CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

AUSTIN MYERS, Petitioner,

vs.

STATE OF OHIO, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: NO EXECUTION DATE SET)

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QUESTIONS PRESENTED

CAPITAL CASE: NO CURRENT EXECUTION DATE

I.

Do the Ohio state courts deny a death-sentenced postconviction petitioner's rights to due process, access to the Ohio courts, and an adequate corrective process when those courts enforce an unreasonable and improperly-restrictive definition of "good cause" and fail to allow petitioner to conduct necessary discovery on the vast majority of his grounds for relief—including on all grounds challenging the deficient performance of his trial counsel in the guilt-innocence phase of his capital trial—before summarily dismissing those grounds without a hearing?

II.

Is the infliction of the death penalty on a person who was nineteen years old at the time of the offense, and was not the actual killer of the single victim of the subject crime, cruel and unusual punishment, and thus barred by the Eighth and Fourteenth Amendments?

DIRECTLY RELATED CASES

1. *State v. Myers*, Case No. 2021-0390 (Supreme Court of Ohio), order of denial of discretionary appeal entered on August 17, 2021

2. *State v. Myers*, Case No. CA2019-07-074 (Ohio Court of Appeals, 12th App. Dist.), judgment and opinion affirming in part and reversing in part denial of petition for postconviction relief entered March 8, 2021

3. *Myers v. Ohio*, Case No. 18-6532 (U.S. Supreme Court), certiorari denied on January 7, 2019, in direct appeal

4. *State v. Myers*, No. 2014-1862 (Supreme Court of Ohio), judgment and opinion affirming, on direct appeal, conviction and death sentence entered May 17, 2018

5. *State v. Myers*, Case No. 14-CR-29826 (Court of Common Pleas, Warren County, Ohio), judgment of death sentence & sentencing opinion, and sentences to other counts, entered October 16-17, 2014, and judgment of denial of post-conviction petition entered June 27, 2019

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Rules, and Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Austin Myers ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio, dated August 17, 2021, in *State v. Myers*, 2021-Ohio-2742, 164 Ohio St. 3d 1403, 172 N.E.3d 167 (2021).

OPINIONS BELOW

The order of the Supreme Court of Ohio for which Petitioner seeks a writ of certiorari is reported at *State v. Myers*, 2021-Ohio-2742, 164 Ohio St. 3d 1403, 172 N.E.3d 167 (2021). (*Appx*-0001.)

The opinion and order of the Ohio Court of Appeals, Twelfth Appellate District, which affirmed in part and reversed in part the trial court's dismissal of Petitioner's petition for postconviction relief, is reported at *State v. Myers*, Case No. CA2019-07-074, 2021-Ohio-631, 2021 Ohio App. LEXIS 652 (Twelfth Dist. Ohio App. 2021). (*Appx*-0002.)

The opinion and order of the state trial court, which dismissed on June 27, 2019, the Petitioner's petition for postconviction relief in *State v. Myers*, Case No. 14-CR-29826 (Court of Common Pleas, Warren County, Ohio June 27, 2019), is unreported. (*Appx*-0126.)

This Court's denial of certiorari of January 7, 2019, as to review of the Supreme Court of Ohio's May 17, 2018, decision on direct appeal is reported at *Myers v. Ohio*, 139 S. Ct. 822, 202 L. Ed. 2d 599 (U.S. 2019). (*Appx*-0056.)

The Supreme Court of Ohio's opinion and judgment on direct appeal, issued on May 17, 2018, is reported at *State v. Myers*, Case No. 2014-1862, 2018-Ohio-1903, 154 Ohio St. 3d 405, 114 N.E.3d 1138 (Ohio 2018). (*Appx*-0057.)

The trial court's sentencing opinion of October 16, 2014, and related judgment of October 17, 2014, in which that court sentenced Petitioner to death, are unreported. (*Appx*-0117.)

JURISDICTION

The Supreme Court of Ohio issued its judgment denying review of the lower Ohio courts' dismissal of Petitioner's petition for postconviction relief on August 17, 2021. (*Appx*-0001.) This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, which provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment, which provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment, which provides:

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

The Fourteenth Amendment, which provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 1, 2014, Petitioner Austin Myers was found guilty by a jury in Warren County, Ohio of the January 28, 2014, aggravated murder of Justin Back with capital specifications, and other offenses. (Transcript Trial Phase ("TT") at 1766-77.) After a very brief mitigation phase on October 6, 2014 (Transcript Mitigation Phase ("TM")), the jury recommended a death sentence (TM at 162-65), and, on October 16, 2014, the trial court imposed that sentence. (Transcript Sentencing ("TS") at 20-22.)

At the time of the crime, Petitioner was 19 years and 23 days old. His co-defendant, Tim Mosley, was also 19-years old. ***Mosley was the principal offender and actual killer who inflicted the fatal injuries on the victim***; ***Mosley received a sentence of LWOP***. As a result of Petitioner's death sentence, he became the youngest person at that time awaiting execution on Ohio's death row. (He still is the youngest person because, on December 17, 2020, the Supreme Court of Ohio vacated the death sentence of Damantae Graham who was, at the time of *his* 2016 crime, 19 years and 20 days old. *State v. Graham*, 2020-Ohio-6700 (Dec. 17, 2020).)

On May 17, 2018, the Supreme Court of Ohio in direct appeal affirmed Petitioner's conviction and death sentence. *State v. Myers*, 2018-Ohio-1903, 154 Ohio St. 3d 405 (2018). (*Appx*-0057.) This Court denied certiorari on January 7, 2019. *Myers v. Ohio*, 139 S. Ct. 822, 202 L. Ed. 2d 599 (2019). (*Appx*-0056.) Petitioner did not raise in his direct appeal his current claim that the Eighth and Fourteenth Amendment prohibit the execution of a teenager.

A. Trial court proceedings in postconviction.

Petitioner filed his timely postconviction petition under R.C. 2953.21 ("Petition") in the trial court on November 10, 2016. His Petition raised 60 Grounds for Relief and was supported with five volumes of Exhibits, which included some 32 affidavits and 7 expert reports/affidavits, plus substantial additional documentary support. (Trial docket no. ("T.d.") 366, PCR Petition and

T.d. 368-372, PCR Appendix.) In his PCR Petition and in subsequent state-court proceedings in litigating that petition, Petitioner raised the issues on which he now seeks certiorari in this Court: (1) his rights to due process, access to the Ohio courts, and to an adequate corrective process bar the Ohio courts' summary dismissal, without affording him any discovery or a hearing, of the constitutional claims which challenge the constitutionally-deficient performance of his trial counsel in the guilt-innocence phase of his capital case, and (2) the Eighth and Fourteenth Amendments bar capital punishment against a person who was nineteen years old at the time of the offense, and especially so when that teenager was not the actual killer of the victim of the subject homicide offense.

Petitioner sought discovery in the trial court and an evidentiary hearing on many of his Grounds for Relief in the PCR Petition. (T.d. 401, Supp. Motion for Discovery.) The State opposed discovery. (T.d. 402, State's Opp.)

On July 3, 2018, the trial court issued an 11-page order denying Petitioner's motion for discovery. (T.d. 408, Order Denying Discovery (*Appx*-0144).) The trial court denied all discovery; it did so in relevant part because, in the court's view, Petitioner had not met the requirement for "good cause" as the trial court construed that requirement of Ohio's postconviction statute. (*Id.* at 5-10 (*Appx*-0148 to -0153).)

Then, on June 27, 2019, and without having granted a hearing or any discovery, the trial court issued an order "summarily dismissing" Petitioner's PCR Petition in its entirety. (T.d. 423, Dismissal Order of 6/27/19 at 2 (*Appx*-0126 to -0143).)

B. Appellate court proceedings in postconviction.

Petitioner took a timely appeal to the intermediate Ohio appellate court, in this case the Twelfth Appellate District. (T.d. 426, Notice of Appeal.) Among the errors Petitioner raised is his appeal, as relevant here, are:

(1) The trial court committed reversible error in finding barred by res judicata and/or otherwise meritless Petitioner's claims challenging the constitutionality, propriety, and/or proportionality of a death sentence, under the Ohio and U.S. Constitutions, for an offender, like Petitioner, who was still a teenager at the time of his offense.

(2) The trial court committed reversible error in failing to allow discovery on any of the 60 Grounds raised in Petitioner's Petition, including his claims of ineffective assistance of trial counsel in the guilt-innocence phase.

(3) The trial court committed reversible error in dismissing all 60 of Petitioner's Grounds for Relief without allowing discovery or an evidentiary hearing on any of them.

The Twelfth Appellate District, on March 8, 2021, affirmed in part, reversed in part, and remanded. *State v. Myers*, 2021-Ohio-631, ¶¶ 153-54 (Twelfth App. Dist. March 8, 2021) (*Appx*-0002 to -0055).

The appellate court affirmed the trial court's dismissal of Petitioner's categorical constitutional challenge to the death penalty for teenaged offenders as either barred by res judicata and/or because, citing *Roper v. Simmons*, 543 U.S. 551 (2005), this Court has set the age line at under 18. (*Myers*, 2021-Ohio-631 at ¶¶ 54-59 (*Appx*-0020 to -0022); T.d. 423, Dismissal Order of 6/27/19 at 13 (*Appx*-0138).) The appellate court also cited the Supreme Court of Ohio's recent decision in *State v. Graham*, 2020-Ohio-6700, ¶ 182 (Dec. 17, 2020), where that court rejected a categorical challenge by a 19-year-old offender under the Eighth Amendment and where the court said, in reviewing the issue under a plain-error standard: "[B]ecause the United States Supreme Court has drawn the line at 18 for Eighth Amendment purposes, state courts are not free to invoke the Eighth Amendment as authority for drawing it at a higher age. . . . *Roper* is controlling, and we must follow it." *Graham* at ¶ 182 (cited in *Myers*, 2021-Ohio-631 at ¶ 58 (*Appx*-0022)).

The appellate court allowed discovery on only three of the 60 Grounds—all pertaining to the penalty phase—and remanded for such discovery and an evidentiary hearing on only those three Grounds. Those three Grounds (Grounds 21, 44, and 45) pertain to Petitioner's claims of

ineffective assistance of trial counsel for failing to present expert testimony at the penalty phase on the issue of adolescent brain development in conjunction with Petitioner's young age and mental health issues.

With the exception of those three Grounds, the appellate court affirmed the trial court's dismissal, and denial of discovery and an evidentiary hearing, on all other 57 Grounds in the PCR Petition.

C. Proceedings in the Supreme Court of Ohio in postconviction.

Petitioner pursued discretionary review in the Supreme Court of Ohio, by filing a memorandum in support of jurisdiction on April 21, 2021. Among other issues, he raised those which are pertinent here:

> 1. The lower Ohio courts deny a death-sentenced postconviction petitioner's rights to due process, access to the Ohio courts, and an adequate corrective process, and violate R.C. § 2953.21(A)(1) and its 2017 discovery amendments, when the courts enforce an unreasonable and improperly-restrictive definition of "good cause" and fail to allow petitioner to conduct necessary discovery on the vast majority of his grounds for relief before summarily dismissing those grounds without a hearing. U.S. Const. Amends. V, VIII, XIV; Ohio Const. Art. I, §§ 2, 16; R.C. 2953.21(A)(1); Ohio R. Civ. P. 56.
>
> 2. The prohibition against the infliction of cruel and unusual punishments, in the Eighth Amendment to the U.S. Constitution, as applied in light of prevailing standards of decency and modern scientific knowledge, does not permit a death sentence for an offender who was only 19 years old at the time of his offense. Such a death sentence violates the U.S. Constitution and must be set aside. U.S. Const. Amends. V, VI, VIII, XIV.

On August 17, 2021, the Supreme Court of Ohio denied discretionary review. *State v. Myers*, 2021-Ohio-2742, 164 Ohio St. 3d 1403 (2021). (*Appx*-0001.)

STATEMENT OF THE FACTS

Petitioner's trial counsel did not use a fact investigator even though funds were authorized by the trial court. See T.d. 372, PCR Appendix Exh. 92. Trial counsel's statement that he did not want to "waste county funds" on an investigator is a shocking abandonment of his duty to Petitioner to fully investigate all facts and circumstances before making whatever strategic decisions he deemed appropriate.

The prejudice to Petitioner was evident in the exhibits to his postconviction petition ("PCR Petition") and was not rebutted by any affidavits or exhibits by the State. In particular, a fact investigator would have found, if used by trial counsel, the information and facts described below and in paragraphs 90-91 of the PCR Petition and the exhibits cited. All of this information is outside the record and none of it was available to show prejudice on direct appeal; the State's argument that there is no evidence that counsel themselves did not investigate is specious. The lack of presentation of this evidence and counsel's clear statements that no investigator was needed belies such a strained interpretation of the evidence in the PCR Petition.

Tim Mosley, the testifying co-defendant, provided much damaging testimony against Petitioner. However, Mosley's credibility could and should have been impeached by a competent investigation of his background.

For example, Mosley's depression and rage leading up to the day in question, his severe drug addiction and depression, his violent tendencies, his cell phone records which contradict his testimony, the lack of history/habit of note taking that a good friend (Logan Zennie) could have testified about, all lead one to understand that Mosley's credibility was not meaningfully tested by adequate cross examination or presentation of witnesses. (See T.d. 366, PCR Petition at ¶¶ 90-91 & Exhs. 22, 23A-B, 24, 25, 26, 27, 42, 46, 49, 52, 55, and 90.)

How did this happen? Simply put, there was no adequate investigation by the defense even

though funds were allocated by the trial court for that very purpose.

Instead of diligently investigating the case, Petitioner's lead trial counsel seemed more concerned with not "wasting county resources." What about defending Petitioner? And now more resources have been and will be spent by the State in attempting to defend a completely inept defense predicated on no independent fact investigation.

The facts as may be relevant to guilt/innocence, were not investigated by the trial team and no reasonable strategic decision exists to not investigate them, understand them, and present them to the jury and trial court. The State has not rebutted the facts contained in these exhibits including the facts contained in Exhibit 90 (the affidavit of co-defendant Tim Mosley).

What is more, Petitioner is the youngest persons awaiting execution on Ohio's death row. He was born on January 4, 1995. Tim Mosley, Petitioner's co-defendant, was born on October 11, 1994. Therefore, on January 27, 2014, when the charged criminal acts at issue were conceived by the defendants—resulting, the jury found, in the murder of Justin Back on January 28, 2014—Petitioner ***was 19 years and 23 days old***, and Mosley was 19 years and 108 days old.

The jury knew virtually nothing about the issue of Petitioner's youth and neurodevelopment status, other than the mere fact that he was 19 years old. Petitioner's trial counsel presented no expert witnesses, or any evidence, to educate the jury about the modern scientific studies and professional consensus which hold that a person who is a few weeks passed his 19th birthday, like Petitioner was at the time of this crime, possesses *all* the exact same characteristic deficiencies of youth which caused this Court in 2005 to bar capital punishment for those under 18.

Those deficiencies are: (1) a lack of maturity, (2) an increased susceptibility to negative influences and outside pressures including peer pressure, and (3) an unformed or underdeveloped character. And, because youthful offenders—even those who are 19 and 20 years old—possess all

these inherent and scientifically-recognized deficits, such offenders are not as morally culpable for serious criminal conduct as are fully-developed adult offenders who are not so burdened.

At the time of the crime and sentence in 2014, Petitioner was "still in the commonly accepted developmental stage of late adolescence." (T.d. 371, PCR Appx. Exh. 37, Davis Aff./Report at pp. 10.) Petitioner was "unfinished" from "a neurodevelopmental standpoint." (*Id.*) He was, because of his young age and development status, "less likely than a fully developed adult to understand and appreciate fully the long-term consequences of his actions, a finding commonly seen in the research literature," he "was more influenced by peers than he would have been if he were older," and he was "less able to make fully intelligent and informed decisions about participating or not in criminal behavior." (*Id.* at pp. 31-32.) He was also "much less able to self-regulate or conform his behavior than would be older adults and much less able to resist social and emotional impulses." (*Id.* at pp. 33.)

Nonetheless, and due in part to his trial counsel's ineffective performance and ignorance about the current science about the developing adolescent brain, the prosecutor was able to make false statements to the jury—never corrected—that youth only impacts criminal behavior to the extent characterized by immaturity, irresponsibility, or recklessness, but is irrelevant to crimes like aggravated murder which require thought or planning. Those statements are false.

Indeed, the recognition of a categorical ban against capital punishment for youthful offenders under the age of 18 was made by this Court in a case involving a murder that was as brutal, pre-meditated, and planned as could be imagined. *Roper*, 543 U.S. at 556-57. Youthful offenders are protected from capital punishment *not because* they are incapable of murders which require thought and planning, but because, even when they commit such awful crimes, they are *less morally culpable* because of the inherent deficits they possess due to their still-developing teenaged brains. These are the exact deficits Petitioner possessed during all relevant times in

January 2014.

Based on what is known today about neurodevelopmental status in mid- and late-adolescence, compelling a teenager to pay for his crime with his life is too great a toll for a just and moral society to exact. No matter how horrible the crime, no matter how heartbreaking the loss.

REASONS FOR GRANTING THE WRIT

I. The lower Ohio courts deny a death-sentenced postconviction petitioner's rights to due process, access to the Ohio courts, and an adequate corrective process when the courts enforce an unreasonable and improperly-restrictive definition of "good cause" and fail to allow petitioner to conduct necessary discovery on the vast majority of his grounds for relief before summarily dismissing those grounds without a hearing. U.S. Const. Amends. V, VIII, XIV.

This issue addresses the constitutional errors of the lower Ohio courts in failing to allow Petitioner to conduct necessary discovery on his grounds for relief in his postconviction petition, concerning the guilt-innocence phase of his capital case, before the courts granted or affirmed summary dismissal of 57 of those grounds without a hearing.

The intermediate Ohio appellate court, reversing the trial court's failure to allow *any* discovery, has at least allowed Petitioner to obtain discovery, on remand, for three of his Grounds (Nos. 21, 44, and 45). *State v. Myers*, 2021-Ohio-631, ¶¶ 153-54 (*Appx*-0055). The three Grounds are Grounds 21, 44, and 45 of the Petition; these Grounds pertain to Petitioner's claims of ineffective assistance of trial counsel for failing to present expert testimony at the penalty phase on the issue of adolescent brain development in conjunction with Petitioner's young age and mental health issues. But the intermediate appellate court affirmed the trial court's dismissal, and denial of discovery and an evidentiary hearing, on all other Grounds in the Petition including on all guilt phase issues.

Petitioner's well-supported PCR Petition identified many ways in which he was denied the effective assistance of trial counsel during the guilt-innocence phase of his capital trial. *Strickland v. Washington*, 466 U.S. 668 (1984). Buttressed by numerous supporting affidavits and documents, Petitioner's PCR Petition described an extensive list of acts and omissions of his trial counsel which constitute ineffective assistance under applicable constitutional standards:

1. **Ground No. 6:** Failure to pursue a first phase youth-based defense theory in anticipation of mitigation. (*See* T.d. 366, PCR Petition at ¶¶ 49-58 & Exhs. 22, 27, 28, 37, 49, 50, and 67.)
2. **Ground No. 10:** Failure to consult with or retain a fact investigator. (*See* T.d. 366, PCR Petition at ¶¶ 86-92; T.d. 369, PCR Appx. Exhs. 21, 22 and 22A; T.d. 372, PCR Appx. Exhs. 86, 90, 92.)
3. **Ground No. 11:** Failure to conduct a proper and full cross-examination of Tim Mosley. (*See* T.d. 366, PCR Petition at ¶¶ 93-101; T.d. 369, PCR Appx. Exhs. 22, 23A-B, 24, 25, 26; T.d. 371, PCR Appx. Exhs. 42, 46, 48, 49, 52, 55; T.d. 372, PCR Appx. Exh. 90.)
4. **Ground No. 12:** Failure to conduct an effective cross-examination of the State's witnesses Detective Wyatt and Sergeant Garrison, both at the suppression hearing held on August 15, 2014, and at trial. (*See* T.d. 366, PCR Petition at ¶¶ 102-07; T.d. 369, PCR Appx. Exh. 27.)
5. **Ground No. 13:** Failure to investigate and present a crime scene/police procedures expert to challenge the State's case, and especially Tim Mosley's journal. (*See* T.d. 366, PCR Petition at ¶¶ 108-16; T.d. 369, PCR Appx. Exh. 27; T.d. 372, PCR Appx. Exh. 92.)
6. **Ground No. 14:** Failure to investigate and present a police procedures

expert to challenge *Miranda* issues. (*See* T.d. 366, PCR Petition at ¶¶ 117-25; T.d. 369, PCR Appx. Exh. 27; T.d. 371, PCR Appx. Exhs. 65, 66; T.d. 372, PCR Appx. Exh. 92.)

7. **Ground No. 15:** Failure to investigate and present an expert to evaluate Petitioner's understanding of his *Miranda* rights. (*See* T.d. 366, PCR Petition at ¶¶ 126-35; T.d. 369, PCR Appx. Exh. 28; T.d. 372, PCR Appx. Exh. 92.)

8. **Ground No. 16:** Failure to achieve a change of venue for Petitioner's capital trial and/or to competently present and preserve that issue. (*See* T.d. 366, PCR Petition ¶¶ 136-45; T.d. 370, PCR Appx. Exh. 29, 30; T.d. 371, PCR Appx. Exhs. 62, 63, 64.)

9. **Ground No. 17:** Failure to fully challenge the chain of custody of Tim Mosley's journal. (*See* T.d. 366, PCR Petition at ¶¶ 146-56; T.d. 369, PCR Appx. Exh. 27; T.d. 372, PCR Appx. Exh. 86.)

With such allegations and supporting evidence, Petitioner satisfied any reasonable definition of "good cause" so as to be allowed to conduct discovery on these claims, and specifically at least the depositions of, and document productions from, Petitioner's trial counsel about these issues concerning their performance in the guilt-innocence phase of the trial.

Petitioner made specific allegations in his PCR Petition, supported by affidavits and other items of evidence, including expert affidavits (T.d. 369, PCR Appx. Exhs. 27 (Gary A. Rini), Exh. 28 (Drew H. Barzman, M.D.)), such that there is "reason to believe that the petitioner may, if the facts are more fully developed, be able to demonstrate that he is … entitled to relief.…'" *Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

Petitioner's allegations of ineffective assistance of trial counsel were neither patently

frivolous nor palpably incredible, and, indeed, were supported with at least some evidence. The discovery he requested was specific, limited, and reasonably calculated to lead to evidence in support of those claims of ineffective assistance of trial counsel. *See, e.g.*, *Monroe v. Warden*, 2012 U.S. Dist. LEXIS 135535, at *27 (S.D. Ohio Sep. 21, 2012) ("The deposition discovery of the trial attorneys is clearly relevant to the claims that they were ineffective."); *Johnson v. Bobby*, 2010 U.S. Dist. LEXIS 103351, at *20-21 (S.D. Ohio Sep. 30, 2010) ("depositions of Petitioner's trial attorneys are the best, if not the only, source of information about counsel's investigation, impressions, preparation, and strategic decisions"); *Hill v. Anderson*, 2010 U.S. Dist. LEXIS 132468, at *24-25 (N.D. Ohio Dec. 14, 2010) (depositions and discovery of documents).

The requested discovery would have enabled Petitioner to more fully establish that his trial counsel were deficient, in the above respects, under the relevant performance standards, including because their investigation was insufficient and incomplete. Discovery would also have enabled Petitioner to establish that trial counsel's deficiencies were not the result of "trial strategy" or "tactics," and that Petitioner was "prejudiced" by the deficient performance in that, but for counsel's unprofessional errors, the result of the proceeding (as to guilt) would have been different. *Strickland.*

When a state establishes a program or procedure, the state must operate that program or procedure consistent with the due process clause of the Fourteenth Amendment. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). In the State of Ohio, a petitioner in a postconviction proceeding has the initial burden of submitting documentation *de hors* the record to demonstrate that an evidentiary hearing is warranted. *State v. Kapper*, 5 Ohio St. 3d 36, 38 (1983). The State, consistent with the due process clause, cannot place this initial evidentiary burden on a petitioner and deny him a meaningful opportunity to meet that burden. "In almost every setting where important decisions

turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269.

The Ohio courts denied Petitioner a meaningful opportunity in violation of the Due Process to establish that his trial counsel was ineffective in the guilt-innocence phase of his case when it denied him all discovery and an evidentiary hearing on these critical issues.

II. Certiorari should be granted because the execution of an offender who committed his offense while still a teenager constitutes cruel and unusual punishment, and especially when the teenager was not the actual killer of the victim of the subject homicide offense.

The Eighth Amendment guarantees individuals the right to be free from excessive sanctions. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). An individual has the right to be free from cruel and usual punishment. This fundamental right springs from one of the basic "precept[s] of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id*. (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

To determine which punishments are so disproportionate as to be cruel and unusual, the Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society.'" *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 560.

As explained in *Graham v. Florida*, the Court has taken the following approach in cases adopting categorical rules: First, it "considers objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Graham v. Florida*, 560 U.S. 48, 61 (2010) (internal citations and quotation marks omitted).

As discussed more fully below, and to give proper effect to the principles in *Atkins*, *Roper*, and other controlling cases, the Eighth Amendment requires the categorical exemption for youthful offenders to cover those who were under the age of 21 at the time of their offense, and it certainly requires this exemption for a teenager who was not the actual killer of the victim of the subject homicide offense.

A. Youth is a Condition Defined by Specific Characteristics.

"[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage[.]" *Roper*, 543 U.S. at 569 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). *See generally* T.d. 371, PCR Appx. Exh. 37 (Affidavit/Report of Daniel L. Davis, Ph.D., ABPP (hereinafter "Davis Report") at pp. 29-36 & nn. 2-19); T.d. 371, PCR Appx. Exh. 67 (Affidavit of Bobbie Hopes, Ph.D. at ¶¶ 5-7); T.d. 371, PCR Appx. Exh. 60 (Affidavit of Antoinette Kavanaugh at pp. 1-7); T.d. 415, Supp. PCR Appx., Exh. 1 (Hearing Testimony of Laurence Steinberg on September 13, 2017 in *Cruz v. United States* (hereinafter "Steinberg Testimony") at pp. 3-71).

The governing case law from this Court recognizes three general differences between children, as defined as those under 18, and adults, defined as those over 18. These hallmark

characteristics of youth are: (1) a lack of maturity, (2) an increased susceptibility to negative influences and outside pressures, and (3) an unformed or underdeveloped character. *Roper*, 543 U.S. at 569-70. *See also* John H. Blume, Hannah L. Freedman, Lindsey S. Vann, and Amelia C. Hritz, *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 TEXAS L. REV. 921, 927-28 (2020); T.d. 371, PCR Appx. Exh. 37, Davis Report at pp. 29-36 & nn. 2-19; T.d. 415, Supp. PCR Appx., Exh. 1, Steinberg Testimony at pp. 3-71.

"First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569-70 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

Second, the young are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" because, in part, they "have less control, or less experience with control, over their own environment." *Id.* at 569.

Finally, the character of someone under 18 "is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570.

"For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood[.]" *Id.* (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM.

PSYCHOLOGIST 1009, 1014 (2003)). *See also* T.d. 371, PCR Appx. Exh. 37, Davis Report at pp. 29-36 & nn. 2-19; T.d. 415, Supp. PCR Appx., Exh. 1, Steinberg Testimony at pp. 3-71.

These defining characteristics of youth make it difficult, even for experts, to differentiate between youthful offenders "whose crime reflects unfortunate yet transient immaturity" and the rare youthful offender "whose crime reflects irreparable corruption." *See Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. 573); *see also Miller v. Alabama*, 567 U.S. 460, 471-72 (2012).

B. Age 18 is "a Conservative Estimate of the Dividing Line Between Adolescence and Adulthood."

"The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. As some members of this Court have already observed, "age 18…is in fact 'a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.'" *In re Stanford*, 537 U.S. 968, 971 (2002) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) (quoting *Brief for American Society for Adolescent Psychiatry et al. as Amici Curiae*).

Today, there is a strong professional consensus about adolescent brain development based on incontrovertible evidence. Neuroscientific evidence continues to demonstrate that "adolescent brains are not fully developed, which often leads to erratic behaviors and thought processes in that age group." *Id.* at 968 (internal citations and quotation marks omitted). "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68 (citing *Brief for American Medical Association et al.*; *Brief for American Psychological Association*). *See also* Blume et al., *Death by Numbers*,

98 TEXAS L. REV. at 930-35 ("In the fourteen years since Roper, the scientific, legal, and societal understanding of youth's significance has fundamentally changed. Neuroscience has revealed a more nuanced view of the physiological markers of youth, how those markers affect behavior, and ways in which young people's brains continue developing into their mid-twenties. At the same time, society's understanding of what it means to be a young person has evolved, and capital-sentencing practices reflect that evolution by limiting the death penalty's use against youths under the age of twenty-one.").

Based on "the studies underlying *Miller*, *Roper*, and *Graham*—studies that establish a clear connection between youth and decreased moral culpability for criminal conduct[,]" and "the benefit of those advances in the scientific literature"—the Washington Supreme Court in 2015 overturned an outdated 1997 opinion of that court which barred any exceptional downward departure from a standard sentence on the basis of youth. *State v. O'Dell*, 358 P.3d 359, 366-68 (Wash. 2015) (*en banc*). The state supreme court found that the "reasoning" supporting its earlier decision "has been thoroughly undermined by subsequent scientific developments[,]" *id.* at 368, because "we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." *Id.* at 366.

"The young adult brain is still developing, and young adults are in transition from adolescence to adulthood." *People v. House*, 72 N.E.3d 357, 387 (Ill. App. Dec. 24, 2015) (quoting Kanako Ishida, *Young Adults in Conflict with the Law: Opportunities for Diversion, Juvenile Justice Initiative*, at 1 (Feb. 2015)). "Young adults are, neurologically and developmentally, closer to adolescents than they are to adults." *Id. See also Cruz v. United States*, 2018 U.S. Dist. LEXIS 52924 at **61-65 (D. Conn March 29, 2018).

"[T]he bright line cut-off of age eighteen does not accurately reflect the realities of adolescent brain development[.]" *United States v. C.R.,* 792 F. Supp. 2d 343, 502 (E.D.N.Y. May

16, 2011) (characterizing hearing testimony of Dr. Steinberg, the lead scientist who assisted the American Psychological Association's counsel in preparing its amicus brief in both *Roper* and *Graham*), *decision vacated and remanded sub nom. United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013). As Dr. Steinberg explained during hearing testimony in *C.R.*, "impulse control, susceptibility to influence, thinking ahead, considering the future consequences of one's actions, those [psychosocial capacities] are all still immature at age 18." *Id.* at 505. "On average" "a normal 19-year-old's brain is not fully developed[.]" *Id.* at 503. *See also* Blume et al., *Death by Numbers*, 98 TEXAS L. REV. at 930-35; Elizabeth S. Scott, Richard J. Bonnie, Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641 (2016); Alexandra O. Cohen, et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMPLE L. REV. 769 (2016); Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 582 (2015); Emily Powell, *Underdeveloped and Over-Sentenced: Why Eighteen to Twenty-Year-Olds Should Be Exempt from Life Without Parole*, 52 U. RICH. L. REV. ONLINE 83 (2018).

While "the age of 18 is the point where society draws the line for many purposes between *childhood* and *adulthood*[,]" *Roper*, 543 U.S. at 574 (emphasis added), science now accepts that there is a period of adolescence that exists between the stages of "childhood" and "adulthood" considered by the Court in drawing the line in *Roper*. During this period of adolescence, though legally an "adult," youths in this age category, on average, still possess all the relevant psychosocial deficiencies deemed worthy of protection in *Roper*.

As noted by the Court in *Miller*, the decisions in *Roper* and *Graham* relied on significant gaps between juveniles and adults including that juveniles possess a "'lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking.'" *Miller*, 567 U.S. 471 (quoting *Roper*, 543 U.S. at 569). These gaps remain at ages 18, 19,

and 20, as the science confirms.

"In the years since *Roper*, developments in neuroscience have made clear that the line the Court chose in *Roper*—eighteen years—is too low." *See* Blume et al., *Death by Numbers*, 98 TEXAS L. REV. at 930.

C. There is a Consensus that Persons Under 21 at the Time of Their Offense Do Not Possess the Requisite Level of Culpability Necessary for the Government to Impose a Death Sentence Upon Them.

In addition to the existing scientific consensus, there is also a societal consensus about those under 21. Society agrees these young adults have neither attained a level of maturity, nor an appreciation for the consequences of their actions, sufficient to participate in numerous activities requiring those characteristics. As a result, "[s]ociety treats people under twenty-one more like teenagers than adults, acknowledging—at least tacitly—the fact that brain development is not complete by the age of eighteen." Blume et al., *Death by Numbers*, 98 TEXAS L. REV. at 935.

When setting the cutoff at 18, the Court acknowledged that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," however "a line must be drawn." *Roper*, 543 U.S. at 574. That line was drawn at 18 because that is "the point where society draws the line for many purposes between childhood and adulthood." *Id.* Yet, society draws the line higher, at age 21, for a significant number of activities.

As noted by the Court in *Miller*, the decisions in *Roper* and *Graham* relied on significant gaps between juveniles and adults including that juveniles possess a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 U.S. 471 ((quoting *Roper*, 543 U.S. at 569). These gaps remain at age 18, and our society accepts, particularly as to risky behaviors such as drinking or gambling, that the

necessary faculties required to responsibly engage in these behaviors are only sufficiently developed, at a minimum, at age 21. Thus, as a result, we, as a society, exclude those who are over 18, but still under 21, from these types of activities.

Age 21—the line for entry into "full" adulthood—is also consistent with our societal values, as reflected through countless legislative enactments. Age-based classifications found in legislation across the U.S. reveal our implicit societal beliefs regarding levels of responsibility among the young. These regulations are abundant and well-known.

Generally, laws using age 18 as a threshold age can be characterized broadly as involving inherently personal decisions. These decisions include marriage, voting, entering the military, purchasing tobacco, pursuing (or abstaining) from certain medical treatments, and entering personal contracts. These decisions impact, either directly or primarily, the individual making the decision, and the individual usually can take their time in making the decision or acting upon it in the future.

On the other hand, laws using the age of 21 as a threshold generally govern activities or decisions that require the exercise of good judgment, self-control, or involve the weighing of risk. Such activities include purchasing and consuming alcohol, casino gambling, and recreational marijuana use in states which permit it. These types of activities involve actions or decisions made in the relative short-term, which have the potential to jeopardize the health, finances, or physical safety of the person engaging in the activity or others.

The line was drawn at 18 in *Roper* because that is "the point where society draws the line for many purposes between childhood and adulthood." *Id.* However, the point where society draws the line is not as suggested and/or it has changed since 2005 as society's perceptions of youth have evolved.

And when the social and scientific basis for an age line are no longer valid, the Court has

set a new line or (as in *Roper*) adopted the line set by a state supreme court applying the relevant Eighth Amendment principles:

> [W]e cannot impose an immutable line—a cutoff date based only on chronological age—after which we refuse to consider an offender's individual and mitigating characteristics; ***even the Supreme Court's "line" has evolved in recent decades—notably, continually upward—as society's standards, mores, and understanding of the impact of immaturity on the culpability of youthful offenders have evolved***.

Nelson v. State, 947 N.W.2d 31, 43 (Minn. 2020) (Chutich, J., dissenting) (emphasis supplied and some citations omitted). *See also* Blume et al., *Death by Numbers*, 98 TEXAS L. REV. at 929 ("[W]hen the Court has drawn bright lines that are later shown to lack social and scientific support, it has redrawn them. In *Roper*, the Court revisited its prior decisions because the scientific and societal bases upon which they were based could no longer support an age cutoff of sixteen."); Michael L. Perlin and Alison J. Lynch, *Therapeutic Jurisprudence and Family Law: "Some Mother's Child Has Gone Astray": Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing*, 59 FAM. CT. REV. 478, 479 (2021) ("While some significant legal strides have been made in cases such as *Miller v. Alabama*, . . . there are still areas in which the law needs -- badly -- to catch up to what current neuroscience can tell practitioners about the immaturity of the juvenile brain.").

> **D. There are increasing objective indications—in dramatically reduced use of the death penalty, in other sentencing practices, and in evolving case law—which reflect today's societal consensus that 18-20 year olds are undeserving of the criminal law's harshest punishments because the hallmark characteristics of youth make them less morally culpable than mature adults.**

Because the legislature may fail to act to extend protections to an unpopular or disfavored group, like criminal defendants, the Supreme Court aptly recognizes that in cases of this nature "[t]here are measures of consensus other than legislation." *Graham*, 560 U.S. at 62 (quoting

Kennedy, 554 U.S. 433). "Actual sentencing practices are an important part of the Court's inquiry into consensus." *Id.* (citing *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982)); *see also Atkins*, 536 U.S. at 316 ("[i]t is not so much the number of these States [that forbade execution of the intellectually disabled] that is significant, but the consistency of the direction of change."); *Roper*, 543 U.S. at 564-65; *Kennedy*, 554 U.S. at 412.

1. Sentencing practices and data.

In Ohio and throughout the country, there has been a marked decline in recent years in the imposition of new death sentences, and especially on teenagers. *See* Death Penalty Information Center (DPIC), Death Sentences in the United States From 1977 By State and By Year.[1]

In 2005, for example, the year *Roper* was decided, there were 140 death sentences nationwide and 5 in Ohio; yet, in 2020, there were 18 nationwide and only 1 in Ohio (that of Joel Drain). *See* Ohio Attorney General's Capital Crimes Report for 2020 at pp. 37, 40 (April 1, 2021).[2]

As another measure, in Ohio, there were **167** death sentences in Ohio during the 15 full years before and including the year of *Roper*'s decision in 2005 (thus, from 1991-2005). In the 15 full years since *Roper*'s decision (from 2006-2020), there have been **49**. *See* OAG's 2020 Capital Crimes Report at pp. 40-42.

In addition to the reduction in the number of new death sentences imposed, there has also been a precipitous drop in the number of executions actually carried out upon those who were under 21 at the time of their crime. A careful study analyzing the relevant data, conducted in 2016,

[1] Available at: https://deathpenaltyinfo.org/death-sentences-united-states-1977-present (last visited November 8, 2021).

[2] The Ohio Attorney General's Capital Crimes Report for 2020 was issued on April 1, 2021. It will hereinafter be referred to as: "OAG's 2020 Capital Crimes Report." It is available at: https://www.ohioattorneygeneral.gov/2020CapitalCrimesReport (last visited November 8, 2021).

concluded that executions of emerging adults—those who were 18, 19 or 20 at the time of their offenses—"***are rare and occur in just a few states***". Brian Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels's A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 147, 152 (2016) (footnotes omitted). *See also* Andrew Michaels, *A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139 (2016); Note, *The Roper Extension: A California Perspective*, 71 HASTINGS L.J. 197, 204 (Dec. 2019) ("A national consensus, specifically against imposing the death penalty on society's youngest adults, has developed as young adults are facing execution with less frequency.").

The relative rarity was confirmed is a more recent study published in the Texas Law Review in 2020. "Since *Roper*, only 165 of the 1,351 death sentences were imposed on youthful offenders and the number of youthful offenders sentenced to death each year has been declining." Blume et al., *Death by Numbers*, 98 TEXAS L. REV. at 939. And these death sentences of youthful offenders are concentrated in only a few counties. "Of the over 3,000 counties in the United States, eighty-five have sentenced a youthful offender to death since *Roper* and only thirty have sentenced more than one youthful offender to death in that time period." *Id.* at 942.

The data in Ohio also confirms the evolution of standards of decency away from death sentences and executions of youthful offenders. There were ***42*** death sentences imposed in Ohio upon youthful offenders who were between ages 18 and not-yet-21 at the time of their offense, during the fifteen-year period between 1981 (when capital prosecutions resumed in Ohio) and June 30, 1996 (when LWOP became available as a sentencing option). (*See* Ohio Death Sentences: Age of Offenders at Time of Offense (T.d. 415, Supp. PCR Appx., Exh. 5)). ***During the eighteen-year period, from July 1, 1996 through September 2014 (when the data was assembled), there were***

only 8. *Id. See also* Ohio Attorney General, Capital Crimes Annual Report for 2015 (April 2016) (T.d. 369, PCR Appx. Exh. 16)).

More recent data in Ohio only reaffirms and solidifies the societal consensus against death sentences for youthful offenders, certainly in this State. Since 2005 (the year of *Roper*), there have been 49 Ohio death sentences. *See* OAG's 2020 Capital Crimes Report at p. 40-41. In those 15 full years (2006-2020), ***only 5 of the 49 were teenaged offenders*** (Lang, Pickens, Ford, Myers, Graham). *Id.*

In 1998 alone, there were 16 death sentences in Ohio, and 7 were of those under 21 (Franklin, Hughbanks, Johnson, Carter, Green, Stallings, and Herring). *See* OAG's 2020 Capital Crimes Report at p. 42; Ohio Death Sentences: Age of Offenders at Time of Offense at pp. 3, 7-8 (T.d. 415, Supp. PCR Appx., Exh. 5).

In the next ***22 years*** in Ohio (from 1999 to 2020), there were 99 death sentences. *See* OAG's 2020 Capital Crimes Report at pp. 40-42. ***Only 6 were teens*** (Yarborough, Lang, Pickens, Ford, Myers, Graham). *See* Ohio Death Sentences: Age of Offenders at Time of Offense at pp. 8-10 (T.d. 415, Supp. PCR Appx., Exh. 5).

Seven in 1998. Six in the next 22 years. Petitioner is one of those six.

The foregoing data indicates that the practice of sentencing those under 21 to death is now increasingly rare, and the rarity reveals a national consensus opposed to their execution. *See Graham*, 560 U.S. at 62-65. *See also* Blume et al., *Death by Numbers*, 98 TEXAS L. REV. at 939-44; *Michaels*, 40 N.Y.U. Rev. L. & Soc. Change 139, 149-51, 168-72 (2016).

2. Many states have abolished the death penalty altogether or have not used it in a decade or more.

Although it is true that no state has enacted legislation raising the minimum age for death-eligibility above 18, that is likely because, instead of taking that incremental step, states have

chosen to abandon the death penalty altogether. States which have abolished the death penalty are to be counted as part of the national consensus against the execution of those under 21. *See Hall v. Florida*, 572 U.S. 701, 716 (2014).

As of November 8, 2021 (the date this Petition was finalized), twenty-three states (23) and the District of Columbia have abolished the death penalty either in full or for new offenses. *See* Death Penalty Information Center, *States With and Without the Death Penalty*.[3] The most recent abolition states are Virginia (2021, by legislation), Colorado (2020, by legislation), New Hampshire (2019, by legislation), and Washington (2018, by court decision, *State v. Gregory*, 192 Wash. 2d 1, 427 P.3d 621 (2018)).

In thirteen (13) of the other states that still retain the death penalty as a sentencing option, there have been no executions in a decade or more. *See* Death Penalty Information Center, *States With No Recent Executions*.[4] *See also Glossip v. Gross*, 576 U.S. 863, 939 (2015) (Breyer, J., dissenting) (citing to DPIC, Executions by State and Year).

Thus, in total, 36 states and the District of Columbia have either formally abolished the death penalty or have not conducted an execution in more than a decade. *See id.* ***Accordingly, in practice, the super-majority of states have not executed anyone under 21 in over a decade.***

3. Court decisions are increasingly recognizing the diminished moral culpability of youthful offenders extends to those 18, 19 and 20.

Another measure of consensus is court decisions on the issue of youthful offenders and their eligibility for death sentences and life without possibility of parole. A number of courts have,

[3] See https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited November 8, 2021).

[4] See https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (updated as of March 24, 2021 (last visited November 8, 2021)).

in recent years, recognized that offenders older than 18, but who are still teenagers and/or younger than 21, possess the exact same characteristics of youth and immaturity upon which the categorical ban against capital punishment for those under 18 was established in *Roper*, and, accordingly, such youthful offenders should also be exempt from execution or the criminal law's other harshest punishments.

In *Commonwealth v. Bredhold*, for example, a common pleas court in August 2017 declared Kentucky's death penalty statute unconstitutional insofar as it allows capital punishment for those who were under 21 years of age when they committed their offenses. *Commonwealth v. Bredhold*, No. 14-CR-161, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional (Fayette Co. Aug. 1, 2017) (T.d. 415, Supp. PCR Appx., Exhibit 8.)

On March 26, 2020, the Kentucky Supreme Court vacated and remanded because the issue was not yet justiciable and a young offender does not have standing to make his Eighth Amendment challenge to a death sentence until the sentence has actually been imposed. *Commonwealth v. Bredhold*, 599 S.W.3d 409, 412 (Ky. 2020). But the court nonetheless recognized the critical importance of the age issue. *Id.* at 423.

The Washington Supreme Court recently (March 21, 2021) addressed the age issue in the context of postconviction claims by two offenders—Monschke and Bartholomew—convicted of aggravated first degree murder committed in 2003 and 1981, respectively, when they were 19 and 20 years old, and sentenced to LWOP as mandated by Washington law. The two offenders argued that mandatory LWOP sentences were unconstitutionally cruel when applied to youthful defendants like themselves. The Court agreed under the Washington constitution's cruel punishments clause:

> ¶2 Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood. For some purposes, we defer to the legislature's decisions as to

> who constitutes an "adult." But when it comes to mandatory LWOP sentences, *Miller*'s constitutional guaranty of an individualized sentence—one that considers the mitigating qualities of youth—must apply to defendants at least as old as these defendants were at the time of their crimes. *Miller v. Alabama*, 567 U.S. 460, 469-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

In re Pers. Restraint of Monschke, 197 Wash. 2d 305, 306-07, 482 P.3d 276, 277 (2021).

The court relied on this Court's recent decision in *Hall* to drive home its conclusion that the constitutional protection extends to those over 17, and includes 19 and 20 year olds like Monschke and Bartholomew. *In re Pers. Restraint of Monschke*, 197 Wash. 2d at 325, 482 P.3d at 286. *See also People v. Rodriguez*, 2021 IL App (1st) 190983-U, 2021 Ill. App. Unpub. LEXIS 199 (Feb. 10, 2021) (allowed an 18 year old offender who received a de facto life sentence in 2001—of 50 years in prison—to go back to the trial court on a successor postconviction petition); *People v. House*, 2019 436 Ill. Dec. 355, 142 N.E.3d 756 (Ill. App. 2019) (holding that Illinois Constitution prohibits a mandatory life sentence for a young adult offender who was 19 at the time of the offense).

These same issues, in the mandatory LWOP context, were addressed in great detail by the federal district court in *Cruz v. United States*, 2018 U.S. Dist. LEXIS 52924 (D. Conn. Mar. 29, 2018). In 1994, Luis Noel Cruz and a co-defendant, both members of a violent street gang, murdered two people on orders of their gang leader. Cruz was 18 years and twenty weeks old at the time. In September 1995, Cruz was convicted in federal court of three Violent Crimes in Aid of Racketeering, to wit one count of conspiracy to murder and two counts of murder. In January 1996, Cruz was sentenced to concurrent terms of mandatory life without parole. In 1999, his convictions were affirmed. *United States v. Diaz, et. al.*, 176 F.3d 52 (2d Cir. 1999).

In the succeeding years, from 2001 to 2013, Cruz filed *four* applications for habeas corpus relief under 28 U.S.C. § 2255. All of them were denied, or the Second Circuit denied permission

to proceed. On June 25, 2012, the Supreme Court decided *Miller v. Alabama*, holding that "mandatory life without parole for those *under the age of 18* at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Even though Cruz was over the age of 18 at the time of *his* crimes, he filed *pro se* a fifth application for § 2255 relief, seeking to come within the protection of *Miller*. On July 22, 2013, the Second Circuit certified Cruz's fifth motion as having made a prima facie showing that his claim under *Miller* satisfied the successive petition requirements. *Cruz v. Unites States*, Case No. 13-2457 (2nd Cir. 2013).

The federal district court ultimately granted Cruz's request for an evidentiary hearing on his habeas claim for expansion of *Miller* to include youthful offenders over 18 on the premise that such offenders share the same characteristic weaknesses addressed in *Roper*. Judge Hall recognized that *Roper*, *Graham*, and *Miller* lack any discussion of "what courts should do when presented with those individuals who are just past the line established twelve years ago in *Roper*, as adopted by *Miller*, but to whom all of the various Eighth Amendment concerns about protecting juveniles from disproportionate punishment may apply with almost equal force." *Cruz v. United States*, 2017 U.S. Dist. LEXIS 143842, at *23 (D. Conn. Apr. 3, 2017), *reconsideration denied*, Order (D. Conn. July 12, 2017).

On March 29, 2018, the federal court, after holding a hearing at which Professor Laurence Steinberg testified about the current state of the scientific learning in this area, granted Cruz's petition. The district court held that Cruz's sentence in 1996 of mandatory LWOP violated the Eighth Amendment under the rule announced in *Miller v. Alabama*. *Cruz v. United States*, 2018 U.S. Dist. LEXIS 52924, at *70-71. Based on that decision, the district court on March 18, 2019, re-sentenced Cruz to 35 years in prison. *See United State v. Cruz*, Case No. 3:94-cr-00112-JCH-16, Docket No. 2118 (D. Conn. March 18, 2019). On September 11, 2020, however, a panel of the Second Circuit vacated the lower court's decision in *Cruz* on the basis of an earlier decision by a

panel of the Second Circuit in *United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019), which held that mandatory life sentences for individuals eighteen years old or older do not violate the Eighth Amendment. *See Cruz v. United States*, 826 Fed. Appx. 49 (2d Cir. 2020).

In compliance with the Second Circuit's mandate, the district court reinstated the original judgment imposing life imprisonment for Cruz on March 16, 2021. However, on April 9, 2021—with Cruz now "45 years old [and having] effectively served almost 31 years of that life sentence," for a crime he committed when he was 18—the court granted Cruz's motion for a sentence reduction under the First Step Act, and reduced his life sentence to a term of 30 years and ordered him released. In doing so, the judge in part relied on the developing science about the teenaged brain and the distinguishing characteristics of youth. *United States v. Cruz*, 2021 U.S. Dist. LEXIS 68857, at *12-17 (D. Conn. Apr. 9, 2021).

A panel of the U.S. Court of Appeals for the Sixth Circuit on September 5, 2018, citing Judge Hall's 2018 opinion in *Cruz*, authorized the filing of a successor habeas petition by a Michigan prisoner who had been sentenced to LWOP in 1996 for a first-degree murder he committed when he was 18 years old, so that he can now raise the following claim: "Whether the protections of *Miller* should be extended to 18 year olds based on the societal evidence of national consensus and scientific evidence demonstrating that a youth of 18 years of age is legally and developmentally a child." *In re Lambert*, No. 18-1726, 2018 U.S. App. LEXIS 25332, at *3 (6th Cir. Sep. 5, 2018).

In July 2017, the Sixth Circuit's chief judge, R. Guy Cole, Jr., recognized the significance of the 18-21 age issue in his concurring opinion in the case of Ohio death-row inmate Ronald Phillips. Although the panel of the Sixth Circuit held that procedural barriers prevented that court, in 2017, from allowing further review of the death sentence imposed upon Phillips in 1993 when he was 19 years old, Chief Judge Cole stated in his concurring opinion:

> [R]ecent decisions by several courts, including the Supreme Court, have recognized that the qualities separating juveniles from adults are not static. Rather, such characteristics fall along a spectrum that varies as each person ages and matures. It is clear under Supreme Court precedent that persons under the age of eighteen may not be sentenced to death due to the impact that their emotional and psychological maturity has on their sense of culpability. Likewise, developments in science have shown that young adults beyond the age of eighteen continue to experience a similar impact on their sense of responsibility and judgment. Because these arguments touch on the essential guarantees against cruel and unusual punishment and unequal protection, concerns regarding the culpability of such young adults merit further consideration by the Supreme Court.

In re Phillips, 2017 U.S. App. LEXIS 17766, at *10-11 (6th Cir. July 20, 2017) (Cole, C.J., concurring). More recently, Judge Jane Stranch made similar points in her concurring opinion in *Pike v. Gross*, 936 F.3d 372, 383 (6th Cir. Aug. 22, 2019) (Stranch, J., concurring).

And, on August 24, 2020, the Sixth Circuit suggested in *United States v. Sherrill*, 972 F.3d 752 (6th Cir. 2020), citing Judge Stranch's concurrence, that a reassessment may be underway on whether a life sentence violates the Eighth Amendment (or is substantively unreasonable) because it is imposed on an offender between the ages of 18 and 21. *Id.* at 774.

There is, to be candid, other recent case law where courts have declined to extend the age line beyond 18 as set in *Roper*, but sometimes there are dissents and/or procedural barriers to full consideration. *See, e.g.*, *United States v. Roof*, 2021 U.S. App. LEXIS 25525, at *128-29 (4th Cir. Aug. 25, 2021); *United States v. Tsarnaev*, 968 F.3d 24, 96-97 (1st Cir. 2020); *Hairston v. State*, 472 P.3d 44 (Idaho Sep. 3, 2020); *Nelson v. State*, 947 N.W.2d 31 (Minn. July 29, 2020).[5]

[5] Recognizing the same directional trend away from the execution of teenagers, the American Bar Association ("ABA") issued a Resolution in February 2018, "urg[ing] 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." *See* Seth Miller and Robert Weiner, *Report to the House of Delegates, Resolution 111, American Bar Association Death Penalty Due Process Review Project and Section of Civil Rights and Social Justice*, February 2018, and also available at https://www.abajournal.com/files/2018_hod_midyear_111.pdf) (last visited November 8, 2021).

It is of no consequence that legislation has not been enacted specifically in this regard—to "benefit" a disfavored group, capital defendants. That omission, when coupled with the multitude of laws establishing age-based distinctions between 18 and 19-year-olds on the one hand, and 21-year-olds on the other, supports the need in this context for this Court to recognize the inherent judgments embodied in those laws. Such laws reflect society's acceptance of meaningful differences between 18 and 19-year-olds, and 21-year-olds, which have significant impact on their respective culpability in the capital context. In this way, legislatures have already weighed the relevant issue countless times.

"The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. . . . An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015). Because Petitioner is seeking to vindicate a fundamental right protected by the Eighth Amendment, the minimum age for capital punishment is a question properly before this Court.

E. There is an Unacceptable Risk That the Brutal Nature of a Capital Crime Will Render the Sentencer Unable to Afford Mitigating Arguments Based on Youth Their Proper Weight.

A central feature of capital sentencing is an individualized assessment of the circumstances of the crime and the characteristics of the offender. "The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case." *Roper*, 543 U.S. at 569. As a result, raising the age of offenders protected by the categorical ban may seem unnecessary. But that is wrong. In capital cases, the risk is much too great that the sentencer—because of the sheer horror of the crime, and magnitude of the loss—will be unable to give youth, and its attendant characteristics, the mitigating value to which they are entitled.

That risk was demonstrated in this case, as the senselessness and cold-blooded nature of

the crime, and the magnitude of the loss of young Justin Back, overwhelmed the ability of the jury and trial court to afford Petitioner's youthfulness the proper weight it must be afforded under the constitution.

This Court has voiced significant concern over the known "risks" which accompany the prosecutions of crimes which should, by definition, be factually among the "worst of the worst." When determining if a defendant accused of committing a capital crime is also among "the worst of the worst" offenders, the risk is "unacceptable" "that the brutality or cold-blooded nature" of the crime may "overpower mitigating arguments based on youth." *Roper*, 543 U.S. at 573. There is also the risk that youth will be improperly treated as an aggravating factor rather than a mitigating one. *Id.* Further, it is difficult even for experts to know when a youthful offender's actions reflect "transient immaturity" versus "irreparable corruption." *See id. See also Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 734 (2016); *Miller*, 567 U.S. at 479-80.

Petitioner's case exemplifies the potential for the facts of the crime, as presented by the State, to overwhelm the sentencer's ability to properly consider the weight of youth and its attendant features. This problem was only compounded by the independent proportionality review on direct appeal. There, the Supreme Court of Ohio afforded only "some weight" to Petitioner's youth, and collectively afforded *all* his mitigation only "at most, *modest* weight." *State v. Myers*, 154 Ohio St. 3d 405, 447, 2018-Ohio-1903, ¶¶ 224-26 (May 17, 2018) (emphasis supplied).

F. There are Insufficient Penological Justifications for the Execution of Youthful Offenders.

There are insufficient penological justifications for the use of capital punishment as a sentencing option for youthful offenders. "[T]here are two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'" *Atkins*, 536 U.S. at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell, and

Stevens, JJ)).

However, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. "Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Eddings*, 455 U.S. at 115 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

As far as deterrence is concerned, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (plurality opinion). *See also* Blume et al., *Death by Numbers*, 98 TEXAS L. REV. at 934 ("As the Court has explained, unless the imposition of the death penalty on a particular class of offender measurably contributes to the penological justifications for capital punishment—retribution and deterrence—'it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.' Executing youthful offenders serves neither goal.") (citations and footnotes omitted).

G. Drawing the Line at Age 18 Arbitrarily Excludes Those Who Possess All the Characteristics Deemed Worthy of Protection Under the Categorical Ban.

The categorical ban protecting youthful offenders from disproportionate death sentences is no longer sufficient for its intended purpose. Based on all we have learned from and since *Roper*, the arbitrary cut-off at age 18 fails to protect all those youthful offenders slightly over age 18 whom, because they share the exact same characteristic vulnerabilities and weaknesses as those under 18, are equally justified in being exempted from a death sentence. They are excluded

from this protection not because they are unworthy of it but, rather, because they fall just outside a line that this Court can and should adjust to properly include them.

The Court recently did just that in the content of another exemption from the death penalty, intellectual disability. In *Hall v. Florida*, the Court found unconstitutional a Florida rule that prevented a person under a death sentence from presenting additional evidence that qualified under *Atkins* as intellectual disability unless they had an I.Q. score of 70 or lower. *Hall*, 520 U.S. at 710-11. Cognizant of the fact that "[i]ntellectual disability is a condition, not a number," *id.* at 723, the Court struck down the "rigid rule" concerning I.Q. scores because it "create[s] an unacceptable risk that persons with intellectual disability [would] be executed." *Id.* at 704. *Hall* also stressed the importance of the medical community in defining and diagnosing the condition. *Id.* at 710-11, 721-22.

Hall clarifies that in the context of a categorical ban with a foundation in science, the underlying characteristics which define the class of persons is what entitles the person to protection—not the number associated with it. Just as an I.Q. score of 70 approximates intellectual disability, so too is age 18 a proxy for youth. That proxy is now deficient for many of the same reasons a score of 70 is deficient for intellectual disability.

The Washington Supreme Court, in *In re Pers. Restraint of Monschke*, discussed above, relied upon *Hall* to drive home its conclusion that the constitutional protection extends to those over 17, and includes 19 and 20 year olds like Monschke and Bartholomew. *In re Pers. Restraint of Monschke*, 197 Wash. 2d at 325, 482 P.3d at 286.

Science and society have progressed to such a point that it is now widely accepted that there is a time of adolescence between the stages of "childhood" and "adulthood" as they were considered and understood in *Roper*. As a result, today "[t]he bright line cut-off of age eighteen does not accurately reflect the realities of adolescent brain development[.]" *United States v. C.R.*,

792 F. Supp. 2d at 502. This Court should now adjust that line to include at least those, like Petitioner, who were still teenagers at the time of their offense.

The evolving standards establish that it is immoral and unjust for society to permit imposition of a death sentence upon a youthful offender, at the "outset" of life, when such an offender is still unformed as a person, and, due to his youth and developing brain, still has "the potential to attain a mature understanding of his own humanity." *Roper*, 543 U.S. at 574. This Court should address the question of the minimum age of execution and raise the categorical bar to age 21, or at least age 20, to bring the controlling case law in conformance with prevailing standards of dignity.

H. The Line Drawn by *Roper* is Now Ripe for Reevaluation.

Given the steady progression of societal standards toward a "more humane justice" and the tremendous consequences, the question of the minimum age for capital punishment in the modern era has been revisited by this Court every twelve years or so. The Court has similarly revisited questions on other categorical bans, such as intellectual disability, within that same timeframe. Given this past practice, the time is ripe for reexamination of this sentencing practice. A review of the relevant cases confirms the point.

Twelve years after the Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), the first challenge to the imposition of the death penalty based on age was decided in 1988 in *Thompson,* 487 U.S. at 818-38 (plurality) (offenders under 16 may not be executed).

The following term, the Court revisited the minimum age of execution, this time to address "whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at 16 or 17 years of age." *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989). The Court, 5 to 4, declined to extend the age bar established in *Thompson* the previous term. Coincidentally, the same day *Stanford* was decided, another 5 to 4 opinion was issued in the intellectual disability case

Penry v. Lynaugh, 492 U.S. 302 (1989). In *Penry*, the Court declined to categorically prohibit the execution of offenders with intellectual disability. *Id.* at 335.

Thirteen years after declining the categorical relief sought in *Penry*, the Court in 2002 established categorical protection for those with intellectual disability in *Atkins*. The Court reassessed the evidence of a national consensus under the then-prevailing standards of decency, finding that in the intervening years since its last review, meaningful development in areas supporting the ban had developed—evidence the Court had notably found lacking in *Penry*.

Within months of *Atkins'* issuance, relying on the parallels between the limitations of those with intellectual disability and those under age 18, one of the petitioners in *Stanford v. Kentucky* sought an original writ of habeas corpus in this Court. Though four Justices voted to hear the case, procedurally, five votes are required before the Court could take up the case. Thus, the writ was denied, but four Justices dissented in an opinion by Justice Stevens. *In re Stanford*, 537 U.S. at 968 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting).

Sixteen years after the Court's last substantive evaluation of the minimum age for execution in *Stanford v. Kentucky*, the Court revisited the minimum age question in 2005 in *Roper*, to reevaluate the appropriateness of the juvenile death penalty in terms of contemporary standards of decency. *Roper*, 543 U.S. at 560-64. The Court found that the standards prevailing in 2005, and the Court's own independent judgment, compelled the categorical prohibition on the execution of those under age 18 at the time of their offense. *Id.* at 564-70.

In 2014, twelve years after *Atkins*, this Court revisited its holding in that case in *Hall v. Florida*. The question posed by *Hall* was how intellectual disability must be defined in order to implement the principles and the holding of *Atkins*. The Court reaffirmed its ruling in *Atkins*, admonishing the rigid conformity of states like Florida who enforced a strict numerical cutoff of 70 for I.Q. scores in ID cases.

Now, sixteen years after *Roper*, Petitioner presents his petition to the Court requesting that the minimum age question be revisited under today's prevailing standards of decency. As outlined above, there has been a sea change in youth sentencing standards, reflected in the robust body of relevant case law developed since that time.

While the State can and should punish youthful offenders severely for their crimes, asking a teenager to pay for his crime with his life is too great a toll for a just and moral society to exact. This Court should revisit the question of the minimum age of execution and raise the categorical bar to age 21 to bring the controlling case law in conformance with prevailing standards of dignity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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