 2000)).

Here, competent, substantial evidence as to the relevant factors supports the circuit court's determination that trial counsel made a reasonable strategy decision. More specifically, trial counsel testified that retaining a forensic pathologist would have allowed the State to emphasize the gruesome details of Sparre's attack on the victim. Additionally, trial counsel was able to cross-examine Dr. Giles concerning the subject matter that the defense expert proposed by postconviction counsel, Dr. John Marraccini, would have addressed. Specifically, the defense's theory that Sparre committed the murder in a frenzied state depended on the allegation that all the wounds could have been inflicted within a short period of time, such as two minutes. Although Dr. Giles opined that the attack would have taken at least several minutes, on cross-examination, Dr. Giles conceded that he could give "just an estimate at best." Although the record shows that Dr. Marraccini was available at the time of trial, at the postconviction evidentiary hearing, Dr. Marraccini agreed with the majority of the trial testimony presented by the State's expert, Dr. Giles—specifically, the description of the victim's wounds, the cause of death, the order in which the victim's neck wound was inflicted as compared to her other wounds, the effect of the neck wound, and the fact that the victim lived through most of the injuries. Moreover, although Dr. Marraccini disagreed with Dr. Giles on the duration of the attack—a point significant to Sparre's theory that the killing was not premeditated—neither expert could testify with certainty as to the length of the

attack, and even Dr. Marraccini conceded on cross-examination that the attack could have taken longer than the two-minute period in which he opined on direct examination that all of the victim's wounds could have been inflicted. In sum, the record shows that if trial counsel had consulted and retained Dr. Marraccini to testify at trial, the State would have been able to emphasize the gruesome nature of the murder, and Dr. Marraccini would not have been able to fully rebut the testimony of Dr. Giles, thus still leaving the jury without definitive expert testimony that the killing was frenzied. Accordingly, we affirm the circuit court's finding that trial counsel made a reasonable strategy decision and was, therefore, not deficient for failing to consult with or retain a forensic pathologist. *See Allen*, 261 So. 3d at 1284.

(5) Defense Guilt-Phase Closing Argument

Sparre next argues that trial counsel was ineffective for extensively attacking the victim during closing argument and for failing to explain how the evidence supported Sparre's defense that he "snapped" and committed the killing in a frenzy, rather than with premeditation. We agree that trial counsel's closing argument was deficient but affirm the circuit court's denial of relief because Sparre has not established prejudice.

As conveyed during trial counsel's opening statement, Sparre argued that the killing was not premeditated because, just before stabbing the victim, he learned

certain information about her that contradicted the victim's prior representations to Sparre. Specifically, Sparre's counsel claimed that, at that moment, Sparre learned that the victim was married, that her husband was a sailor in the United States Navy and out at sea, and that her children were staying with their grandmother. Trial counsel alleged that these revelations triggered memories and feelings of turmoil, pain, and neglect from Sparre's own life experiences and caused Sparre to snap and kill the victim.

During Sparre's closing argument, however, trial counsel's main approach was to comment negatively on the victim's lifestyle, history, and representations of herself online, without explaining how these comments related to the evidence presented at trial that, arguably, supported the defense theory of a frenzied killing. Primarily, this evidence included Sparre's statements to law enforcement from which trial counsel could have drawn parallels between Sparre's life, including the neglect Sparre experienced as a child and his perception that his mother chose a man over him before ultimately abandoning him to a boy's home, and what he might have envisioned to be the life of the victim's children based on the information he had about her. Instead of tying this evidence into the theme announced in the opening statement, trial counsel devoted nearly half of his closing argument to simply attacking the victim, including referencing her associations with other men, her Craigslist postings, and her concerns about possibly having a

mental illness. Because trial counsel failed to tie any of his statements about the victim into the defense theory that the killing was frenzied and, in the process, left unargued evidence that could have potentially supported this defense, we hold that trial counsel delivered a deficient closing argument. *Cf. Jackson v. State*, 147 So. 3d 469, 487 (Fla. 2014) (rejecting claim that trial counsel's closing argument was deficient where trial counsel's "logical" and "coherent" argument stressed the victim's risky lifestyle in the context of arguing that numerous people other than the defendant could have caused the victim's death).

However, because there is no reasonable probability that trial counsel's deficient performance affected the jury's verdict finding Sparre guilty of first-degree murder, there is no prejudice. As an initial matter, Sparre's defense that the killing was frenzied is not a defense to first-degree *felony* murder, of which Sparre's jury also found him guilty. *See Sparre*, 164 So. 3d at 1201 ("Sparre exhibited his intent to commit burglary when he remained in Pool's residence and committed a forcible felony against her (murder).").

Moreover, there is no reasonable probability that trial counsel's deficient closing argument affected the jury's verdict as to first-degree premeditated murder either. Although the jury heard Sparre's statements to law enforcement, including that he was physically abused and neglected as a child and through his adolescence, and that he experienced a blackout when he murdered the victim,

Sparre did not tell law enforcement that he snapped in reaction to something the victim said. Moreover, Sparre's defense that the killing was frenzied fails to account for how he came into possession of the knife, which belonged to the victim's kitchen knife set. Irrespective of any intent that could have been formed in the length of time required to inflict at least 88 "sharp-force injuries," the record shows that Sparre had to have either acquired the murder weapon before the victim said something that caused him to snap or walked out of the bedroom to the kitchen to retrieve it after she said what she allegedly said. Either scenario indicates premeditation and contradicts Sparre's theory.

Accordingly, even if trial counsel had made a more coherent closing argument connecting information about the victim to the defense theory that Sparre killed her in a frenzy, there is no reasonable probability that the jury would have acquitted Sparre of first-degree murder—under either the premeditated or felony-murder theory—and convicted him of second-degree murder instead. Therefore, because Sparre has failed to establish prejudice, we affirm the circuit court's denial of this claim. *See Strickland*, 466 U.S. at 694.

(6) Prosecutor's Statements

Sparre next argues that trial counsel was ineffective for failing to object to several allegedly improper comments by the prosecutor during the State's guilt-

and penalty-phase closing arguments.[5] With respect to all but two of the comments, we affirm the circuit court's denial of relief without discussion, other than to note that each of these subclaims was properly denied for one or both of the following reasons: (1) the comment at issue was not improper as a matter of law and counsel cannot be deficient for failing to raise a meritless argument, *see Valentine v. State*, 98 So. 3d 44, 55 (Fla. 2012), or (2) the trial court correctly ruled that Sparre failed to meet his burden to present evidence in support of the claim, *see Ferrell v. State*, 918 So. 2d 163, 173-74 (Fla. 2005), where postconviction counsel did not specifically question trial counsel about the comment at issue and trial counsel testified generally that they would have objected if they had found the comments improper and that sometimes objecting to an improper comment is more prejudicial to the defendant than helpful.

We disagree, however, with the circuit court's ruling that trial counsel was not deficient for failing to object to the prosecutor's (1) guilt-phase closing arguments that crossed the line into misrepresenting and mocking Sparre's defense

5. Sparre argues that the prosecutor made the following improper arguments to which trial counsel was ineffective for failing to object: (1) alleged misstatements of the law pertaining to first- and second-degree murder; (2) alleged inflammatory statements; (3) alleged improper vouching for the victim's credibility; (4) alleged statements arguing facts not in evidence; (5) statements allegedly denigrating the defense theory that the killing was not premeditated; (6) statements improperly arguing aggravation during the guilt phase; and (7) statements improperly invoking the State's authority in arguing that the jury should recommend a death sentence because the State was seeking the death penalty.

that the killing was frenzied rather than premeditated; and (2) penalty-phase closing arguments that crossed the line into denigrating Sparre's proposed mitigating circumstance that he was under the influence of extreme mental or emotional disturbance, as evidenced by the number of wounds that Sparre inflicted on the victim, which Sparre argued demonstrated the frenzied nature of the killing. *See Jackson v. State*, 147 So. 3d 469, 486 (Fla. 2014) ("[A] prosecutor may not ridicule a defendant or his theory of defense." (quoting *Servis v. State*, 855 So. 2d 1190, 1194 (Fla. 5th DCA 2003))); *see also Delhall v. State*, 95 So. 3d 134, 167-68 (Fla. 2012) ("This Court has long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument." (quoting *Williamson v. State*, 994 So. 2d 1000, 1014 (Fla. 2008))).

Specifically, during the guilt-phase closing argument, the prosecutor crossed the line into misrepresenting and then mocking Sparre's defense by, for example, suggesting that Sparre's rebuttal to the premeditation element of first-degree murder 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 a little carried away" and "the knife just kept slipping." These claims, of course, were not the defense Sparre asserted. Similarly, during the penalty-phase closing argument, the prosecutor crossed the line into denigrating Sparre's proposed mitigating circumstance that he was under the influence of extreme mental or emotional disturbance as

demonstrated by the frenzied nature of the killing by, for example, arguing that in proposing this mitigating circumstance, Sparre was apparently asking the jury to accept that he had "decided just to kill [the victim] for the heck of it, for his enjoyment" because "he was very emotional, disturbed, distraught because his grandmother was having surgery at the hospital," when in fact Sparre did not argue that he killed the victim for enjoyment, that doing so would somehow establish the mitigator in question, or that the alleged frenzy was triggered by an emotional response to his grandmother's health situation.

Nevertheless, we affirm the circuit court's denial of relief because Sparre cannot establish prejudice as a result of trial counsel's deficiency in failing to object to these improper arguments. There is no reasonable probability that Sparre's trial counsel's failure to object during the guilt phase affected the jury's verdict of first-degree murder because, as explained above with regard to the deficiency in defense counsel's closing argument, Sparre's frenzy theory did not confront the State's felony-murder theory, which the jury accepted, and did not account for the substantial evidence of premeditation. Likewise, there is no reasonable probability that the deficiency affected the jury's sentencing recommendation or the trial court's rejection of Sparre's proposed mitigating circumstance that Sparre was under the influence of extreme mental or emotional

disturbance. Accordingly, because Sparre cannot establish prejudice, we affirm the circuit court's denial of relief. *See Strickland*, 466 U.S. at 694.

(7) Cumulative Error

Sparre next argues that the cumulative effect of trial counsel's errors entitles him to relief. Because we found trial counsel deficient in two respects—for failing to deliver a coherent guilt-phase closing argument as to Sparre's defense that the killing was frenzied and for failing to object to closing arguments by the prosecutor that crossed the line into denigrating this defense and the proposed mitigator of extreme mental or emotional disturbance as demonstrated by the frenzied nature of the killing—we must analyze whether these two deficiencies, taken together, are sufficient to establish the requisite prejudice. *See Parker*, 89 So. 3d at 867. They are not. There is no reasonable probability that, taken together, these deficiencies affected the first-degree murder verdict or the sentence of death on the record before us. Accordingly, we affirm the denial of Sparre's cumulative error claim.

B. Other Claims

Sparre also argues that the postconviction court erred in three other respects, namely (1) in denying Sparre's claim that the categorical Eighth Amendment bar against executing juvenile offenders established by *Roper v. Simmons*, 543 U.S. 551 (2005), should be extended to Sparre, who was 19 years old at the time of the

murder; (2) in denying Sparre relief from his death sentence pursuant to *Hurst*[6]; and (3) in denying Sparre's motion to amend his postconviction motion to add a claim that trial counsel was ineffective for failing to file the defense sentencing memorandum.

As to the first two claims, our precedent plainly forecloses relief on the merits of Sparre's *Roper* claim—even assuming it is not procedurally barred because Sparre failed to raise it on direct appeal. *See Branch v. State*, 236 So. 3d 981, 987 (Fla. 2018). Likewise, our precedent forecloses Sparre's *Hurst* claim. *See Philmore v. State*, 234 So. 3d 567, 568 (Fla. 2018) (citing *Davis v. State*, 207 So. 3d 142, 173-75 (Fla. 2016)).

As to the third claim, we find no abuse of discretion in the circuit court's order denying Sparre's motion to amend. *See Marek v. State*, 8 So. 3d 1123, 1131 (Fla. 2009) (reviewing denial of motion to amend rule 3.851 motion for abuse of discretion). The crux of the claim that Sparre sought to add to his rule 3.851 motion was ineffective assistance of counsel based on the failure to perfect the record on appeal with the defense sentencing memorandum. However, as explained above, it was appellate counsel's duty to ensure that the memorandum—which trial counsel filed with the trial court—was included in the record on appeal.

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6. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State (Hurst)*, 202 So. 3d 40 (Fla. 2016).

See Fla. R. App. P. 9.200(e). Therefore, appellate counsel's deficiency in failing to do so was properly raised in Sparre's habeas petition as a claim of ineffective assistance of appellate counsel, not in a rule 3.851 motion under the guise of a claim of ineffective assistance of trial counsel. Accordingly, the circuit court did not abuse its discretion in denying Sparre's motion to amend his postconviction motion to include this claim.

III. HABEAS PETITION

In his habeas petition, Sparre argues that appellate counsel was ineffective in three respects, namely (1) for failing to supplement the record on appeal with the defense sentencing memorandum; (2) for failing to argue fundamental error based on prosecutorial misconduct; and (3) for failing to challenge the admission of certain autopsy photographs.

This Court has explained the standard for reviewing claims of ineffective assistance of appellate counsel, which are properly presented in a petition for a writ of habeas corpus, as follows:

> "The standard of review for ineffective appellate counsel claims mirrors the *Strickland* standard for ineffective assistance of trial counsel." [*Wickham v. State*, 124 So. 3d 841, 863 (Fla. 2013).] Specifically, to be entitled to habeas relief on the basis of ineffective assistance of appellate counsel, the defendant must establish
>
> > [first, that] the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, [that] the deficiency

> in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Bradley v. State*, 33 So. 3d 664, 684 (Fla. 2010) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)). Further, "appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims." *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002).

England v. State, 151 So. 3d 1132, 1140 (Fla. 2014).

(1) Sentencing Memorandum

As to Sparre's first habeas claim, we agree that appellate counsel was deficient for failing to supplement the record on appeal with the defense sentencing memorandum, which trial counsel filed with the trial court but which (apparently) was not filed with the clerk of court and therefore not included in the record on appeal. Appellate counsel was deficient for failing to ensure that the record on appeal was complete. *See* Fla. R. App. P. 9.200(e) ("The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or the appellant."). However, we cannot agree that the deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *England*, 151 So. 3d at 1140 (quoting *Bradley*, 33 So. 3d at 684). Rather, the record contains a proffer by defense counsel that is similar in all material respects to the mitigating evidence addressed in the defense sentencing memorandum. Thus, this Court's review of Sparre's death sentence on

direct appeal was not affected in any way, let alone compromised to such a degree as to undermine our confidence in the correctness of the result. Accordingly, we deny relief as to this claim.

(2) Prosecutorial Misconduct

Sparre next argues that appellate counsel was ineffective for failing to raise several claims of fundamental error predicated on alleged prosecutorial misconduct in the State's guilt-phase closing arguments and as a result of the State's failure to correct certain alleged deficiencies in the presentence investigation (PSI) report regarding available mitigation. We disagree.

Regarding the State's guilt-phase closing arguments, in light of our holding that Sparre was not prejudiced by trial counsel's failure to object to the arguments we found improperly denigrated Sparre's defense theory (and proposed mitigation based on that theory), it necessarily follows that had appellate counsel raised this unpreserved error on direct appeal, counsel would not have been able to make the more exacting showing required to establish the error was fundamental. *See State v. Spencer*, 216 So. 3d 481, 492 (Fla. 2017). Accordingly, because "appellate counsel cannot be deemed ineffective for failing to raise . . . issues that were not properly raised in the trial court and are not fundamental error," *Serrano v. State*, 225 So. 3d 737, 757 (Fla. 2017), Sparre is not entitled to relief.

Nor is Sparre entitled to relief on his claim concerning the PSI report. On direct appeal, this Court held that the PSI report complied with the requirement of *Muhammad v. State*, 782 So. 2d 343, 363-64 (Fla. 2001), to be a comprehensive document. *Sparre*, 164 So. 3d at 1195. In so doing, we observed that "neither party raised any objection on the record or otherwise informed the trial court that the PSI report filed is inadequate." *Id*. Sparre now contends that appellate counsel should have argued on direct appeal that the prosecutor committed misconduct amounting to fundamental error by failing to alert the trial court to unpresented mitigation evidence during the *Spencer* hearing and further arguing that Sparre offered no expert testimony to establish mental health mitigation despite knowing such evidence existed. However, Sparre does not allege that the State possessed any mitigation other than that contained in the detailed proffers that the defense team presented to the trial court when Sparre waived the presentation of mitigation during the penalty phase and at the *Spencer* hearing. Thus, this claim appears to be an improper attempt to relitigate the merits of an issue—the PSI report's compliance with *Muhammad*—raised and decided against Sparre on direct appeal. *See Deparvine v. State*, 146 So. 3d 1071, 1108 (Fla. 2014) ("[H]abeas corpus 'is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal.' " (quoting *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992))). But even if it is not, because all the relevant

mitigation was before the trial court, if appellate counsel had raised this argument on direct appeal, counsel would not have been able to establish that the alleged error was fundamental. Accordingly, Sparre is not entitled to habeas relief. *See Serrano*, 225 So. 3d at 757.

(3) Autopsy Photographs

In the last claim of his habeas petition, Sparre argues that appellate counsel was ineffective for failing to argue on direct appeal that the trial court abused its discretion in admitting 28 of the 35 autopsy photographs admitted during the guilt phase. We disagree.

The general standard governing the admission of evidence over an objection that the evidence is overly prejudicial or cumulative is that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2011). We have explained that the admission, over an objection based on this rule, of "photographic evidence of a murder victim is within the discretion of the trial court, and its ruling will not be disturbed on appeal absent a clear showing of abuse of that discretion." *Rodriguez v. State*, 919 So. 2d 1252, 1286 (Fla. 2005). Autopsy photographs can be relevant to "explain a medical examiner's testimony [and] to show the manner of death [and] the location of wounds," *Floyd v. State*, 808 So. 2d 175, 184 (Fla. 2002)

(quoting *Larkins v. State*, 655 So. 2d 95, 98 (Fla. 1995)), or more generally, "to show the circumstances of the crime and the nature and extent of the victim's injuries," *id.* We have recognized that a trial court should limit the number of gruesome photographs shown to the jury, *id.*, so that unnecessarily repetitive photos are not admitted, *see Straight v. State*, 397 So. 2d 903, 907 (Fla. 1981) (discussing *Young v. State*, 234 So. 2d 341 (Fla. 1970), where this Court found prejudicial error in the admission of 45 autopsy photographs, including 25 depicting the victim's partially decomposed body), while also recognizing that each case is different and the number of photographs admitted is not dispositive. *See Orme v. State*, 896 So. 2d 725, 740 (Fla. 2005) (finding no abuse of discretion in the admission of allegedly gruesome photographs even though there were 43 of them).

Here, the trial court admitted 35 photographs. However, because Sparre inflicted approximately 88 wounds on the victim, her injuries could not be fully understood through only a few photographs. Although some of the injuries appear in multiple photographs from different angles, the record shows that the trial court attempted to avoid unnecessary duplication of gruesome images. In some cases, injuries were shown more than once from different angles to provide a fuller understanding of the extent and nature of the injuries. In other cases, injuries were shown more than once because they appear in the periphery of a photograph

intended to depict another injury. Also, the trial court admitted some pictures showing broader views so that the patterns of the injuries could be understood, while admitting closer up views of some of the same injuries so that the extent of those injuries could be understood. The photographs provided a much clearer understanding of the victim's injuries than what could have been accomplished through the medical examiner's testimony alone, and for this reason, were probative of the determination of whether this murder was premeditated. It was within the trial court's discretion to admit each of the photographs, as their probative value was not substantially outweighed by the danger of unfair prejudice. *See* § 90.403, Fla. Stat.; *see also Rodriguez*, 919 So. 2d at1286.

Moreover, following a thorough review of the 35 photographs, there are only three that even arguably should have been excluded as cumulative—an extra picture of each of the victim's palms and a close-up of the right side of the victim's face that is potentially duplicative of another close-up of the same side of the victim's face, although even this picture was taken from a slightly different angle. Nevertheless, because there is no reasonable possibility that the admission of these photographs contributed to the conviction in any way that the remaining photographs would not have, any error in their admission was harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (explaining that error is harmless if "there is no reasonable possibility that [it]

contributed to the conviction"). Because, to the extent any error occurred, it was harmless and therefore would not have entitled Sparre to relief, appellate counsel was not ineffective for failing to raise this meritless claim on direct appeal. *See Valle*, 837 So. 2d at 908. Accordingly, Sparre is not entitled to habeas relief.

IV. CONCLUSION

For the foregoing reasons, we affirm the denial of Sparre's postconviction motion and deny his habeas petition.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,
Elizabeth Anne Senterfitt, Judge - Case No. 162010CF008424AXXXMA
And an Original Proceeding – Habeas Corpus

Robert S. Friedman, Capital Collateral Regional Counsel, Stacy R. Biggart, Assistant Capital Collateral Regional Counsel, Northern Region, Tallahassee, Florida,

for Appellant

Ashley Moody, Attorney General, and Janine D. Robinson, Assistant Attorney General, Tallahassee, Florida,

for Appellee

EXHIBIT 2

Supreme Court of Florida

WEDNESDAY, FEBRUARY 26, 2020

CASE NOS.: SC18-1192 & SC19-389
Lower Tribunal No(s).:
162010CF008424AXXXMA

DAVID KELSEY SPARRE	vs.	STATE OF FLORIDA
DAVID KELSEY SPARRE	vs.	MARK S. INCH, ETC.
Appellant/Petitioner		Appellee/Respondent

Appellant/Petitioner's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

JANINE D. ROBINSON
STACY R. BIGGART
MATLETHA BENNETTE
BERNARDO ENRIQUE DE LA RIONDA
HON. MARK H. MAHON, CHIEF JUDGE
HON. ELIZABETH ANNE SENTERFITT, JUDGE
HON. RONNIE FUSSELL, CLERK

EXHIBIT 3

ADOPTED

AMERICAN BAR ASSOCIATION

DEATH PENALTY DUE PROCESS REVIEW PROJECT
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense.

REPORT

Introduction

The American Bar Association (ABA) has long examined the important issue of the death penalty and has sought to ensure that capital punishment is applied fairly, accurately, with meaningful due process, and only on the most deserving individuals. To that end, the ABA has taken positions on a variety of aspects of the administration of capital punishment, including how the law treats particularly vulnerable defendants or those with disabilities. In 1983, the ABA became one of the first organizations to call for an end of using the death penalty for individuals under the age of 18.[1] In 1997, the ABA called for a suspension of executions until states and the federal government improved several aspects of their administration of capital punishment, including removing juveniles from eligibility.[2]

Now, more than 35 years since the ABA first opposed the execution of juvenile offenders, there is a growing medical consensus that key areas of the brain relevant to decision-making and judgment continue to develop into the early twenties. With this has come a corresponding public understanding that our criminal justice system should also evolve in how it treats late adolescents (individuals age 18 to 21 years old), ranging from their access to juvenile court alternatives to eligibility for the death penalty. In light of this evolution of both the scientific and legal understanding surrounding young criminal defendants and broader changes to the death penalty landscape, it is now time for the ABA to revise its dated position and support the exclusion of individuals who were 21 years old or younger at the time of their crime.

The ABA has been – and should continue to be – a leader in supporting developmentally appropriate and evidence-based solutions for the treatment of young people in our criminal justice system, including with respect to the imposition of the death penalty. In 2004, the ABA filed an amicus brief in *Roper v. Simmons,* in which the U.S. Supreme Court held that the Eighth Amendment prohibited the imposition of the death penalty on individuals below the age of 18 at the time of their crime.[3] It also filed an amicus brief in 2012 in *Miller v. Alabama,* concerning the constitutionality of mandatory life without parole sentences for juveniles convicted of homicides.[4] The ABA's brief in *Roper*

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[1] ABA House of Delegates Recommendation 117A, (adopted Aug. 1983), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/juvenile_offenders_death_penalty0883.authcheckdam.pdf.

[2] ABA House of Delegates Recommendation 107 (adopted Feb. 1997), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/aba_policy_consistency97.authcheckdam.pdf.

[3] Brief for the ABA as Amicus Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005).

[4] Brief for the ABA as Amicus Curiae Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012).

emphasized our long-standing position that juvenile offenders do not possess the heightened moral culpability that justifies the death penalty.[5] It also demonstrated that under the "evolving standards of decency" test that governs the Eighth Amendment, over 50 percent of death penalty states had already rejected death as an appropriate punishment for individuals who committed their crimes under the age of 18.[6] In *Miller*, the ABA stressed that mandatory life without parole sentences for juveniles, even in homicide cases, were categorically unconstitutional because "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation."[7]

Not only has the U.S. Supreme Court held that there is a difference in levels of criminal culpability between juveniles and adults generally,[8] but the landscape of the American death penalty has changed since 1983. Fifty-two out of 53 U.S. jurisdictions now have a life without parole (LWOP) option, either by statute or practice;[9] and the overall national decline in new death sentences corresponds with an increase in LWOP sentences in the last two decades.[10] In 2016, 31 individuals received death sentences,[11] and only two of those individuals were under the age of 21 at the time of their crimes.[12] As of the date of this writing, 23 individuals had been executed in 2017, further reflecting a national decline in the imposition of capital punishment.[13] The U.S. Supreme Court has also recognized that the Eighth Amendment's evolving standards of decency has made other groups categorically ineligible for the death penalty – most notably individuals with intellectual disability.[14]

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[5] Brief for the ABA as Amicus Curiae Supporting Respondent at 5-11, *Roper v. Simmons*, 543 U.S. 551 (2005).
[6] Brief for the ABA as Amicus Curiae Supporting Respondent at 18, *Roper v. Simmons*, 543 U.S. 551 (2005).
[7] Brief for the ABA as Amicus Curiae Supporting Petitioners at 12*, Miller v. Alabama*, 567 U.S. 460 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 79 (2010)).
[8] *See, e.g., Miller v. Alabama,* 567 U.S. 460, 474 (2012); *Graham v. Florida ,* 560 U.S. 48, 50, 76 (2010); *Roper v. Simmons*, 543 U.S. 551, 553 (2005).
[9] *See Life Without Parole,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/life-without-parole (last visited Sept. 28, 2017).
[10] Notes, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1845- 47 (2006).
[11] *Facts about the Death Penalty,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Nov. 7, 2017).
[12] Damantae Graham was under the age of 19 at the time of his crime. *See* Jen Steer, *Man Sentenced to Death in Murder of Kent State Student,* FOX 8 (Nov. 15, 2016), http://fox8.com/2016/11/15/man-sentenced-to-death-in-murder-of-kent-state-student. Justice Jerrell Knight was under the age of 21 at the time of his crime. *See* Natalie Wade, *Dothan Police Arrest Teenager in Murder of Dothan Man; Another Suspect Still at Large,* AL.COM (Feb. 8, 2012), http://blog.al.com/montgomery/2012/02/dothan_police_arrest_teenager.html.
[13] *See Searchable Execution Database,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2017&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply (last visited Nov. 13, 2017).
[14]*See Atkins v. Virginia*, 536 U.S. 306 (2002). The ABA was at the forefront of this movement as well, passing a resolution against executing persons with intellectual disability in 1989. *See* ABA House of Delegates Recommendation 110 (adopted Feb. 1989),

Furthermore, the scientific advances that have shaped our society's improved understanding of the human brain would have been unfathomable to those considering these issues in 1983. In 1990, President George H.W. Bush launched the "Decade of the Brain" initiative to "enhance public awareness of benefits to be derived from brain research."[15] Advances in neuroimaging techniques now allow researchers to evaluate a living human brain.[16] Indeed, neuroscience "had not played any part in [U.S. Supreme Court] decisions about developmental differences between adolescents and adults," likely due to "how little published research there was on adolescent brain development before 2000."[17] These and other large-scale advances in the understanding of the human brain, have led to the current medical recognition that brain systems and structures are still developing into an individual's mid-twenties.

It is now both appropriate and necessary to address the issue of late adolescence and the death penalty because of the overwhelming legal, scientific, and societal changes of the last three decades. The newly-understood similarities between juvenile and late adolescent brains, as well as the evolution of death penalty law and relevant standards under the Eighth Amendment lead to the clear conclusion that individuals in late adolescence should be exempted from capital punishment.[18] Capital defense attorneys are increasingly making this constitutional claim in death penalty litigation and this topic has become part of ongoing juvenile and criminal justice policy reform conversations around the country. As the ABA is a leader in protecting the rights of the vulnerable and ensuring that our justice system is fair, it is therefore incumbent upon this organization to recognize the need for heightened protections for an additional group of individuals: offenders whose crimes occurred while they were 21 years old or younger.

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http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_retardation_exemption0289.authcheckdam.pdf; *see also Kennedy v. Louisiana,* 554 U.S. 407, 413 (2008) (holding that the Eighth Amendment prohibits execution for crime of child rape, when victim does not die and death was not intended).

[15] *Project on the Decade of the Brain*, LIBR. OF CONGRESS, http://www.loc.gov/loc/brain/ (last visited Oct. 6, 2017).

[16] B.J. Casey, *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104,104-10 (2005).

[17] Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions about Adolescents' criminal Culpability*, 14 NATURE REVIEWS NEUROSCIENCE 513, 513-14 (2013).

[18] Earlier this year, a Kentucky Circuit Court held pre-trial evidentiary hearings in three cases and found that it is unconstitutional to sentence to death individuals "under twenty-one (21) years of age at the time of their offense."*See Commonwealth v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 14-CR-161, *1, 12 (Fayette Circuit Court, Aug. 1, 2017); *Commonwealth v. Smith*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 15-CR-584-002, *1, 12 (Fayette Circuit Court, Sept. 6, 2017); *Commonwealth v. Diaz*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 15-CR-584-001, *1, 11 (Fayette Circuit Court, Sept. 6, 2017).).

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Major Constitutional Developments in the Punishment of Juveniles for Serious Crimes

The rule that constitutional standards must calibrate for youth status is well established. The U.S. Supreme Court has long recognized that legal standards developed for adults cannot be uncritically applied to children and youth.[19] Although "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[20] the Court has held that "the Constitution does not mandate elimination of all differences in the treatment of juveniles."[21]

As noted above, between 2005 and 2016, the U.S. Supreme Court issued several landmark decisions that profoundly alter the status and treatment of youth in the justice system.[22] Construing the Eighth Amendment, the Court held in *Roper v. Simmons* that juveniles are sufficiently less blameworthy than adults, such that the application of different sentencing principles is required under the Eighth Amendment, even in cases of capital murder.[23] In *Graham v. Florida*, the Court, seeing no meaningful distinction between a sentence of death or LWOP, found that the Eighth Amendment categorically prohibited LWOP sentences for non-homicide crimes for juveniles.[24]

Then, in *Miller v. Alabama,* the U.S. Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."[25] Justice Kagan, writing for the majority*,* was explicit in articulating the Court's rationale: the mandatory imposition of LWOP sentences "prevents those meting out punishment from considering a juvenile's 'lessened culpability 'and greater 'capacity for change,'[26] and runs afoul of our cases 'requirement of individualized sentencing for defendants facing the most serious penalties.'"[27] The Court grounded its holding "not only on common sense…but on science and social science as

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[19] *See, e.g.*, *May v. Anderson*, 345 U.S. 528, 536 (1953) ("Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State 's duty towards children."); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) ("[A child] cannot be judged by the more exacting standards of maturity.").

[20] *In re Gault*, 387 U.S. 1, 13 (1967).

[21] *Schall v. Martin*, 467 U.S. 253, 263 (1984) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)) (holding that juveniles have no right to jury trial).

[22] Apart from the sentencing decisions discussed herein, the Court, interpreting the Fifth and Fourteenth Amendments, held in *J.D.B. v. North Carolina,* that a juvenile's age is relevant to the *Miranda* custody analysis. 564 U.S. 261, 264 (2011). In all of these cases, the Court adopted settled research regarding adolescent development and required the consideration of the attributes of youth when applying constitutional protections to juvenile offenders.

[23] 543 U.S. 551, 570-71 (2005).

[24] 560 U.S. 48, 74 (2010).

[25] 567 U.S. 460, 479 (2012).

[26] *Miller v. Alabama,* 567 U.S. 460, 465 (2012) (citing *Graham* v. *Florida*, 560 U.S. 48, 68, 74 (2010)).

[27] *Miller,* 567 U.S. at 480.

well,"[28] all of which demonstrate fundamental differences between juveniles and adults.

The Court in *Miller* noted the scientific "findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"[29] Importantly, the Court specifically found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific."[30] Relying on *Graham*, *Roper*, and other previous decisions on individualized sentencing, the Court held "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."[31] The Court also emphasized that a young offender's moral failings could not be comparable to an adult's because there is a stronger possibility of rehabilitation.[32]

In 2016, the U.S. Supreme Court in *Montgomery v. Louisiana* expanded its analysis of the predicate factors that the sentencing court must find before imposing a life without parole sentence on a juvenile.[33] *Montgomery* explained that the Court's decision in *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.[34] The Court held "that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption*,"* noting that a life without parole sentence "could [only] be a proportionate sentence for the latter kind of juvenile offender."[35]

Collectively, these decisions demonstrate a distinct Eighth Amendment analysis for youth, premised on the simple fact that young people are different for the purposes of criminal law and sentencing practices. Relying on prevailing developmental research and common human experience concerning the transitions that define adolescence, the Court has recognized that the age and special characteristics of young offenders play a critical role in assessing whether sentences imposed on them are disproportionate under the Eighth Amendment.[36] More specifically, the cases recognize three key characteristics that distinguish adolescents from adults: "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more

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[28] *Id.* at 471.
[29] *Id.* at 472 (quoting *Graham,* 560 U.S. at 68; *Roper,* 543 U.S. at 570).
[30] *Id.* at 473.
[31] *Id.* at 477.
[32] *Miller 567* U.S. at 471 (citing *Roper,* 543 U.S. at 570).
[33] *Montgomery v. Louisiana,* 577 U.S. __, 136 S. Ct. 718 (2016).
[34] *Id*. at 734 (emphasis added).
[35] *Id.* (emphasis added).
[36] *See Graham*, 560 U.S. at 68; *see also Miller*, 567 U.S. at 471-72.

vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'"[37]

As both the majority and the dissent agreed in *Roper* and *Graham*, the U.S. Supreme Court has supplanted its "death is different" analysis in adult Eighth Amendment cases for an offender-focused "kids are different" frame in serious criminal cases involving young defendants.[38] Indeed, in *Graham v. Florida*, the Court wrote "criminal procedure laws that fail to take defendants' 'youthfulness into account at all would be flawed."[39]

Increased Understanding of Adolescent Brain Development

American courts, including the U.S. Supreme Court, have increasingly relied on and cited to a comprehensive body of research on adolescent development in its opinions examining youth sentencing, capability, and custody.[40] The empirical research shows that most delinquent conduct during adolescence involves risk-taking behavior that is part of normative developmental processes.[41] The U.S. Supreme Court in *Roper v. Simmons* recognized that these normative developmental behaviors generally lessen as youth mature and become less likely to reoffend as a direct result of the maturational process.[42] In *Miller and Graham,* the Court also recognized that this maturational process is a direct function of brain growth, citing research showing that the frontal lobe, home to key components of circuitry underlying "executive functions" such as planning, working memory, and impulse control, is among the last areas of the brain to mature.[43]

In the years since *Roper*, research has consistently shown that such development actually continues beyond the age of 18. Indeed, the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development. While there were findings that pointed to this conclusion prior to 2005,[44] a wide body of research has since provided us with an

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[37] *Miller,* 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569-70).
[38] *See Graham v. Florida*, 560 U.S. 48, 102-103 (2010) (Thomas, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 588-89 (2005) (O'Connor, J., dissenting).
[39] 560 U.S. at 76.
[40] *See, e.g.*, *Roper v. Simmons,* 543 U.S. 551, 569-70 (2005); *Graham v. Florida*, 560 U.S 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012).
[41] NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 66-74 (Joan McCord et al. eds., National Academy Press 2001).
[42] *See Roper*, 543 U.S. at 570-71; *see also* NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 91 (Richard J. Bonnie et al. eds., Nat'l Acad. Press, 2013).
[43] *See Miller v. Alabama*, 567 U.S. 460, 472 (2012); *Graham* v. *Florida,* 560 U.S. 48, 68 (2010).
[44] *See, e.g.,* Graham Bradley & Karen Wildman, *Psychosocial Predictors of Emerging Adults' Risk and Reckless Behaviors*, 31 J. YOUTH & ADOLESCENCE 253, 253–54, 263 (2002) (explaining that, among emerging adults in the 18-to-25-year-old age group, reckless behaviors—defined as those actions that are not socially approved–were found to be reliably predicted by antisocial peer pressure and stating that "antisocial peer pressure appears to be a continuing, and perhaps critical, influence upon [reckless] behaviors well into the emerging adult years"); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 AM.

expanded understanding of behavioral and psychological tendencies of 18 to 21 year olds.[45]

Findings demonstrate that 18 to 21 year olds have a diminished capacity to understand the consequences of their actions and control their behavior in ways similar to youth under 18.[46] Additionally, research suggests that late adolescents, like juveniles, are more prone to risk-taking and that they act more impulsively than older adults in ways that likely influence their criminal conduct.[47] According to one of the studies conducted by Dr. Laurence Steinberg, a leading adolescent development expert, 18 to 21 year olds are not fully mature enough to anticipate future consequences.[48]

More recent research shows that profound neurodevelopmental growth continues even into a person's mid to late twenties.[49] A widely-cited longitudinal

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PSYCHOLOGIST 1009, 1013, 1016 (2003) ("[T]he results of studies using paper-and-pencil measures of future orientation, impulsivity, and susceptibility to peer pressure point in the same direction as the neurobiological evidence, namely, that brain systems implicated in planning, judgment, impulse control, and decision making continue to mature into late adolescence. . . . Some of the relevant abilities (e.g., logical reasoning) may reach adult-like levels in middle adolescence, whereas others (e.g., the ability to resist peer influence or think through the future consequences of one's actions) may not become fully mature until young adulthood.").

[45] *See* Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731 (2007) ("When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual's future behavior and structural brain development.") (citing Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766, 766–67 (2006)); Damien A. Fair et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization,* 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 626, 632, 634 (2005) (examining a sample of 306 individuals in 3 age groups—adolescents (13-16), youths (18-22), and adults (24 and older) and explaining that "although the sample as a whole took more risks and made more risky decisions in groups than when alone, this effect was more pronounced during middle and late adolescence than during adulthood" and that "the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions"); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91 (2008) (noting that "the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults").

[46] *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 343 (1992); Kathryn L. Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 L. & HUM. BEHAV. 78, 79 (2008) ("In general, the age curve shows crime rates escalating rapidly between ages 14 and 15, topping out between ages 16 and 20, and promptly deescalating.").

[47] *See* Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy,* 85 FORDHAM L. REV. 641, 644 (2016).

[48] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 (2009).

[49] *See* Christian Beaulieu & Catherine Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood, 27* J. OF NEUROSCIENCE 31 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women*

study sponsored by the National Institute of Mental Health tracked the brain development of 5,000 children, discovering that their brains were not fully mature until at least 25 years of age.[50] This period of development significantly impacts an adolescent's ability to delay gratification and understand the long-term consequences of their actions.[51]

Additionally, research has shown that youth are more likely than adult offenders to be wrongfully convicted of a crime.[52] Specifically, an analysis of known wrongful conviction cases found that individuals under the age of 25 are responsible for 63 percent of false confessions.[53] Late adolescents' propensity for false confessions, combined with the existing brain development research, supports the conclusion that late adolescents are a vulnerable group in need of additional protection in the criminal justice system.[54]

Legislative Developments in the Legal Treatment of Individuals in Late Adolescence

The trend of treating individuals in late adolescence differently from adults goes well beyond the appropriate punishment in homicide cases. As noted, scientists, researchers, practitioners and corrections professionals are all now recognizing that individuals in late adolescence are developmentally closer to their peers under 18 than to those adults who are fully neurologically developed. In response to that understanding, both state and federal legislators have created greater restrictions and protections for late adolescents in a range of areas of law.

For example, in 1984, the U.S. Congress passed the National Minimum Drinking Age Act, which incentivized states to set their legal age for alcohol purchases at age 21.[55] Since then, five states (California, Hawaii, New Jersey, Maine, and Oregon) have also raised the legal age to purchase cigarettes to age 21.[56] In addition to restrictions on purchases, many car rental companies have

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(Ages 0 to 85 Years) Measures with Atlas-Based Parcellation of MRI, 65 NEUROIMAGE 176. 176-193 (2013).

[50] Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1358–59 (2010).

[51] *See* Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 28 (2009).

[52] *Understand the Problem*, BLUHM LEGAL CLINIC WRONGFUL CONVICTIONS OF YOUTH, http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem/ (last visited Nov. 10, 2017).

[53] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004).

[54] *See Atkins v. Virgina*, 536 U.S. 304, 320-21 (2002) (possibility of false confessions enhances the imposition of the death penalty, despite factors calling for less severe penalty).

[55] 23 U.S.C. § 158 (1984).

[56] Jenni Bergal, *Oregon Raises Cigarette-buying age to 21*, WASH. POST, (Aug. 18, 2017), https://www.washingtonpost.com/national/health-science/oregon-raises-cigarette-buying-age-to-21/2017/08/18/83366b7a-811e-11e7-902a-2a9f2d808496_story.html?utm_term=.132d118c0d10.

set minimum rental ages at 20 or 21, with higher rental fees for individuals under age 25.[57] Under the Free Application for Federal Student Aid (FASFA), the Federal Government considers individuals under age 23 legal dependents of their parents.[58] Similarly, the Internal Revenue Service allows students under the age of 24 to be dependents for tax purposes.[59] The Affordable Care Act also allows individuals under the age of 26 to remain on their parents' health insurance.[60]

In the context of child-serving agencies, both the child welfare and education systems in states across the country now extend their services to individuals through age 21, recognizing that youth do not reach levels of adult independence and responsibility at age 18. In fact, 25 states have extended foster care or state-funded transitional services to late adolescents through the Fostering Connections to Success and Increasing Adoptions Act of 2008.[61] Under the Individuals with Disabilities Education Act (IDEA), youth and late adolescents (all of whom IDEA refers to as "children") with disabilities who have not earned their traditional diplomas are eligible for services through age 21.[62] Going even further, 31 states allow access to free secondary education for students 21-years-old or older.[63]

Similar policies protect late adolescents in both the juvenile and adult criminal justice systems. Forty-five states allow youth up to age 21 to remain under the jurisdiction of the juvenile justice system.[64] Nine of those states also allow individuals 21 years old and older to remain under the juvenile court's jurisdiction, including four states that have set the maximum jurisdictional age at 24.[65] A number of states have created special statuses, often called "Youthful

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[57] *See, e.g., What are Your Age Requirements for Renting in the US and Canada*, ENTERPRISE.COM, https://www.enterprise.com/en/help/faqs/car-rental-under-25.html (last visited Oct. 16, 2017); *Restrictions and Surcharges for Renters Under 25 Years of Age*, BUDGET.COM, https://www.budget.com/budgetWeb/html/en/common/agePopUp.html (last visited Oct. 16, 2017); *Under 25 Car Rental,* HERTZ.COM, https://www.hertz.com/rentacar/misc/index.jsp?targetPage=Hertz_Renting_to_Drivers_Under_25.jsp (last visited Oct. 16, 2017).

[58] *See Dependancy Status,* FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/fafsa/filling-out/dependency (last visited Sept. 21, 2017).

[59] *See Dependants and Exemptions 7,* I.R.S, https://www.irs.gov/faqs/filing-requirements-status-dependents-exemptions/dependents-exemptions/dependents-exemptions-7 (last visited Sept. 21, 2017); 26 U.S.C. § 152 (2008).

[60] 42 U.S.C. § 300gg-14 (2017).

[61] *See Extending Foster Care to 18*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx.

[62] 20 U.S.C. § 1412 (a)(1)(A) (2017).

[63] *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2015*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp.

[64] Jurisdictional Boundaries, *Juvenile Justice Geography, Policy, Practice & Statistics*, NAT'L CTR. FOR JUV. JUST.,http://www.jjgps.org/jurisdictional-boundaries#delinquency-age-boundaries?year=2016&ageGroup=3 (last visited Nov. 8, 2017).

[65] *Id.*

Offender" or "Serious Offender" status that allows individuals in late adolescence to benefit from similar protections to the juvenile justice system, specifically related to the confidentiality of their proceedings and record sealing.[66]

For example, in 2017, the Vermont legislature changed the definition of a child for purposes of juvenile delinquency proceedings in the state to an individual who "has committed an act of delinquency after becoming 10 years of age and prior to becoming 22 years of age."[67] This change affords late adolescents access to the treatment and other service options generally associated with juvenile proceedings.[68] In 2017, Connecticut, Illinois, and Massachusetts legislators were considering similar efforts to provide greater protections to young adults beyond the age of 18.[69] Notably, even when late adolescents enter the adult criminal justice system, some states have created separate correctional housing and programming for individuals under 25.[70]

Furthermore, several European countries maintain similarly broad approaches to treatment of late adolescents who commit crimes. In countries like England, Finland, France, Germany, Italy, Sweden, and Switzerland, late adolescence is a mitigating factor either in statute or in practice that allows many 18 to 21 year olds to receive similar sentences and correctional housing to their peers under 18.[71]

There has thus been a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18. These various laws and policies, designed to both restrict and protect individuals in this late adolescent age group, reflect our society's evolving view of the maturity and culpability of 18 to 21 year olds, and beyond. Virtually all of these important reforms have come after 1983, when the ABA first passed its policy concerning the age at which individuals should be exempt from the death penalty.

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[66] *See* FLA. STAT. § 958.04 (2017) (under 21); D.C. CODE § 24-901 *et seq.* (2017) (under 22); S.C. CODE ANN. § 24-19-10 *et seq.* (2017) (under 25); *see also* 33 V.S.A § 5102, 5103 (2017) (under 22).

[67] The legislature made this change in 2017 in order to make Vermont law consistent, as it had also expanded its Youthful Offender Status in 2016 so that 18-to-21-year-olds would be able to have their cases heard in the juvenile court versus the adult court. *See* H. 95, 2016 Leg., Reg. Sess. (Vt. 2016); S. 23, 2017 Leg., Reg. Sess. (Vt. 2017).

[68] *Id.*

[69] *See* H.B. 7045, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017); H.B. 6308, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); H. 3037, 190th Gen. Ct., Reg. Sess. (Mass. 2017).

[70] *See* S.C. CODE Ann. § 24-19-10; H. 95, 2016 Leg., Reg. Sess. (Vt. 2016); *Division of Juvenile Justice,* CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Juvenile_Justice/ (last visited on Oct. 16, 2017); *Oregon Youth Authority Facility Services*, OR. YOUTH AUTH., http://www.oregon.gov/oya/pages/facility_services.aspx#About_OYA_Facilities (last visited on Oct. 18, 2017), Christopher Keating, *Connecticut to Open Prison for 18-to-25 Year Olds*, HARTFORD COURANT (Dec. 17, 2015), http://www.courant.com/news/connecticut/hc-connecticut-prison-young-inmates-1218-20151217-story.html.

[71] Ineke Pruin & Frieder Dunkel, TRANSITION TO ADULTHOOD & UNIV. OF GREIFSWALD, BETTER IN EUROPE? EUROPEAN RESPONSES TO YOUNG ADULT OFFENDING: EXECUTIVE SUMMARY 8-10 (2015).

Purposes Served by Executing Individuals in Late Adolescence

Regardless of whether one considers the death penalty an appropriate punishment for the worst murders committed by the worst offenders, it has become clear that the death penalty is indefensible as a response to crimes committed by those in late adolescence. As discussed in this report, a growing body of scientific understanding and a corresponding evolution in our standards of decency undermine the traditional penological purposes of executing defendants who committed a capital murder between the ages of 18 and 21. Just as the ABA has done when adopting earlier policies, we must consider the propriety of the most common penological justifications for the death penalty: "retribution and deterrence of capital crimes by prospective offenders."[72]

Capital punishment does not effectively or fairly advance the goal of retribution within the context of offenders in late adolescence. Indeed, the Eighth Amendment demands that punishments be proportional and personalized to both the offense and the offender.[73] Thus, to be in furtherance of the goal of retribution, those sentenced to death – the most severe and irrevocable sanction available to the state – should be the most blameworthy defendants who have also committed the worst crimes in our society. As has been extensively discussed above, contemporary neuroscientific research demonstrates that several relevant characteristics typify late adolescents' developmental stage, including: 1) a lack of maturity and an underdeveloped sense of responsibility, 2) increased susceptibility to negative influences, emotional states, and social pressures, and 3) underdeveloped and highly fluid character.[74]

The U.S. Supreme Court's holdings in *Roper* and *Atkins* were based on the findings that society had redrawn the lines for who is the most culpable or "worst of the worst." Similarly, the scientific advancements and legal reforms discussed above support the ABA's determination that there is an evolving moral consensus that late adolescents share a lesser moral culpability with their teenage counterparts. If "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state", then the lesser culpability of those in late adolescence surely cannot justify such a form of retribution.[75]

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[72] *Roper,* 543 U.S. at 553.
[73] *Graham v. Florida,* 560 U.S. 48, 59 (2010) (citing *Weems v. United States,* 217 U.S. 349, 367 (1910)).
[74] *See Commonwealth v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 14-CR-161, *1, 7-8 (Fayette Circuit Court, Aug. 1, 2017) (After expert testimony and briefing based on contemporary science, the court made specific factual findings that individuals in late adolescence are more likely to underestimate risks; more likely to engage in "sensation seeking;" less able to control their impulses; less emotionally developed than intellectually developed; and more influenced by their peers than adults. It then held that, based on those traits and other reasons, those individuals should be exempt from capital puninshment.)
[75] *See Atkins v. Virginia,* 536 U.S. 304, 319 (2002).

Second, there is insufficient evidence to support the proposition that the death penalty is an effective deterrent to capital murder for individuals in late adolescence. In fact, there is no consensus in either the social science or legal communities about whether there is any general deterrent effect of the death penalty.[76] Even with the most generous assumption that the death penalty may have some deterrent effect for adults without any cognitive or mental health disability, it does not necessarily follow that it would similarly deter a juvenile or late adolescent. Scientific findings suggest that late adolescents are, in this respect, more similar to juveniles.[77] As noted earlier, late adolescence is a developmental period marked by risk-taking and sensation-seeking behavior, as well as a diminished capacity to perform rational, long-term cost-benefit analyses. The same cognitive and behavioral capacities that make those in late adolescence less morally culpable for their acts also "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[78]

Finally, both the death penalty and LWOP effectively serve the additional penological goal of incapacitation, as either sentence will prevent that individual from release into general society to commit any future crimes. However, only the death penalty completely rejects the goal of providing some opportunity for redemption or rehabilitation for a young offender. Ninety percent of violent juvenile and late adolescent offenders do not go on to reoffend later in life.[79] Thus, many of these individuals can and will serve their sentences without additional violence, even inside prison, and will surely mature and change as they reach full adulthood. Imposing a death sentence and otherwise giving up on adolescents, precluding their possible rehabilitation or any future positive contributions (even if only made during their years of incarceration), is antithetical to the fundamental principles of our justice system.

Conclusion

In the decades since the ABA adopted its policy opposing capital punishment for individuals under the age of 18, legal, scientific and societal developments strip the continued application of the death penalty against

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[76] John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate,* 58 STAN. L. REV. 791, 843 (2005).
[77] James C. Howell et al., *Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What Happens, What Should Happen, and What We Need to Know,* NAT'L INST. OF JUST. STUDY GROUP ON THE TRANSITIONS BETWEEN JUV. DELINQ. AND ADULT CRIME, at Bulletin 5, 24 (2013).
[78] *Atkins,* 536 U.S. at 320.
[79] Kathryn Monahan et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior,* 25 DEV. & PSYCHOPATHOLOGY 1093, 1093-1105 (2013); Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders,* 22 DEV. & PSYCHOPATHOLOGY 453,453-75 (2010).

individuals in late adolescence of its moral or constitutional justification. The rationale supporting the bans on executing either juveniles, as advanced in *Roper v. Simmons,* or individuals with intellectual disabilities, as set forth in *Atkins v. Virginia,* also apply to offenders who are 21 years old or younger when they commit their crimes. Thus, this policy proposes a practical limitation based on age that is supported by science, tracks many other areas of our civil and criminal law, and will succeed in making the administration of the death penalty fairer and more proportional to both the crimes and the offenders.

In adopting this revised position, the ABA still acknowledges the need to impose serious and severe punishment on these individuals when they take the life of another person. Yet at the same time, this policy makes clear our recognition that individuals in late adolescence, in light of their ongoing neurological development, are not among the worst of the worst offenders, for whom the death penalty must be reserved.

Respectfully submitted,

Seth Miller
Chair, Death Penalty Due Process Review Project

Robert Weiner
Chair, Section of Civil Rights and Social Justice

February, 2018

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GENERAL INFORMATION FORM

Submitting Entities: Death Penalty Due Process Review Project, with Co-sponsor: Section of Civil Rights and Social Justice

Submitted By: Seth Miller, Chair, Steering Committee, Death Penalty Due Process Review Project; Robert N. Weiner, Chair, Section of Civil Rights and Social Justice.

1. Summary of Resolution.

This resolution urges each death penalty jurisdiction to not execute or sentence to death anyone who was 21 years old or younger at the time of the offense. Without taking a position supporting or opposing the death penalty, this recommendation fully comports with the ABA's longstanding position that states should administer the death penalty only when performed in accordance with constitutional principles of fairness and proportionality. Because the Eighth Amendment demands that states impose death only as a response to the most serious crimes committed by the most heinous offenders, this resolution calls on jurisdictions to extend existing constitutional protections for capital defendants under the age of 18 to offenders up to and including the age of 21.

2. Approval by Submitting Entity.

Yes. The Steering Committee of the Death Penalty Due Process Review Project approved the Resolution on October 26, 2017 via written vote. The Council of the Section of Civil Rights and Social Justice approved the Recommendation at the Section's Fall Meeting in Washington, D.C on October 27, 2017, and agreed to be a co-sponsor.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has existing policy that pertains to the imposition of capital punishment on young offenders under the age of 18; this new policy, if adopted, would effectively supercede that policy and extend our position to individuals age 21 and under. Specifically, at the 1983 Annual Meeting, the House of Delegates adopted the position "that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committee while under the age of 18."[80]

[80] ABA House of Delegates Recommendation 117A, (adopted Aug. 1983), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/juvenile_offenders_death_penalty0883.authcheckdam.pdf.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation.

N/A. There is no known relevant legislation pending in Congress or in state legislatures. However, several states have passed laws in recent years extending juvenile protections to persons older than 18 years of age, including, for example, allowing youth under 21 to remain under the jurisdiction of the juvenile justice system. Additionally, this is an issue being raised more frequently in capital case litigation.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use this policy to enable the leadership, members and staff of the ABA to engage in active and ongoing policy discussions on this issue, to respond to possible state legislation introduced in 2018 and beyond, and to participate as *amicus curiae*, if a case reaches the U.S. Supreme Court with relevant claims. The sponsors will also use the policy to consult on issues related to the imposition of the death penalty on vulnerable defendants generally, and youthful offenders specifically, when called upon to do so by judges, lawyers, government entities, and bar associations.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

This Resolution has been referred to the following ABA entities that may have an interest in the subject matter:

Center for Human Rights
Center on Children and the Law
Coalition on Racial and Ethnic Justice
Commission on Youth at Risk
Criminal Justice Section
Death Penalty Representation Project
Judicial Division
Law Student Division

Litigation
Section of International Law
Section of State and Local Government Law
Solo, Small Firm and General Practice Division
Standing Committee on Legal Aid and Indigent Defense
Young Lawyers Division

11. Contact Name and Address Information (prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges each death penalty jurisdiction to not execute or sentence to death anyone who was 21 years old or younger at the time of the offense.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the practice of sentencing to death and executing young persons ages 21 and under. The resolution clarifies that the ABA's long-standing position on capital punishment further necessitates that jurisdictions categorically exempt offenders ages 21 and under from capital punishment due to the lessened moral culpability, immaturity, and capacity for rehabilitation exemplified in late adolescence.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution aims to accomplish this goal by consulting on issues related to young offenders and the death penalty when called upon to do so by judges, lawyers, government entities, and bar associations, by supporting the filing of amicus briefs in cases that present issues of youthfulness and capital punishment, and by conducting and publicizing reports of jurisdictional practices vis-à-vis the imposition of death on late adolescent offenders for public information and use in the media and advocacy communities.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.