

No. \_\_\_\_\_

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IN THE  
Supreme Court of the United States

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ALLEN WARD COX,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

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**PETITION FOR A WRIT OF CERTIORARI**

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**CAPITAL CASE**

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## **CAPITAL CASE**

### **QUESTION PRESENTED**

1. Whether the Petitioner's medical condition which includes brain damage and dementia that results in impulse control deficits, impaired executive function and emotional dysregulation, would subject Petitioner to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution if he is executed, based on evolving standards of decency that mark the progress of a maturing society.

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page. Petitioner, Allen Ward Cox, a death-sentenced Florida prisoner, was the appellant in the Supreme Court of Florida. Respondent, State of Florida, was the appellee in the Supreme Court of Florida.

## **LIST OF RELATED CASES**

### **Trial**

Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida  
*State of Florida v. Allen Ward Cox*; Case number: 99-249-CF  
Judgment entered: March 14, 2000. Death recommendation, March 18, 2000. Death sentence imposed by court on July 24, 2000;

### **Direct Appeal**

Supreme Court of Florida  
*Cox v. State*, 819 So. 2d 705 (Fla. 2002); Case Number: SC2000 - 1751  
Judgment entered: May 23, 2002; Rehearing denied: July 23, 2002.

### **Certiorari**

Supreme Court of the United States  
*Cox v. Florida*, 571 U.S. 1120 (2003); Case Number: 02-7094  
Judgment entered: January 13, 2003; *cert denied*.

### **Postconviction Motion**

Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida  
*Allen Ward Cox v. State of Florida*; Case Number: 99-249-CF  
Judgment entered: April 19, 2005; order denying postconviction relief (unpublished).

### **Appeal of denial of postconviction**

Supreme Court of Florida  
*Cox v. State*, 966 So. 2d 337 (Fla. 2007); Case Number: SC05-914.  
Judgment entered: July 5, 2007; Rehearing denied: September 25, 2007.

### **State habeas petition**

Supreme Court of Florida  
*Cox v. Secretary*, 966 So. 2d 337 (Fla. 2007); Case Number: SC06-40  
Judgment entered: July 5, 2007; Rehearing denied: September 25, 2007.

**Successive Postconviction Motion**

Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida

*Allen Ward Cox v. State of Florida*; Case Number: 99-249-CF

Judgment entered: March 24, 2008; order denying postconviction relief (unpublished). Rehearing denied: April 8, 2008.

**Appeal of Denial of Successive Postconviction Motion**

Supreme Court of Florida

*Cox v. State*, 5 So. 3d 337 (Fla. 2009); Case Number: SC08-887

Judgment entered: March 12, 2009.

**Federal habeas petition**

United States District Court, Middle District. Florida, Ocala Division.

*Cox v. McNeil*, Case Number: 07-00425-CV-WTH-GRJ.

Judgment signed: April 8, 2009; Judgment entered: April 9, 2009.

**Appeal from the denial of federal habeas petition**

United States Court of Appeals, Eleventh Circuit.

*Cox v. McNeil*, 638 F. 3d 1356 (11th Cir. 2011); Case Number: 09-12480-P

Judgment entered: April 21, 2011.

**Certiorari**

Supreme Court of the United States

*Cox v. Tucker*, 565 U.S. 906 (2011); Case Number: 11–5424

Judgment Entered: October 3, 2011; *cert denied*.

**Successive Postconviction motion**

Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida

*Allen Ward Cox v. State of Florida*; Case Number: 99-249-CF

Judgment entered: July 23, 2017; order granting motion for postconviction relief. (Pursuant to *Hurst v. Florida*, 577 U.S. 92 (Fla. 2016)).

**Penalty Phase Trial (*Hurst*)**

Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida

*State of Florida v. Allen Ward Cox*; Case number: 99-249-CF

Death sentence imposed by court following unanimous death recommendation on October 24, 2022.

**Direct Appeal**

Supreme Court of Florida

*Cox v. State*, 390 So. 3d 1189 (Fla. 2024); Case Number: SC2022 - 1553

Judgment entered: July 11, 2024.

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**IN THE SUPREME COURT OF THE UNITED STATES**

**PETITION FOR A WRIT OF CERTIORARI**

Allen Ward Cox respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida.

**OPINIONS BELOW**

This is a petition regarding the errors of the Supreme Court of Florida in affirming the Circuit Court of The Fifth Judicial Circuit, In and For Lake County, Florida. The opinion at issue is reported and reproduced at Appendix A (hereinafter App. A).

**JURISDICTION**

The opinion of the Supreme Court of Florida was entered on July 11, 2024. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. Amend. VIII.

**STATEMENT OF THE CASE**

**I. Procedural History**

Petitioner, Allen Ward Cox was charged by indictment in this capital case with first-degree murder following an incident in December of 1998 at the Lake Correctional Institute (“LCI”) which resulted in the death of a fellow inmate, Thomas Baker. (R 2012-13). At the conclusion of his first trial, Mr. Cox was convicted and

sentenced to death. (R 2010). The Florida Supreme Court (“FSC”) affirmed his sentence on direct appeal<sup>1</sup> in 2002 and affirmed the denial of his subsequent post-conviction challenge<sup>2</sup> in 2007. In July of 2017, Mr. Cox was granted a new penalty phase pursuant to *Hurst v. Florida*, 577 U.S. 92 (2016). (R 627-635, 2011).

In April of 2022, the new penalty phase commenced, wherein the State sought to prove four aggravating circumstances: (1) the murder was “committed by a person previously convicted of a felony and under sentence of imprisonment” (“Imprisonment”); (2) the defendant was previously convicted of another violent felony (“Prior Violent Felony”); (3) the murder was especially heinous, atrocious, or cruel (“EHAC”); and (4) the murder was cold, calculated, and premeditated (“CCP”). (R 643). Of these, only EHAC and CCP were contested. (T 612, 1754).

The defense sought to prove a total of 80 mitigating circumstances, two of which were statutory: specifically, (1) “The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance” and (2) “The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.” (R 1842-1848, 2017-20).

At the conclusion of the 2022 penalty phase, the jury found that the State had proven only two of the four aggravators presented: specifically, the “Imprisonment”

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<sup>1</sup> See *Cox v. State*, 819 So.2d 705 (Fla.2002), cert. denied, 537 U.S. 1120, 123 S.Ct. 889, 154 L.Ed.2d 799 (2003).

<sup>2</sup> *Cox v. State*, 966 So. 2d 337 (Fla. 2007).

and “Prior Violent Felony” aggravators. (R 1832-34). The jury further found that the aggravating circumstances outweighed the mitigating circumstances and unanimously recommended a sentence of death. (R 1832-34). One or more jurors found that one or more mitigating circumstances were established by the greater weight of the evidence. (R 1833). The State and the Defense submitted sentencing memorandums shortly thereafter. (R 1893-1933, 1934-2007).

On October 24, 2022, the trial court sentenced Appellant to death, and contemporaneously issued a written sentencing order detailing the court’s consideration and weighing of the aggravating and mitigating circumstances. (R 2010-54). In all, the court found that 57 mitigating circumstances had been established and were entitled to weight. The court specifically found that:

- (i) Neither of the two statutory mitigating circumstances had been established;
- (ii) Of the 78 non-statutory mitigating circumstances, 7 had not been established; and,
- (iii) Of the 71 established non-statutory mitigating circumstances, 7 were “not mitigating under the facts of this case”.<sup>3</sup>

The FSC affirmed the denial of relief on July 11, 2024. (App. A.). This petition follows.

### **REASONS FOR GRANTING THE PETITION**

- A. It would be a violation of the Eighth Amendment to the United States Constitution to execute Mr. Cox, because of the evolving standards of decency that mark the progress of a maturing society.**

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<sup>3</sup> (R 2034-35, 2037, 2044, 2046-47, 2048, 2053, 2061).

Mr. Cox's death sentence is unconstitutional because evolving standards of decency have reached the point where someone suffering from the severe mental deficits that Mr. Cox does, cannot constitutionally be sentenced to death. This Court has barred the execution of the intellectually disabled and the execution of juveniles in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). Both cases cited to evolving standards of decency in today's society as the main factors justifying vacation of those death sentences. In light of the principles announced in *Atkins* and *Simmons*, and in light of the evolving standards of decency in today's society, this Court should grant the writ.

This Court reaffirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual. This Court outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the intellectually disabled.

Prior to 2002, this Court had refused to categorically exempt intellectually disabled persons from capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). However, in *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that standards of decency had evolved in the 13 years since *Penry* and that a national consensus had formed against such executions, demonstrating that the execution of the intellectual disabled is cruel and unusual punishment. *Atkins*, *Id.* at 307. The majority opinion found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether. This Court counted the states with no

death penalty, pointing out that a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles.

In ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the *Roper v. Simmons* Court found it significant that juveniles are vulnerable to influence and susceptible to immature and irresponsible behavior. In light of a juvenile's diminished culpability, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy, writing for the majority, said: Retribution 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 v. Simmons* at 571.

Mr. Cox's culpability and blameworthiness are diminished in this case. Mr. Cox's sentence of death violates the Eighth and Fourteenth Amendments prohibiting cruel and unusual punishment, as well as the arbitrary and capricious imposition of the ultimate penalty as applied.

Evolving standards of decency prevent the execution of Mr. Cox. The United States Supreme Court has long recognized that:

The prohibition against cruel and unusual punishments, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

*Roper v. Simmons*, 543 U.S. 551, 560-61(2005). Indeed:

Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. *Atkins*, supra, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. *Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980) (plurality opinion). In any capital case a defendant has wide latitude to raise as a mitigating factor any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); see also *Johnson v. Texas*, 509 U.S. 350, 359-362 (1993) (summarizing the Court's jurisprudence after *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), with respect to a sentencer's consideration of aggravating and mitigating factors). There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. *Coker v. Georgia*, 433 U.S. 584 (1977) (rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782(1982) (felony murder where defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson v. Oklahoma*, supra; *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins*, supra. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

*Id.* 568-69.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court found that the execution of the intellectual disabled violated the Eighth Amendment's prohibition of cruel and unusual punishment based on evolving standards of decency. *Id.* at 306-307. This Court was very careful to distinguish between the criminal responsibility of the intellectual disabled and the prohibition of their execution:

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit

crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus rejected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

*Id.*

Mr. Atkins presented expert testimony that he was "mildly mentally retarded." *Id.* at 308. Mr. Atkins' expert psychologist reached this conclusion "based on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full-scale IQ test of 59." *Id.* This Court noted that Mr. Atkins' credibility at trial was damaged because of "its substantial inconsistency with the statement he gave to the police upon his arrest." *Id.* at 308, N2.

At the resentencing, the State presented testimony from their own rebuttal expert. *Id.* at 309. The State's expert expressed an opinion that Mr. Atkins "was not mentally retarded, but rather was of 'average intelligence, at least,' and diagnosable as having antisocial personality disorder." *Id.* The State's expert reviewed Mr. Atkins school records, interviewed correctional staff, and asked Mr. Atkins questions taken from a "1972 version of the Wechsler Memory Scale." *Id.*

Mr. Atkins argued on state appeal "that he is mentally retarded and thus



cannot be sentenced to death." *Id.* at 310 (citation omitted). The majority rejected this claim. Two Justices on the court dissented and "rejected [the State's expert]'s opinion that Atkins possesses average intelligence as 'incredulous as a matter of law,' and concluded that 'the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive.'" *Id.* The dissenters found that "it [wa]s indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." *Id.* (citations omitted).

This Court explained the evolving standards of decency regarding the execution of intellectually disabled. *Id.* at 313-14. This Court found it determinative that despite the legislative popularity of "anti-crime legislation," overwhelmingly, states had prohibited the execution of the intellectually disabled by statute. Moreover, states that had the death penalty and did not regularly use it, and states that had no death penalty, showed the consensus against executing the intellectually disabled. This:

provide[d] powerful evidence that today our society views the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. Mentally retarded offenders as categorically less culpable than the average criminal.

*Id.* at 315-316. This Court found:

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

*Id.* at 317.

This Court found that neither of the two permissible bases for capital punishment, deterrence and retribution, were measurably contributed to by the execution of the intellectually disabled. *Id.* at 319. This Court concluded:

Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender."

*Id.* at 321.

In two historic cases, this Court found that death may not be imposed on a certain class of individuals because of "evolving standards of decency." *See Roper*, 536 U.S. at 589; citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958); *Atkins*, 536 U.S. at 311-12; citing *Trop* at 100-101. Evolving standards of decency have rendered the execution of Mr. Cox constitutionally impermissible. As will be discussed in the next sections, deterrence and retribution are not served with Mr. Cox's execution.

**B. It would be a violation of the Eighth Amendment to the United States Constitution to execute Mr. Cox, considering the trial court findings regarding his unique mental health disorders, which would place him outside of the class of individuals to be**

**executed based on this Court's reasoning in *Atkins*.**

The trial court made findings and gave weight to mitigating factors regarding Mr. Cox's mental health, while failing to give weight to others. *Cox v. State*, 390 So. 3d 1189, 1193 (Fla. 2024). Specifically, the trial court determined it was proven at trial that Mr. Cox suffers from the following conditions: (k) Cox suffered head injuries as a child, (l) Cox has brain damage, (m) Cox has suffered from emotional dysregulation throughout his life, and (vvv) Cox suffers from impairments to his executive functioning. *Id.*

While Mr. Cox was a mere child with a developing brain, he experienced a series of brain injuries. He suffered at least one traumatic brain injury growing up. (R 2027). He was hit in the head with a softball at age 10 and woke up on his aunt's couch sometime later. (T 715-716).<sup>4</sup> He was knocked unconscious again in a motorcycle accident at age 14. (T 716, R 2027-28). He was rendered unconscious again, in a logging accident at 16. (R 2027-28).

Mr. Cox should not be held accountable for injuries sustained to his brain while he was only a child, and his brain was still in development. Concussive brain injuries experienced in childhood only reveal part of the story about Mr. Cox's mental health deficits. Regarding emotional dysregulation, One of the experts specified that Mr. Cox "when he gets angry...can't calm himself down." (T 771-72).

Q. The fact that he wasn't able to calm down from that and he wasn't able to process that and logically think about it and react like a normal human being would, is that a direct result of his brain abnormalities?

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<sup>4</sup> Dr. Mark Rubino, a neurologist, testified this was "[c]learly a concussion." (T 716).

A. Yes, a loss of emotional regulation is something that you can see on the MRIs now, which is documented in Dr. McMahon's neuropsych testing, even back in 2000, and that was present then. Even Mr. Stamp mentioned that he his emotions were -- he had mental problems, as he said. So those have been present for a long time. So when he gets angry, he can't calm himself down and he certainly isn't looking at all the possibilities of what can happen from his actions.

Q. Inherently impulsive too?

A. That's inherently impulsive as well.

(T 771-72) (emphasis added).

Q. In regard to the abnormalities that you see and the emotional dysregulation that you see, based on the scans and based on the neuropsychological testing, what happens when Mr. Cox is under a stressful situation and he gets upset, can he calm down like the rest of us?

A. He has a more difficult time calming down.

Q. As opposed to a human being with a normal brain that doesn't have all these abnormalities?

A. Right. A lot of people get angry, they're over it if they don't have anything keeping it going, will stay angry and I think more executive function becomes impaired with planning become poor.

Q. So it's not that he can't control himself, it's that he has a hard time regulating those emotions?

A. Correct.

Q. And that certainly affects the choices that he makes?

A. It does.

(T 857-58) (emphasis added). Mr. Cox, to no fault of his own, is predisposed to having problems regulating his emotions. Similar to a person with an intellectual

disability or immature brain development, Petitioner's mental health condition is mitigating and beyond his ability to self-regulate or control. Mr. Cox's issues with executive function were also proven to mitigate his circumstances. The defense called three expert witnesses – a radiologist, a neurologist, and a neuropsychologist – who each testified that significant damage has affected areas of Petitioner's brain which control impulsivity. (T 724-62, 857-58, 882-92, 1094-95, 1101).

A. Well, where the red arrows are, this again is the frontal lobe. There are some impairments in there. **There's holes in his frontal lobe, which again leads to loss of function regarding impulsiveness, loss of judgment, loss of planning, ultra planning, judgment.**

**The insula**, insula being more **prominent in emotional control and executive function**, sort of like the integrating part of the brain, **that's impaired.**

Q. **So the parts of the brain that are not functioning properly on the PET scan are the parts of the brain that controls emotional regulation and impulse control; is that what I'm hearing?**

A. **Yes.**

(T 760) (emphasis added). A second neuropsychologist compared him to “a freight train that just started down the track and just kept picking up speed without the ability to brake,” and a third agreed that “[h]e gets going on a track and that is where he continues...[h]e just keeps moving in the same direction.” (T 984, 1270).

Q. Okay. Trying to think in layman terms again, is he someone that's able to kind of cognize in a rational way and kind of, you know, tap at the handbrake when required, in terms of his decision making, does that make sense?

A. So when I was -- it does. And I'm going to say no. Obviously, it depends on the situation. [ . . . ] But based on what I've read from those events, to me, the analogy would be, you know, **a freight train that just started**

**down the track and just kept picking up speed without the ability to brake.**

Q. Okay.

A. And led to disastrous horrible consequences.

(T 984) (emphasis added).

A. [. . .] The main problem is further back, but he shows a problem in the front also. And that is up here in the frontal lobes where our executive functioning is. It's mild. And **the main impact of that is simply that he's not dealing with an intact brain.** He's not dealing with a brain that is working at a hundred percent. He's dealing with a brain that is working somewhat less than that, particularly in those areas where he is asked to remember something or he's asked to shift set.

In other words, to shift, to be flexible. And **it's probably the greatest impact on his every day thinking is that he's had trouble being flexible in his thinking. He gets going on a track and that is where he continues.** It's very difficult for him to stop, shift set, and go in another direction. He just keeps moving in the same direction.

(T 1269-70) (emphasis added). The evidentiary support for Mr. Cox's brain damage, which again, was found to be mitigating by the trial court, will be further presented in the next subclaim, as there is an overlap with the findings the trial court *should* have made based on the evidence presented during the penalty phase. The death penalty is unconstitutional in this case. "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper*, 543 U.S. at 568 citing *Thompson v. Oklahoma*, 487 U.S. 815, 856, (1988) (O'CONNOR, J., concurring in judgment). The Eighth Amendment requires that capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."

*Roper v. Simmons*, 543 U.S. 551, 568-69 (2005) citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). To this end, Mr. Cox respectfully submits that the death penalty is inappropriate in this case, and accordingly prohibited by the Eighth Amendment, as the brain damage Petitioner sustained during childhood, and the resulting significant, life-long impairments causing emotional dysregulation and deficits to his executive functioning that flowed therefrom, necessarily exclude him from the category of offenders with “extreme culpability” for which the death penalty is exclusively reserved.

**C. It would be a violation of the Eighth Amendment to the United States Constitution to execute Mr. Cox, considering other evidence of mental impairment proven at trial regarding his unique mental health disorders, which would place him outside of the class of individuals to be executed based on this Court’s reasoning in *Atkins*.**

Mr. Cox suffers from brain damage and has been diagnosed with dementia. His mental health experts also made findings that he lacks impulse control. Based on this Court’s analysis in *Atkins* that people with intellectual disability are ineligible to be executed, Petitioner’s unique mental health deficits place him outside of the class of individuals that may be put to death. Dr. Rubino, the neurologist called by the defense, testified that dementia is present in this case. The doctor distinguished progressive dementia, such as that caused by Alzheimer’s disease, from “static” dementia caused by brain injury, and concluded that both were likely present:

Q. And how about possible dementia?

A. That's part of the cognitive disorder. He probably has -- **he has a dementia, because he has a severe impairment of his thinking, it's I don't know if it's progressive or static.**

Q. And by progressive you mean Alzheimer's?

A. Progressive would be Alzheimer's disease.

Q. And by static you mean just from his brain injury?

A. Just from brain injury. Static just means it's not going anywhere, it's just he has loss of function and it's not going anywhere.

(T 768) (emphasis added).

Q. Okay. The results in the MoCA, is it consistent with any type of neurodegenerative disease?

A. Well, **21 is quite remarkable**, and because that puts us into a range where Parkinson's patients would not be allowed to say they could have surgery or not, **that puts us in a dementia range**. And **dementia is a term for cognitive impairments that cause functional impairment**. But **dementia can be both static *and* progressive**. Static would be a severe brain injury that causes cognitive impairment. And progressive, for example, would be Alzheimer's disease.

Q. Okay.

A. He's definitely in a range where **he could *also* be suffering from early Alzheimer's disease**.

Q. But it could also be that the dementia could be a result of his head injuries from throughout his life?

A. All the head injuries and everything that's happened to him since the head injuries.

(T 737) (emphasis added).

Q. And whether it is progressive dementia or static dementia, in other words if it's going to get worse and worse or if it's going to stay exactly the same, that dementia, as a neurologist, where do you believe that dementia that he has came from?

A. Well, the traumatic brain injury caused -- there's lots of, lots of factors here. He has severe depression, head injuries, alcohol abuse, so those are all risk factors for Alzheimer's disease. So he could have really



Alzheimer's disease. But with all the concussions he had, he also could have CTE, which is kind of more of an insidious thing where you have what's called chronic traumatic encephalopathy. Only time will tell what happens, I'm not a soothsayer, but he seems -- I expect him to get worse over the next through years.

**Q. And is the neuropsychological testing consistent with dementia as well?**

**A. Yes. The difference between the 2000, 2004, and current neuropsych testing shows that he has gotten worse.**

(T 855-56) (emphasis added).

Dr. Rubino concluded his testimony by reiterating that there was no doubt in his mind that the abnormalities seen in Appellant's results – both in the brain imaging and in the psychological testing – were caused by traumatic brain injury.

**Q. All the abnormalities that you saw in all the studies, the 2010 MRI, 2019 MRI, 2019 NeuroQuant, and the abnormalities in the 2019 PET scan, could they have occurred or could those abnormalities exist without traumatic brain injury?**

**A. In something called frontal temporal dementia you can see it, but he didn't have frontal temporal dementia. Behavior is even more messed up in people with FTD. So the only other thing that would cause focal atrophy of the frontal and temporal lobes, and over those areas are very consistent with traumatic brain injury.**

**Q. So is it your opinion today that the abnormalities that you have seen are from traumatic brain injury?**

**A. Yes.**

**Q. Is there any doubt in your mind about that?**

**A. No.**

(T 856-57) (emphasis added).

Despite this testimony, the court ruled that the non-statutory mitigating factor of “early signs of dementia” had not been proved. The trial court’s sentencing order stated:

Dr. Rubino opined that Mr. Cox has dementia. Dr. Rubino testified that he does not know if the dementia is progressive or static. Dr. Rubino opined that static dementia would be just from brain injuries. Dr. Rubino also opined that it is likely Mr. Cox's dementia symptoms are static and caused by head trauma. Dr. Ouau opined that Mr. Cox's testing results were consistent with a decline in neurocognitive abilities. However, there is no evidence that Mr. Cox suffers from early signs of progressive dementia. It is not established by the greater weight of the evidence that Mr. Cox suffers from the early signs of dementia.

(R 2057-58). This Court requires further proceedings where a trial court fails to consider relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982). In *Eddings*, this Court noted that Oklahoma's death penalty statute permits evidence to be permitted as to any mitigating circumstance, and held that "*Lockett [v. Ohio*, 438 U.S. 586 (1978)] requires the sentencer to listen." 455 U.S. 104 at n.10. *Eddings* and *Lockett* are based in the federal Eighth Amendment, which in all death penalty cases requires consideration of the character of the offender as well as the circumstances of the offense. 455 U.S. 104 at 112. Dr. Rubino's testimony was clear that neuropsych testing since 2000 and 2004 indicates that Mr. Cox has gotten worse. Petitioner is slowly deteriorating. Dr. Rubino also opined that Petitioner has a "severe impairment of his thinking." (T 768). Mr. Cox's impaired thinking is also reflected in his deficits in impulse control. As noted in the previous section (B), experts made findings during trial testimony regarding Petitioner's inability to control his impulses:

Q. The fact that he wasn't able to calm down from that and he wasn't able to process that and logically think about it and react like a normal human being would, is that a direct result of his brain abnormalities?

A. Yes, a loss of emotional regulation is something that you can see on the MRIs now, which is documented in Dr. McMahon's neuropsych

testing, even back in 2000, and that was present then. Even Mr. Stamp mentioned that he his emotions were -- he had mental problems, as he said. So those have been present for a long time. **So when he gets angry, he can't calm himself down and he certainly isn't looking at all the possibilities of what can happen from his actions.**

**Q. Inherently impulsive too?**

A. That's **inherently impulsive** as well.

(T 771-72) (emphasis added).

Q. In regard to the abnormalities that you see and the emotional dysregulation that you see, based on the scans and based on the neuropsychological testing, **what happens when Mr. Cox is under a stressful situation and he gets upset, can he calm down like the rest of us?**

**A. He has a more difficult time calming down.**

Q. As opposed to a human being with a normal brain that doesn't have all these abnormalities?

A. Right. A lot of people get angry, they're over it if they don't have anything keeping it going, will stay angry and I think **more executive function becomes impaired with planning become poor.**

**Q. So it's not that he can't control himself, it's that he has a hard time regulating those emotions?**

A. Correct.

**Q. And that certainly affects the choices that he makes?**

A. It does.

(T 857-58) (emphasis added). Testimony at trial further established Petitioner's

inability to control his behavior:

A. [ . . . ] The main problem is further back, but he shows a problem in the front also. And that is up here in the frontal lobes where our executive functioning is. It's mild. And **the main impact of that is simply that he's not dealing with an intact brain.** He's not dealing

with a brain that is working at a hundred percent. He's dealing with a brain that is working somewhat less than that, particularly in those areas where he is asked to remember something or he's asked to shift set.

In other words, to shift, to be flexible. And **it's probably the greatest impact on his every day thinking is that he's had trouble being flexible in his thinking. He gets going on a track and that is where he continues.** It's very difficult for him to stop, shift set, and go in another direction. He just keeps moving in the same direction.

(T 1269-70) (emphasis added).

Q. [ . . . ] Do you believe Allen's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired when he committed the crime that we're here for?

A. Yes, I think so.

Q. Please explain.

A. **He's not able to process** I'm going to get him and kill him and that's going to be bad and I'm going to go – he doesn't process that. He's -- **he can't control his emotions.** He doesn't plan well. **His process just does not work.**

(T 772) (emphasis added).

In its sentencing order, the court found that the crime was neither spontaneous nor impulsive. (R 2021). The court acknowledged that four defense experts agreed that impulse control deficits are present, but – relying on its own finding that the defendant's actions leading up to the murder showed he could control his behavior – nevertheless ruled that the non-statutory mitigating circumstance that Appellant “suffers from impulse control deficits” is not mitigating on the facts of this case. (R 2021, 2035-36). The trial court's findings are contrary to the weight of the evidence presented. Pursuant to the Court's reasoning in *Atkins*, executing Mr. Cox would

violate the Eighth Amendment. Evolving standards of decency have made the execution of Mr. Cox to be constitutionally impermissible. Deterrence and retribution are not served with Mr. Cox's execution because:

1. People suffering from the level of mental illness Mr. Cox did at the time of offense are incapable of being deterred by the death penalty.

2. It is hardly a just retribution, as Mr. Cox had little capacity at the time of offense to act rationally and avoid committing capital murder.

3. Like the intellectually disabled, it is morally repugnant to take the life of an individual whose ability to plan, regulate, and control themselves is so impaired by severe mental health deficits.

This Court should grant the petition.

### **CONCLUSION**

For all of these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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