No._____

In The

Supreme Court of the United States

OCTOBER TERM 2020

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EROLD MARTIN PANOPIO,
Petitioner,

v.

UNITED STATES
Respondent.

_____

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

WILLIAM MALLORY KENT
Florida Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
(904) 398-8000 Telephone
(904) 348-3124 Fax
kent@williamkent.com Email
Counsel for Petitioner Panopio

QUESTION PRESENTED

I. WHETHER A NEAR TWENTY YEAR PRISON SENTENCE FOLLOWED BY A FIFTEEN YEAR TERM OF SUPERVISED RELEASE FOR A YOUTHFUL OFFENDER SUCH AS PANOPIO VIOLATES THE EIGHTH AMENDMENT.

LIST OF PARTIES

Erold Martin Panopio, Petitioner

United States of America, Respondent

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The Petitioner, Erold Martin Panopio, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The decision and order of the Eleventh Circuit is included in the Appendix, *infra*.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

Erold Martin Panopio ("Panopio" or "Petitioner") was charged in a single count indictment filed December 6, 2018 in the United States District Court for the Middle District of Florida, Jacksonville Division. Panopio was charged with a violation of 18 U.S.C. § 2422(b), attempting to entice a person whom the defendant believed had not obtained the age of 18 years to engage in sexual activity.

Panopio entered a guilty plea pursuant to a written plea agreement April 24, 2019. The presentence investigation report ("PSR") determined the sentencing guideline range to be 188-235 months. The Government recommended an upward departure above the guideline range, but the District Court instead imposed a sentence at the very top of the guideline range, 235 months imprisonment, followed by 180 months supervised release, a cumulative sentence of almost 35 years custody

and supervision. Panopio raised the same issue presented here at the Eleventh Circuit Court of Appeals on Direct Appeal and his sentence was affirmed by an opinion issued December 15, 2020.

STATEMENT OF THE FACTS PERTINENT TO THIS PETITION

The PSR outlined the offense conduct as follows:

> In late 2018, a mental health counselor for a 15 years old child whose initials are L.M. told police that the child's mother suspected that L.M. was communicating with older men online. Police spoke with the child's mother, who gave them consent to search the child's phone. A forensic analysis revealed conversations between L.M. and Erold Panopio on an app known as Snapchat. Panopio's username on the app was "irky_3rold," and he was listed in the child's phone as "Erold Panopio." Further, the analysis of L.M.'s phone revealed a video of her and another 15-year-old child (J.S.) engaged in sexual intercourse with Panopio, as well as at least 600 text messages.
>
> Some of the communications between Panopio and L.M. capture Panopio telling the child that he was age 19; and the child detailing her emotional vulnerability. For example, on October 16, 2018, L.M. texted "Sorry i never mentioned but I suffer with 1 form of chronic and 1 form of severe depression. But im also bipolar sooo." Panopio subsequently asked if she was "ok" and after she responded, "yeah until im left in my own thoughts again," he responded "LMAO," and resumed his attempt to convince her to sneak out of her home for sex. L.M. also told Panopio that her conditions were worsened because her mother was ill with cancer and because her father abandoned her.
>
> Based on the foregoing, authorities assumed L.M.'s online identity and engaged Panopio in conversation using the iPhone text messaging feature. Panopio's communication with who he believed was L.M. occurred between November 6 and November 24, 2018, and as will be detailed, was designed to entice L.M. and, eventually, another

> individual, who he believed was a 13-year old child, to engage in sexual intercourse with him. The information that follows is not a verbatim account of the child and Panopio's communication but rather a summary that captures his historical sexual relationship with the L.M. and J.S., while also portraying his intent to engage in intercourse with L.M. and who he believed was her 13-year-old friend child.

[PSR, ¶¶ 8-14]

A series of text messages was exchanged between Panopio and the undercover officer between November 6 and November 26, 2018, when Panopio agreed to drive to meet up with the person he thought was the underage female. The PSR continues:

> After Panopio exited his vehicle, he was arrested. Post-Miranda, he admitted driving to the residence to meet two girls, both of whom he knew were minors. The defendant stated that he was "pretty sure" that one of the girls was 15 and the other was 12. Panopio advised that he went to the house to "do it," and later clarified that statement to indicate that he intended to have sexual intercourse with the children.
>
> Panopio also acknowledged having sex with L.M. at his apartment on prior occasions, as well as with her and her friend, J.S., who is also 15 years old.

[PSR, ¶¶ 15-16]

Probation attempted to obtain a victim impact statement from the "victim" of the offense, but was told by her counselor:

> L.M. does not want to submit a personal statement because ***she does not perceive herself a victim as she willingly engaged in a relationship with Panopio***.

[PSR, ¶ 18] (emphasis supplied).

Panopio, who was 24 years old at the time of the offense, was evaluated by a forensic psychologist who in the past had been employed by the United States Court for the Middle District of Florida and the Probation Office for the Middle District of Florida to provide sex-offender counseling to persons on pretrial release and supervised release, Dr. Stephen Bloomfield. ***Dr. Bloomfield reported to the Court in both a written report and in testimony at sentencing, that Panopio was not a pedophile and indeed that he was a perfectly normal young man with no aberrant sexual interests***.

A carefully prepared defense sentencing memorandum detailed an exemplary life as a child and young man, starting with his birth in the Philippines, his childhood immigration to the United States, his citizenship, his active church involvement, his determination to serve in the United States military, his first time away from home by himself after joining the Navy and being assigned to the Naval Air Station in Jacksonville as an avionics technician.

At sentencing, arguing for imposition of the statutory minimum mandatory ten year sentence, Panopio's counsel tried to explain to the Court what life is like

today for young people, young men in the Navy, the change in sexual mores, and the availability of sex over the internet with no constraints:

> Because we live in a world today that is vastly different than it was 50 years ago. Fifty years ago, if you had sex outside the confines of marriage, it was a crime. And there were obvious reasons for that. If a woman had a child that was a child out of wedlock, there were all sorts of problems for the community as a general rule.
>
> Today there are birth control and it's not nearly the problem as we've progressed through the last 40 or 50 years of our culture. And today, based on what I see on the Internet, what I see in the news, what I hear people talk about, sexual behavior is almost, today, inconsequential. And it is all, in my view, because the Internet has proliferated this sort of behavior for our entire culture.
>
> Years ago, I was involved in trying to stop this behavior. And we had -- the process was that a lot of these aberrant behaviors were validated, if you will, in magazines. So there were any number of magazines that my former agency was able to stop the publication of, through use of the courts, so that there was not this rampant validation of conduct that exists today.
>
> Because what happens when people see other people engaging in the behavior -- and this is just human nature – they tend to think: Well, that's okay. I can raise those tomatoes, when I absolutely can't raise those tomatoes. You get on YouTube and you see how to do it.
>
> Sadly, that has fallen over into our cultural sexual behavior. The oversexualization of young women is something that is rampant in all the advertising agencies. And there are any number of specific cases that I could point to, but won't here, of the misuse of young women in that fashion.

So what I have is a client who basically is from another culture, who leaves his home and his wife, travels to Jacksonville to work for the Navy as an aircraft mechanic because he can't be a pilot.
He thinks he wants to be a pilot, but his eyesight prevents him from doing that, so he is now a mechanic here at the Naval Air Station.

Now, I know that many of the men in this courtroom are aware that behavior among men in cultures that are predominantly male tend to encourage sexual misconduct. It's the very nature of men being men. And I'm not excusing that conduct. I'm not saying that it's appropriate, but what I am saying is that it exists.

So in a circumstance where a young man comes from another culture and another state where he has no backup, he's in with a bunch of men whose mantra is a lover in every port, this behavior is not restricted by the environment . . . He has access to an Internet application that provides dating sites. . . . Now, there's an understanding that these dating application sites are for above 18, but, of course, most of us know that that's not the case. Anybody has access to it. There's no restriction. But he does engage in conversation with individuals which later lead him down a path of criminal behavior. There's no question of that.

But part of the problem for our culture, Your Honor, is that there are no longer any firewalls to protect these young women from men, or young men, even.

Those firewalls don't exist because you can do all of this on the Internet without having to encounter parents or individuals who, in fact, would restrict your access to a young person.

And while I'm not saying in any way that his behavior was appropriate, there are reasons that in our culture today these things are becoming more and more pronounced. . . .

And it would seem to me that in many respects, the laws have failed to keep up with the changes in our culture. And that's not just true in this

> particular case, that's true in many other because technology moves forward so quickly in our culture that tomorrow we don't know -- yesterday we don't know what's going to happen tomorrow.
>
> And all I'm suggesting is that he was influenced by his -- the circumstances surrounding his environment here that led him down a path of criminal conduct.
>
> And, yes, he's responsible. He accepts responsibility. As the Court has heard, he confessed immediately. He didn't try to cover this up or make excuses. He said: Yes, I did this. . . .
>
> And so I would merely ask that the Court at least understand from my client's perspective that there was an environmental circumstance which encouraged him, if not allowed him, to engage in this behavior without regard to his upbringing.

The sentencing court struggled with whether to depart *above* the near twenty year guideline upper limit, but concluded that nearly twenty years was "sufficient":

> So going back to the imposition of sentence and the determination of what's an appropriate sentence. As I concluded before, my struggle was Mr. Panopio is -- is a young man, although entirely too old to be engaging in the conduct in which he engaged. And I struggled to determine what was an appropriate sentence to protect the public, because he is young enough to be released and continue to engage in this conduct.
>
> And I -- I had significant concern when I heard from Mr. Panopio in his allocution of whether -- whether he truly understood the wrongful character of his -- of his actions.
>
> At the end of the day -- and I expressed this I was concerned that the guidelines didn't, but -- but in looking back at it, Mr. Panopio did -- the guidelines did score Mr. Panopio with a five-level enhancement. And that -- that five-level enhancement was based upon his pattern of

activity involving prohibited sexual conduct. And that five-level enhancement changed his guidelines from -- I think it was 100 months at the low and the high end -- well, so without that enhancement, his guidelines would have been 108 to 135 months, and with it, it's 188 to 235 months.

And 235 months is -- is just shy of 20 years. And while I think I could depart upward under 5K 2.0, because even an enhancement for engaging in a pattern -- I'm going to use the statutory language -- of engaging in a pattern of activity involving prohibited sexual conduct, it might not be enough, because arguably that -- that would apply simply based upon Mr. Panopio's engaging in sexual activity with three separate minors before trying to have sex with a 12-year-old, and it wouldn't necessarily cover the fact that he received child pornography, he produced child pornography, he solicited child pornography, and he extorted a 15-year-old for additional child pornography and sexual activity.

And so as you-all can tell, I have struggled with this. At the end of the day, what I'm intending to do is impose the high end of the guideline sentence and leave it at that.

I -- again, I -- it's a little hard to entirely convince myself that that is a sufficient sentence. It is certainly not greater than necessary by any stretch of the imagination to reflect the seriousness of the horrible conduct that Mr. Panopio engaged in, to accomplish just punishment, or to protect the public. It is not greater than necessary to do that.

At the same time, I convinced myself, after rereading everything, even as troubling as it was to reread, that a sentence of essentially 20 years for an individual who's never -- never had any criminal activity in the past, that has to be sufficient, and so that's -- that's the sentence that I'm going to impose today, with a lengthy term of supervised release, in order to assure that Mr. Panopio's conduct is -- is under the watchful eye of an individual who can or a community that can exercise appropriate supervision in the event that Mr. Panopio's sentence is not sufficient to deter his interests in children. . . .

So that's the sentence that the Court intends to impose today.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. WHETHER A NEAR TWENTY YEAR PRISON SENTENCE FOLLOWED BY A FIFTEEN YEAR TERM OF SUPERVISED RELEASE FOR A YOUTHFUL OFFENDER SUCH AS PANOPIO VIOLATES THE EIGHTH AMENDMENT.

Age, rather than death, has come to define this Court's Eighth Amendment jurisprudence.[1]

> The U.S. Supreme Court has made clear that children are entitled to special consideration under the Eighth Amendment in light of their reduced culpability and greater capacity for reform. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court prohibited the execution of children under 18 at the time of the crime.[2] In *Graham v. Florida*, it

[1] See *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012) ("So if . . . death is different, children are different too . . . . [I]t is no surprise that the law relating to society's harshest punishments recognizes such a distinction." (internal quotation marks omitted)); *see* also Mary Berkheiser, Death Is Not So Different After All: *Graham v. Florida* and the Court's 'Kids Are Different' Eighth Amendment Jurisprudence, 36 VT. L. REV. 1, 1 (2011) (describing how the Court's approach in *Graham v. Florida* "unceremoniously demolished the Hadrian's Wall that has separated its 'death is different' jurisprudence from non-capital sentencing review since 1972" and, in its place, "fortified an expansive 'kids are different' jurisprudence"); Carol S. Steiker & Jordan M. Steiker, *Graham* Lets the Sun Shine in: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges, 23 FED. SENT'G REP. 79, 81 (2010) ("Justice Kennedy [in] thus managed to transform what had looked like a capital versus noncapital line, the application of which rendered noncapital challenges essentially hopeless, into a categorical rule versus individual sentence line . . . .").

[2] In drawing the line at 18, the *Roper* Court explained: "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules.

> held that children convicted of nonhomicide offenses cannot be sentenced to life without parole and must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. 48, 74-75 (2010). And in *Miller v. Alabama* and *Montgomery v. Louisiana*, the Court established that children must have this meaningful opportunity for release even in homicide cases—except in the rarest of cases where the sentencer determines that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. 718, 733 (2016); *Miller*, 567 U.S. 460, 473 (2012). These decisions are grounded in "psychology and brain science [showing] fundamental differences between juvenile and adult minds." *Graham*, 560 U.S. at 68; *see also Miller*, 567 U.S. at 471-472, 472 n.5. As some courts and legislatures across the country are beginning to recognize, brain science and psychological research shows that young adults, whose brains are still developing, are similarly less culpable and more capable of reform than older adults, and thus ought be treated more like juveniles than adults when they commit crimes.
>
> Indeed, recent studies show that certain brain systems and structures, including those involved in self-regulation and higher-order cognition, continue to develop and mature well into the mid-twenties.[3]

The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." 543 U.S. at 574.

[3] *See, e.g.*, *Commonwealth v. Bredhold*, No. 14-CR-161, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, at *6-*10 (Fayette Circuit Court, 7th Div. Aug. 1, 2017) (Scorsone, J.) [hereinafter Bredhold Order] (citing, among other sources, B.J. Casey et al., Imaging the Developing Brain: What Have We Learned About Cognitive Development?, 9 Trends in Cognitive Sci. 104-110 (2005); N. Dosenbach, et al., Prediction of Individual Brain Maturity Using fMRI, 329 Sci. 1358-1361 (2011); A. Hedman, et al., Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies, 33

> Moreover, research demonstrates that individuals in their late teens and early twenties are less mature than older adults in several ways, including underestimating risk, reduced ability to control impulses and consider future consequences, and social and emotional immaturity.[4] Finally, brain science shows that the late teens and early twenties is one of the periods of the most marked neuroplasticity of the brain, suggesting that individuals in this age group have a strong potential for behavioral change.[5] Thus, recent research makes clear that older teenagers and young adults are, like juveniles, "more capable of change than are adults, and their actions are less likely to be evidence of an 'irretrievably depraved character,'" *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 570), which warrants special consideration in criminal sentencing.

Hum. Brain Mapping 1987-2002 (2012)); *State v. O'Dell*, 358 P.3d 359, 364, 364 n.5 (Wash. 2015) (citing "psychological and neurological studies showing that the parts of the brain involved in behavior control continue to develop well into a person's 20s") (internal quotation marks omitted).

[4] *See, e.g.*, A. Cohen, et al., When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts, 4 Psychological Science 549-562, 559-560a (2016) ("[T]hese findings suggest that young adulthood is a time when cognitive control is still vulnerable to negative emotional influences, in part as a result of continued development of lateral and medial prefrontal circuitry."); L. Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, Dev. Rev. Vol. 28(1) 78-106 (Mar. 2008) (noting that "rates of risk-taking are high among 18- to 21-year-olds" and explaining that adolescents and young adults are more likely than adults over 25 to engage in risky behaviors); Bredhold Order at *7-*9 (and sources cited therein); *O'Dell*, 358 P.3d at 364 ("[S]tudies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.") (citing sources).

[5] Bredhold Order at *10 (citing Laurence Steinberg, Age of Opportunity: Lessons from the New Science of Adolescence (2014)).

Consideration of Youth for Young Adults, Juvenile Sentencing Project, Quinnipiac University School of Law, January 2020.[6]

In *Graham v. Florida*, 560 U.S. 48 (2010) the Court adopted a new model of proportionality review.[7] The Court considered a categorical challenge to a term-of-years sentence, life without parole for a juvenile convicted of armed burglary and attempted armed robbery, based on the proportionality principle of the Eighth Amendment.[8] The Court used a two-part analysis to consider such categorical challenges: first, do objective indicia suggest there is a national consensus against the sentencing practice; then second, does the punishment violate the Constitution

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[6] Accessed at https://juvenilesentencingproject.org/wp-content/uploads/model_reforms_consideration_of_youth_for_young_adults.pdf.

[7] The description of the *Graham* proportionality review is taken verbatim from Rebecca Shepard, Does The Punishment Fit The Crime?: Applying Eighth Amendment Proportionality Analysis to Georgia's Sex Offender Registration Statute and Residency and Employment Restrictions for Juvenile Offenders, 28 Georgia State University Law Review 529, Winter 2012.

[8] *Graham*, 130 S. Ct. at 2021–23. The Court reviews two classifications of proportionality challenges: 1) challenges to the length or severity of a sentence based on the facts of a particular case, and 2) challenges based on categorical restrictions on the death penalty. *Id.* at 2021. The categorical challenges have included two subsets, one turning on the characteristics of the offense and the other turning on the characteristics of the offender. *Id*. at 2022. *Graham* presented a categorical challenge to a term-of-years sentence for a non-homicide offender, based on the offender's characteristic of being a juvenile, thus questioning a non-capital sentencing practice generally rather than only as applied to the facts of this case. *Id*. at 2022–23.

based on the Court's own interpretation of the Eighth Amendment?[9] When measuring "objective indicia of national consensus," the Court considers legislative enactments permitting the challenged sentence for juveniles and actual sentencing practices.[10] If the punishment is less common, the Court considers it to have less support from the national consensus.[11] However, the Court notes that community consensus "is not itself determinative of whether a punishment is cruel and unusual."[12]

The Court's independent judgment of whether the sentence is cruel and unusual entails considering the culpability of the offender and the severity of the challenged punishment.[13] The culpability of the offender should be assessed "in light

[9] *Id.* at 2022. See also *Roper v. Simmons*, 543 U.S. 551, 564 (2005).
[10] *Graham*, 130 S. Ct. at 2023.
[11] *Id*. at 2023–26. The Court weighed evidence that thirty-seven states, the District of Columbia, and federal law permit life sentences without parole for juvenile non-homicide offenders under some circumstances against the rarity with which this sentence is actually applied. *Id*. at 2023–25. The Court also noted that many states do not specifically prohibit the sentence, but do not actually apply it. *Id*. at 2025. "The sentencing practice now under consideration is exceedingly rare. And 'it is fair to say that a national consensus has developed against it.'" *Id*. at 2026 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).
[12] *Graham*, 130 S. Ct. at 2026.
[13] *Id*. at 2026.

of [his] crimes and characteristics."[14] In evaluating the punishment, the Court must also evaluate whether it serves legitimate penological goals.[15]

Regarding the culpability of juvenile offenders, the Graham Court reiterated the holding in *Roper v. Simmons*, 543 U.S. 551 (2005) that juveniles have diminished culpability as compared to adult offenders, and therefore "are less deserving of the most severe punishments."[16] A juvenile offender who commits a crime that, by its own nature, is less deserving of the most severe punishments "has a twice diminished moral culpability."[17] In evaluating the severity of the challenged punishment, the Court not only observed the harshness of the sentence generally, but specifically

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[14] *Id*.

[15] *Id*. The Court considers whether the challenged sentence is justified by penological goals "that have been recognized as legitimate": retribution, deterrence, incapacitation, and rehabilitation. *Id*. at 2028.

[16] *Id*. at 2026 (affirming the holding in *Roper* that characteristics of juvenile offenders make them less culpable for their actions than are adult offenders, including: a lack of maturity and responsibility, greater susceptibility to negative influences, and a more transitory character (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005))); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (articulating these "[t]hree general differences between juveniles under 18 and adults" that demonstrate the reduced culpability of juvenile offenders).

[17] *Graham*, 130 S. Ct. at 2027. *See* Robert Smith & G. Ben Cohen, Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 87, 91-92 (2010) (discussing the significance of this "constitutional mathematics" in creating a new constitutional principle).

considered its severity as applied to a juvenile.[18] The Court noted that juveniles and adults both sentenced to life without parole only nominally receive the same punishment because the effect of the sentence for a juvenile will be much more severe.[19] Finally, the Court evaluated whether the challenged sentencing practice was supported by legitimate penological goals, and for each penological goal, the characteristics and immaturity of juvenile offenders undermined the justification for the sentence.[20] Because of the diminished culpability of juvenile nonhomicide offenders, the severity of the challenged sentence, and the lack of justification by penological goals, the Court drew a bright line, categorically forbidding life-without-parole sentences for juvenile offenders under age eighteen.[21]

EMERGING CONSENSUS AND SCIENCE REQUIRES *ROPER, GRAHAM* AND *MILLER* TO BE EXTENDED TO YOUNG ADULTS

[18] *Graham*, 130 S. Ct. at 2028.
[19] *Id.*
[20] *Id*. at 2028–30 (finding that goals of retribution, deterrence, incapacitation, and rehabilitation do not justify a life-without-parole sentence for a juvenile non-homicide offender, based largely on the characteristics and immaturity of juveniles).
[21] *Id*. at 2030 (asserting that the Constitution "does not foreclose the possibility that [juvenile nonhomicide offenders] will remain behind bars for life" but that they must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

It is past time for the courts to cross the bright line of *Graham* and adopt similar proportionality analysis to offenders who are young adults but over the age of 18.[22] There is no longer consensus around eighteen years old as the bright line to apply to individualized sentencing taking into consideration the unique brain development of the individual youthful offender and the unique facts of the particular case in determining whether a minimum mandatory sentence or any guideline sentence apply. In Panopio's case a 24 year old was sentenced as if he were a mentally, emotionally and psychologically mature and culpable adult and the guidelines were applied to him and the factors under 18 U.S.C. § 3553 as if he were a fully responsible adult, which he was not. Imposition of a near 20 year prison sentence followed by a 15 year term of supervised release on this particular youthful offender for this particular offense, violated his Eighth Amendment right to be free of cruel and unusual punishment.

SCIENTIFIC RESEARCH ON MATURATION AND ITS IMPLICATIONS FOR CULPABILITY OF JUVENILE OFFENDERS[23]

[22] *But see Melton v. Fla. Dep't of Corr*., 778 F.3d 1234 (11th Cir. 2015).
[23] The argument which follows was taken largely verbatim from Shepard, Does the Punishment Fit the Crime.

Evaluating whether a punishment is cruel and unusual requires courts to apply societal morals and standards of decency, which change over time.[24] Rather than being fixed, notions of cruelty involve moral judgments and, as noted by the United States Supreme Court, "must change as the basic mores of society change."[25] A punishment considered constitutionally permissible in the past may not be acceptable today, because our understandings of decency, culpability, or social values change over time.[26] As science uncovers new information about adolescent development, our understanding of the culpability of youthful offenders evolves, and consequently our evaluation of punishments for these offenders evolves as well.

In *Roper v. Simmons*, this Court held that imposing the death penalty on juvenile offenders violated the Eighth Amendment, thus declaring a punishment previously considered constitutional to be cruel and unusual.[27] The *Roper* Court found that there are three differences between juveniles and adults that diminish juveniles' culpability.[28] First, youths lack maturity and a sense of responsibility, so

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[24] *Id*. at 2021 ("To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976))).
[25] *Furman v. Georgia*, 408 U.S. 238, 382 (1972).
[26] *Graham*, 130 S. Ct. at 2036 (Stevens, J., concurring).
[27] *Roper v. Simmons*, 543 U.S. 551, 568 (2005).
[28] *Id*. at 569.

when they act irresponsibly, their conduct is less morally reprehensible than that of an adult.[29] Second, juveniles have greater susceptibility to negative influences and peer pressure, and at the same time lack control over their environment and ability to escape those influences.[30] Third, juveniles have a more transitory character and personality, undermining any conclusion that a juvenile who commits even a heinous crime has an "irretrievably depraved character."[31] The conclusions about juvenile culpability made in *Roper* were adopted by the Court in *Graham* as well.[32] Since the

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[29] *Id*. (noting that juveniles are denied the same rights as adults because of their immaturity and irresponsibility); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.").

[30] *Roper*, 543 U.S. at 569 (noting that while juveniles are more vulnerable to negative influences, they also have less control over their own environments and "'lack the freedom that adults have to extricate themselves from a crimogenic setting'" (quoting Lawrence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003))).

[31] *Roper*, 543 U.S. at 570. See also Scott & Steinberg, supra note 15, at 821 ("It is fair to assume that most adults who engage in criminal conduct act upon subjectively defined preferences and values, and that their choices can fairly be charged to deficient moral character. This cannot fairly be said of . . . juvenile actors, whose choices, while unfortunate, are shaped by development factors that are constitutive of adolescence.")

[32] *Graham v. Florida*, 560 U.S. 48, 68 (2010) ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. . . . [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

Roper Court based its holding about the constitutionality of the punishment on its findings regarding adolescent development, which were then adopted in *Graham*, further scientific discoveries about maturation could either support the Court's view of juvenile culpability or undermine it.[33]

The *Roper* Court relied upon scientific and psychological research presented in *amicus curiae* briefs in making its conclusions about the differences between juveniles and adults.[34] Critics have challenged the sufficiency of the scientific and psychological support for the Court's conclusions regarding juveniles' reduced culpability.[35]

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[33] *See, e.g.*, Staci A. Gruber & Deborah A. Yurgelun-Todd, Neurobiology and the Law: A Role in Juvenile Justice?, 3 OHIO ST. J. CRIM. L. 321 (2006); (reporting the authors' conclusion from studies of brain development, that "[b]ased on neurobiological data alone, it is clear that children and adolescents are different both structurally and functionally from adults"); Lawrence Steinberg et al., Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop," 64 AM. PSYCHOLOGIST 583 (2009); Scott & Steinberg, *supra*.

[34] *Roper*, 543 U.S. 551; Deborah W. Denno, The Scientific Shortcomings of *Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379, 380–81, 380 n.8 (2006) (noting the Court's reliance on a "substantial number of *amici* briefs," the majority of which (sixteen out of eighteen) were submitted on behalf of the juvenile respondent, including briefs by the American Psychological Association, American Bar Association, and President Jimmy Carter).

[35] *See*, e.g., *Roper*, 543 U.S. at 617–20 (Scalia, J., dissenting) (challenging as contradictory claims by the American Psychological Association in its *amicus* brief for petitioner that minors "lack the ability to take moral responsibility for their decisions" when the Association also submitted an amicus brief in another, unrelated

However, psychological and neurological research continues to support the *Roper* Court's findings that the developmental differences between juveniles and adults are significant and impact culpability.[36]

Different legal issues implicate different types of maturity.[37] While studies indicate that juveniles develop cognitive skills early and may perform cognitive tasks comparable to adults by age sixteen, they are not equal to adults with respect to psychosocial skills, including impulse control and resistance to peer pressure.[38] This psychosocial immaturity means that in circumstances that usually accompany criminal activities, juveniles find themselves facing "the very conditions that are likely to undermine adolescents' decision making competence."[39] Thus, while

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case urging that minors were mature enough to make abortion decisions without parental involvement); Denno, *supra*, at 381 (asserting that the Court failed to cite adequately and relied too heavily on a few resources and some outdated resources).

[36] Psychological and brain research indicates that juveniles differ from adults in their cognitive and psycho-social development, and that risky, even illegal, behavior is a common element of identity development for juveniles. *See*, e.g., Gruber & Yurgelun-Todd, *supra* note 35; *See* Elizabeth S. Scott & Lawrence Steinberg, Blaming Youth, 81 TEX. L. REV. 799 (2003), at 812–20.

[37] Steinberg *et al.*, *supra*.

[38] *Id*. at 586 ("[O]ur findings, as well as those of other researchers, suggest that whereas adolescents and adults perform comparably on cognitive tests measuring the sorts of cognitive abilities . . . that permit logical reasoning about moral, social, and interpersonal matters—adolescents and adults are not of equal maturity with respect to the psychosocial capacities listed by Justice Kennedy in his opinion in *Roper*—capacities such as impulse control and resistance to peer influence.").

[39] *Id.* 592.

juveniles may be capable of making mature decisions under some circumstances, their psychosocial immaturity justifies considerations that they are less culpable than adults when they engage in criminal activities.[40]

Reflecting this understanding of the effects of maturation on juveniles, the Court has found immaturity to reduce culpability when evaluating the constitutionality of capital punishment and a life sentence without parole for juvenile non-homicide offenders.[41]

All of the above considerations apply with equal force to youthful offenders over the age of 18. The emerging consensus is that the bright line for youthful offender sentencing should be 25 years of age, not 18.

APPLYING *GRAHAM* TO PANOPIO'S EIGHTH AMENDMENT CLAIM

Applying the Eighth Amendment analysis of *Graham* to the Panopio's case involves three inquiries. First, is there a national consensus opposing the application of harsh minimum mandatory and harsh guideline penalties to youthful offenders?[42] Second, considering the nature of the crime and characteristics of this offender, is

[40] *Id*. 592–93.
[41] *Graham v. Florida*, 130 S. Ct. 2011 (2010) (finding a life sentence without parole unconstitutional for juvenile non-homicide offenders); *Roper v. Simmons*, 543 U.S. 551 (2005) (finding the death penalty unconstitutional for juvenile offenders).
[42] 108. *Graham*, 130 S. Ct. at 2022.

the severity of the punishment justified?[43] Third, does the punishment serve legitimate penological goals?[44]

INDICIA OF NATIONAL CONSENSUS - LEGISLATION PROVIDING FOR SPECIAL TREATMENT OF YOUNG ADULT OFFENDERS[45]

In *Graham*, the indicia considered to evaluate whether the national consensus supported the challenged sentence were legislative changes. Widespread legislative changes have taken place in recent years.

Recognizing that older teens and young adults are more akin to juvenile offenders than to adults in their reduced culpability and greater capacity for reform, several state legislatures have proposed or implemented reforms that account for youth and mitigate criminal punishment imposed on young adults. Moreover, although most courts have thus far declined to do so, some state and federal courts have extended the relief of *Roper*, *Graham*, *Miller*, and *Montgomery* to young adult offenders. The following is a list of legislative reforms (that have been proposed or enacted) and judicial decisions across the country that provide special treatment and consideration of youth for young adult offenders.

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[43] *Id.* at 2022, 2026.
[44] *Id.*
[45] The following is taken from Consideration of Youth for Young Adults, Juvenile Sentencing Project, Quinnipiac University School of Law, January 2020.

LEGISLATIVE REFORM: YOUTHFUL OFFENDER PAROLE

California – In 2017, California passed a statute that extends youth offender parole eligibility to individuals who committed offenses before age 25.6 This statute amended earlier legislation providing new parole eligibility rules for individuals who committed crimes under age 23 and directing the parole board to use special criteria and procedures in these cases.[46]http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB260. Now, youth offenders are eligible for parole in California as follows, subject to certain exceptions: (1) those convicted of controlling offenses committed at age 25 or younger and sentenced to a determinate sentence are eligible after 15 years; (2) those convicted of controlling offenses committed at age 25 or younger and sentenced to less than 25 years to life are eligible after 20 years; (3) those convicted of controlling offenses committed at age 25 or younger and sentenced to 25 years to life will be eligible after 25 years. Individuals sentenced to life without

[46] *See* S.B. 261 (Cal. 2015) (amending Cal. Penal Code § 3051), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB261. Prior to the enactment of S.B. 261, the legislature had enacted S.B. 260, which created these special parole rules for individuals who committed crimes under the age of 18. *See* S.B. 260 (Cal. 2013) (amending Cal. Penal Code §§ 3041, 3046, 4801 and enacting § 051),

parole for controlling offenses committed under age 18 are eligible after 25 years. Cal. Penal Code § 3051(b). Those sentenced to life without parole for crimes committed after reaching the age 18 are not eligible for the youth offender parole process. Id. § 3051(h). Individuals sentenced under the three strikes law or "Jessica's law" are not eligible for the youth offender parole process. See id. § 3051(h). In addition, the parole process set forth in § 3051 does not apply "to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison." *Id.* Among other requirements, the statute instructs the parole board in reviewing a youthful offender's suitability for parole to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[47]

Illinois – In 2019, Illinois enacted a statute providing for parole review after 10 years for persons under 21 at the time of the commission of crimes other than first-degree murder and aggravated criminal sexual assault, and after 20 years for

[47] *Id*. § 4801(c).

crimes of first-degree murder and aggravated criminal sexual assault.[48] The Prisoner Review Board is directed to consider, inter alia, "the diminished culpability of youthful offenders, the hallmark features of youth, and any subsequent growth and maturity of the youthful offender during incarceration."[49]

LEGISLATIVE REFORM: SPECIAL STATUS AND SENTENCING RELIEF FOR YOUNG ADULTS OR "YOUTHFUL OFFENDERS"

Alabama — Alabama law permits courts to designate certain offenders under the age of 21 as "youthful offenders."[50] A person charged with a felony and adjudged a youthful offender may receive a suspended sentence, a period of probation, a fine, and/or a term of incarceration not to exceed three years.[51] Moreover, the record will be sealed in a case in which the defendant is granted youthful offender status.[52]

Florida — Florida's youthful offender law permits alternative sentences for youth under the age of 21 at the time of sentencing for any felony offense other than those carrying a capital or life sentence. Under the law, courts can sentence such

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[48] 730 Ill. Comp. Stat. 5/5-4.5-115(b).
[49] 730 Ill. Comp. Stat. 5/5-4.5-115(j). Note that the bill excludes those convicted of predatory criminal sexual assault of a child, certain types of first-degree murder, and those sentenced to natural life in prison. 730 Ill. Comp. Stat. 5/5-4.5-115(b).
[50] Ala. Code §§ 15-9-1 to 15-19-7.
[51] *Id*. § 15-19-6.
[52] *Id*. § 15-19-7

defendants to supervision on probation or in a community control program, incarceration in county or community residential facilities, or incarceration in the custody of the state department of corrections for a period not to exceed six years.[53]

Hawaii – Hawaii defines "young adult defendant[]" as a person convicted of a crime under the age of 22 that has not previously been convicted of a felony.[54] Young adult defendants are eligible for specialized correctional treatment, including the possibility of commitment to the custody of the department of public safety and, as far as practicable, special and individualized correctional and rehabilitative treatment according to need. Moreover, young adult defendants may be sentenced to special, indeterminate terms for a maximum of 8 years (for a class A felony) of imprisonment if the court considers such a term adequate. Note that the statute does not apply to young adults convicted of murder or attempted murder.[55]

Virginia — Virginia provides the possibility of relief for young adults convicted of certain first-time offenses that occurred before the age of 21 (excluding capital murder, first- and second-degree murder, and other enumerated crimes). In

[53] Fla. Stat. § 958.04.
[54] Haw. Rev. Stat. § 706-667. Excluded are those previously convicted of a felony as an adult or adjudicated as a juvenile for an offense that would be a felony if committed by an adult.
[55] *Id.*

particular, in such cases, judges have the discretion to sentence to an indeterminate period of incarceration of four years.[56]

LEGISLATIVE REFORM: EXPANDING JUVENILE COURT JURISDICTION TO INCLUDE YOUNG ADULTS

Vermont —Vermont recently passed a law requiring the state's Department for Children and Families and others to report to the General Assembly on a plan for expanding juvenile court jurisdiction to include 18- and 19-year-olds.[57] Raising the age of juvenile jurisdiction will go into effect for 18-year-olds on July 1, 2020 and for 19-year-olds on July 1, 2022.[58] The Act further provides for expungement of criminal history records of certain qualifying crimes committed by youth ages 18-21 30 days after completion of the sentence if the court finds expungement is in the interests of justice.[59]

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[56] Va. Code § 19.2-311.

[57] S. 234, 2017-2018 Sess. (Vt. 2018), https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT201/ACT201%20As%20Enacted.pdf

[58] Report to the Vermont Legislature: Report on the Expansion of Juvenile Jurisdiction, Vermont Agency of Human Services, Department of Children and Families (Nov. 1, 2018), https://legislature.vermont.gov/assets/Legislative-Reports/Act-201-Report.pdf

[59] S. 234, 2017-2018 Sess. (Vt. 2018), https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT201/ACT201%20As%20Enacted.pdf

Connecticut — Legislation introduced in Connecticut in 2018 proposed raising the age of juvenile court jurisdiction to encompass all delinquent acts committed by "young adults," or persons under the age of 21.[60] (The bill provided for a gradual expansion of juvenile court jurisdiction, to 18-year-olds in the first year, then to 18- and 19-year-olds in the second year, and, finally, in the third year, to 18-, 19-, and 20-year-olds.) The bill did not pass in the 2018 legislative session. In 2019, legislation was introduced that would have expanded the jurisdiction of the juvenile court to include "all teenagers."[61]

Massachusetts — A bill currently pending in Massachusetts would gradually expand the upper age in delinquency and youthful offender cases to include 18- to 20-year-olds, and would similarly expand the upper age of commitment to the Department of Youth Services to ensure adequate rehabilitation opportunities, including extending commitment in youthful offender cases up to age 23.[62]

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[60] H.B. 5040, Feb. Sess. 2018 (Conn. 2018), https://www.cga.ct.gov/2018/TOB/h/pdf/2018HB-05040-R00-HB.PDF

[61] S.B. 57, Jan. Sess. 2019 (Conn. 2019), https://www.cga.ct.gov/2019/TOB/s/pdf/2019SB-00057-R00-SB.PDF

[62] H. 3420, 191st Gen. Ct. (Mass. 2019), https://malegislature.gov/Bills/191/H3420

Illinois — A bill introduced in Illinois would expand the definition of "delinquent minor" subject to juvenile court jurisdiction to include, in the first year, 18-yearolds that commit misdemeanor offenses, and, by the third year, 19- and 20-yearolds that commit misdemeanor offenses.[63]

EXTENDING *ROPER*, *GRAHAM*, *MILLER* AND *MONTGOMERY* TO YOUNG ADULTS

Connecticut (federal) — A federal district court for the District of Connecticut has extended *Miller* to an 18-year-old offender, finding that imposition of a mandatory life sentence warranted habeas relief. See *Cruz v. United States*, No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. Mar. 29, 2018) (granting § 2255 habeas relief under *Miller* to a defendant sentenced to mandatory life without parole for a crime committed at age 18, finding a national consensus against imposing mandatory life without parole on 18-year-olds and reasoning that the hallmark characteristics of youth apply to 18-year-olds). Note that the case is currently

[63] HB 4581, 100th Gen. Ass. (Ill. 2018), http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=91&GA=100&DocTypeId=HB&DocNum=4581&GAID=14&LegID=109512&SpecSess=&Session

pending before the Second Circuit. See *Cruz v. United States*, No. 19-989 (2d Cir. 2019).[64]

Kentucky — A circuit court in Kentucky has extended *Roper* to all persons under the age of 21, declaring the death penalty unconstitutional for young adults ages 18-20. See *Commonwealth v. Bredhold*, No. 14-CR-161, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional (Fayette Circuit Court, 7th Div. Aug. 1, 2017) (Scorsone, J.) (declaring the death penalty unconstitutional for offenders under 21, relying heavily on brain science-related testimony to conclude that the death penalty is a disproportionate punishment for offenders younger than 21 because such individuals are categorically less culpable and have a better chance at rehabilitation). Note that the Kentucky Supreme Court recently heard argument in the appeal of this decision. See *Commonwealth v. Bredhold*, No. 2017-SC-000436 (Ky. 2019).

New Jersey — A superior court in New Jersey remanded for resentencing a lengthy sentence imposed on a 21-year old defendant, finding that *Miller* supported

[64] Notably, the Second Circuit first *granted* an application to file a second or successive 2255 to raise this issue, then transferred the case to the district court, where the district court granted relief on the same basis as Panopio argues here.

requiring consideration of youth. See *State v. Norris*, No. A-3008-15T4, 2017 WL 2062145, at *5 (N.J. Super. Ct. App. Div. May 15, 2017).

Washington — The Washington Supreme Court has looked to *Roper*, *Graham*, and *Miller* to conclude that a court must consider the youth of an 18-year-old as a mitigating factor justifying an exceptional sentence, citing "fundamental differences between adolescent and mature brains" that might justify a finding of diminished culpability for youthful offenders older than 17. See *State v. O'Dell*, 358 P. 3d 359 (Wash. 2015).

MODEL LEGISLATION TO RAISE THE AGE OF JUVENILE COURT JURISDICTION ABOVE 18

Most bills raising the age of juvenile court jurisdiction amend the age range provided in the definition of those subject to juvenile court jurisdiction. For example, the Illinois bill would amend the definition of "delinquent minor," Massachusetts' would amend the age of "criminal majority," on which its definition of "delinquent child" relies, and the proposed legislation in Connecticut creates a "young adult" category of offenders subject to juvenile court jurisdiction (in addition to those defined as "child").

The Connecticut bill's definition of "young adult" for purposes of delinquency matters and proceedings—including the gradual ramp-up to encompass 18-, then 19-, and finally 20-year-olds.

MODEL LEGISLATION TO PROVIDE FOR YOUTHFUL OFFENDER PAROLE

California's law providing for youth offender parole for all offenders under the age of 25 at the time of the crime serves as a model for how this Court should review Panopio's claim. The law is produced in part below; for more on the particular youth-sensitive procedures provided and other details.

Cal. Penal Code § 4801(c) provides:

> (c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

Cal. Penal Code § 3051 provides in part:

> (a)(1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger, or was under 18 years of age as specified in paragraph (4) of subdivision (b), at the time of his or her controlling offense.
>
> (2) For the purposes of this section, the following definitions shall apply:

(A) “Incarceration” means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) “Controlling offense” means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b)(1) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(4) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

. . .

> (e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.
>
> (f)(1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.
>
> (2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

It is clear from this partial summary - and this is only a partial review of relevant state statutes and recent legislative activity - that the clear emerging consensus is to treat young adults as well as juveniles with special, individualized attention at sentencing reflecting the scientific knowledge we have today that young adults are not equally culpable compared to older adults, persons over age 25 roughly, whose brains have fully developed.

BALANCING THE YOUTHFUL OFFENDER'S CRIMINAL CONDUCT AND THE SEVERITY OF THE PUNISHMENT

It is clear in light of modern scientific knowledge that the analysis applied by the district court to Panopio's case under 18 U.S.C. § 3553 was simply wrong in every respect. Her consideration of the § 3553 factors completely failed to take into consideration the established science, data and statistics about youthful offenders. The district court sentenced Panopio as if he were an aberrant pedophile sex offender with a record of and prediction for child sex, and whose history and age established could not be rehabilitated. Instead, the record established that Panopio is a defendant whose unrebutted expert psychological assessment was that he was not a pedophile and suffered no aberrant psychosexual condition but was merely a young man exploring his sexual curiosity in an environment accurately described by his defense counsel as tolerating, encouraging and validating such behavior. Proof of how social norms have changed and how the culture encourages such behavior was the adamant refusal of the "victim" in this case to consider herself a victim - she stated that she was not a victim - that what she did was engage in a consensual relationship with Panopio.[65]

[65] *See* Kelsey B. Shust, Extending Sentencing Mitigation for Deserving Young Adults, 104 Journal of Criminal Law and Criminology 667, Fall 2014, for a point by point application of youthful offender considerations to the statutory sentencing factors showing how mistakenly they are applied to youthful offenders.

Panopio, 5 feet 6 inches tall, 24 years old, away from home for the first time in his life, living with other young Navy sailors, exposed to internet sex and internet access to young sex partners, who found a willing partner, with whom he engaged in sex. A pyschosexual evaluation conducted by a forensic expert who has been employed by this very district court to provide counseling for sex offenders found nothing pathological about the young man. The girl involved refused to consider herself a victim and insisted that what she did was consensual. On this record it violated the Eighth Amendment to sentence Panopio to a near twenty year term of imprisonment and fifteen years of sex offender supervised release. Application of this statute to a youthful offender such as Panopio as if he were the same as an older adult offender, even though both this Court's Eighth Amendment jurisprudence and current scientific research embrace the notion that youthful offenders are less culpable than adult offenders committing the same acts, was plain error. The uniform application of this statute is not justified and violates the proportionality principle of the Eighth Amendment. Given what society has learned about young adult brain development, which this Court acknowledges reduces the culpability of youthful offenders, there is no justification for continuing to treat youthful sex offenders uniformly the same as older adults. Individual assessment of youthful offenders and

abolition of minimum mandatory sentences is mandated by Eighth Amendment proportionality concerns.

CONCLUSION

WHEREFORE, the Petitioner, Erold Martin Panopio, respectfully requests this Honorable Court grant this petition for certiorari.

Respectfully submitted,

KENT & McFARLAND,
ATTORNEYS AT LAW

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WILLIAM MALLORY KENT
Florida Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
(904) 398-8000
(904) 348-3124 Fax
kent@williamkent.com