

No. 17-7825

IN THE  
*Supreme Court of the United States*

---

ERIC SCOTT BRANCH,  
PETITIONER,

v.

STATE OF FLORIDA.,  
RESPONDENT.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA

---

AMICUS BRIEF IN SUPPORT OF PETITIONER BY

THE PROMISE OF JUSTICE INITIATIVE

---

G. BEN COHEN\*  
NISHI L. KUMAR  
*THE PROMISE OF JUSTICE INITIATIVE*  
636 BARONNE STREET  
NEW ORLEANS, LA. 70115  
504-529-5955  
benc@thejusticecenter.org

\*COUNSEL OF RECORD

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
INTERESTS OF AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT .....	5
I. OBJECTIVE INDICATORS REVEAL THE PREVAILING STANDARDS OF DECENCY..	5
II. THE EXECUTION OF 21-YEAR- OLDS IS EXCESSIVE.....	7
<i>A. Twenty-Four Jurisdictions Have     Removed the Death Penalty Entirely as     A Possible Punishment. ....</i>	<i>7</i>
1. <i>Twenty jurisdictions do not have         the death penalty.....</i>	<i>7</i>
2. <i>Four additional jurisdictions have         suspended the death penalty and         exhibit long-term disuse.....</i>	<i>8</i>
<i>B. Eight Additional Jurisdictions Have     Exhibited Long-Term Disuse And Have     Little Or No Prospect Of Executing 21-     Year -Olds .....</i>	<i>10</i>

*C. Even in States that have Executed Young People, The Trend Strongly Leads To Exempting 21-Year-Olds from Execution* ..... 12

*D. The American Bar Association Has Called For Exempting 21-Year-Olds From Capital Punishment* ..... 14

III.SCIENTIFIC EVIDENCE NOW DEMONSTRATES THAT 21 YEARS-OLDS ARE NOT FULLY MATURE AND AS SUCH NOT THE MOST CULPABLE..... 15

CONCLUSION.....26

APPENDIX

JURISDICTIONS WITHOUT CAPITAL PUNISHMENT ..... 1a

JURISDICTIONS WITH MORATORIUM .....2a

JURISDICTIONS WITH LONG-TERM DISUSE AND NO NEAR-TERM PROSPECTIVE USE.....3a

ENDNOTES FOR APPENDIX.....5a

## TABLE OF AUTHORITIES

### CASES

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	5
<i>Branch v. State</i> , Nos. SC18-190, SC18-218, 2018 Fla. LEXIS 400 (Fla. Feb. 15, 2018).....	16, 27
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	1
<i>Graham v. Florida</i> , 568 U.S. 48 (2010).....	14
<i>Hall v. Florida</i> , 134 S. Ct. 1986 (2014) .....	6, 9, 12
<i>Kennedy v. Louisiana</i> , , 554 U.S. 407 (2008) ..	2, 5, 7
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	18
<i>Morton v. State</i> , 995 So. 2d 233 (Fla. 2008). .....	16
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)....	3, 5, 7, 18
<i>Trop v. Dulles</i> , 356 U.S. 86, 101 (1958).....	3

### STATUTES

14 V.I. C. § 923(a).....	8
9 G.C.A. § 16.39(b) .....	8
C.N.M.I. Const. Art. I § 4(i) .....	8
P.R. Const. Art. II § 7.....	8

**OTHER AUTHORITIES**

- American Bar Association, Resolution 111,  
February, 2018..... 15
- B.J. Casey, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*,  
Association of Psychological Science, 2016.... 24
- B.J. Casey, et al., *How Should Justice Policy Treat Young Offenders?* U of Pen Law  
School, Public Law Research Paper, No.  
17-17. April 2017 .....17, 23
- Bradley Taber-Thomas and Koraly Perez-  
Edgar, *Emerging Adulthood, Brain Development*, in Jeffrey Jensen Arnett  
(Ed.), The Oxford Handbook of Emerging Adulthood, Oxford University Press (1<sup>st</sup> ed.  
pp 126-131), Oxford England, 2016 ..... 17
- Elizabeth S. Scott, Natasha Duell, Laurence  
Steinberg, *Brain Development, Social Context and Justice Policy*, Washington  
University Journal of Law and Policy,  
Forthcoming (February 6, 2018) ..... 22

<i>Executions in the U.S. 1608–2002</i> , DEATH PENALTY INFO. CTR., available at <a href="http://www.deathpenaltyinfo.org/views-&lt;br/&gt;executions">www.deathpenaltyinfo.org/views- executions</a> .....	11
Giedd, Jay. <i>The Amazing Teen Brain</i> , Scientific American, Vol. 312 32-37. (2015)...	19
Governor John Kitzhaber, Executive Order, November 22, 2011 .....	10
Governor John W. Hickenlooper, Executive Order D-2013-006, May 22, 2013 .....	10
Governor Jay Inslee, Statement February 11, 2014 .....	10
Governor Tom Wolf, Memorandum of Moratorium, February 13, 2015.....	10
House of Commons Justice Committee, (2016), <i>The Treatment of Young Adults in the Criminal Justice System</i> , Seventh Report of Session 2016-17 .....	25
M. Watt Espy & John Ortiz Smykla, <i>Executions in the United States, 1608– 2002: The ESPY File</i> , DEATH PENALTY INFO. CTR.....	10

Rae Simpson, Massachusetts Institute of Technology, <i>Young Development Project</i> , Summary.....	23
Rudolph, Marc & Miranda Dominguez, et al, <i>At Risk Of Being Risky: The Relationship Between “Brain Age” Under Emotional Stress And Risk Preference</i> , Developmental Cognitive Neuroscience 24 (2017).....	24
Scott, Bonnie and Steinberg, Laurence, <i>Young Adulthood As a Transitional Legal Category: Science, Social Change and Justice Policy</i> , Fordham Law Review Vol 85, 641. (2016).....	24
Somerville, Leah H. <i>Searching for Signatures of Brain Maturity: What are we Searching For?</i> , 92 Neuron, 1164, 1165 (2016).....	26
Steinberg, Laurence, <i>A Social Neuroscience Perspective on Adolescent Risk-Taking</i> , DEVELOPMENTAL REVIEW : DR 28.1 (2008):....	20
Steinberg, Laurence, <i>Should the Science of Adolescent Brain Development Inform</i>	

*Public Policy*, Vol. XXVIII, Issue 3, Spring  
2012 ..... 21

Surgeon General Vivek Murthy, *A Report of  
the Surgeon General—Executive Summary*,  
Atlanta, GA: U.S. Department of Health  
and Human Services, Centers for Disease  
Control and Prevention, 2016, Fact Sheet  
508..... 17

Wilbert Rideau, *IN THE PLACE OF  
JUSTICE: A STORY OF PUNISHMENT  
AND DELIVERANCE*, Knopf, New York,  
2010 ..... 1



## INTERESTS OF AMICUS CURIAE<sup>1</sup>

*The Promise of Justice Initiative* (PJI) is a non-profit law office dedicated to upholding constitutional integrity. PJI addresses issues including concerning fairness in the administration of capital punishment.

Experience has taught us that young prisoners, especially, have significant possibility of transformation, but that the death penalty leaves no room for the possibility of rehabilitation or redemption.<sup>2</sup> This is particularly true for those convicted of offenses in late adolescence and early adulthood.

---

<sup>1</sup> Pursuant to this Court's Rule 37, *Amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Timely notice was provided to counsel for petitioner and respondent. The amicus brief in support of the petition is being filed within more than ten days from the date of the due date of the response. Letters of consent by both parties are on file with counsel.

<sup>2</sup> See Wilbert Rideau, *IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE*, Knopf, New York, 2010. Mr. Rideau was 19 years old when he was arrested and charged with capital murder. He was sentenced to death three times, only to be exempted from capital punishment by *Furman v. Georgia*, 408 U.S. 238 (1972). He spent 44 years in prison, and was ultimately released.

This disregard for the possibility of rehabilitation and redemption undermines faith in the criminal justice system. Amicus believes that society experiences loss and injury when the state executes an individual not fully culpable. As this Court has explained: “When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (explaining that “[f]or these reasons we have explained 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.'").

## SUMMARY OF ARGUMENT

The Eighth Amendment draws its meaning from the “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

There is a national consensus that capital punishment should be reserved for the most culpable offenders. Use of capital punishment has been reduced to a handful of states, and even within those states, a small percentage of counties. This firm consensus supports the view that executing those 21 years of age at the time of the offense is excessive, unnecessary, contradicting the principles of deterrence and rehabilitation, and, as such, cruel and unusual punishment.

This consensus is informed by the scientific evidence that the exigencies of youth continue beyond 18 years of age, that brain development is not finalized in the late teenage years, but continues into the mid-twenties. Scientific evidence confirms the concrete behavioral effects this continuing brain development has upon individuals in the late adolescent/young adult range. Further, this evidence demonstrates that childhood and adolescent exposure to lead, trauma, physical or emotional or sexual abuse, neglect, and alcohol or other substance abuse delays brain development.

Now, thirteen years after this Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court can make clear that an individual in his young

twenties, may be cognitively and emotionally indistinguishable from a “typical” juvenile under the age of eighteen. In 32 jurisdictions, there is little or no practical possibility of executing a person who was 21 at the time of the offense.

While a handful of states continue to impose capital punishment on 21-year-olds, most of these states, like Florida, imposed those sentences during a period in the 1990’s when youth was viewed as an aggravating rather than mitigating circumstance.

Executing individuals barely old enough to vote or drink, unable to rent a car, unable to serve in Congress, and still in the throes of cognitive development—based upon now-disregarded views of culpability—undermines this Court’s commitment to dignity, and the possibility of rehabilitation and redemption.

## ARGUMENT

### I. OBJECTIVE INDICATORS REVEAL THE PREVAILING STANDARDS OF DECENCY.

Objective indicators aid the Court’s effort to determine whether a punishment practice or method is consistent with contemporary standards of decency. In *Roper v. Simmons*, for example, the Court counted 30 states that rejected the death penalty for juvenile offenders—“12 that ha[d] rejected it altogether and 18 that maintain[ed] it but, by express provision or judicial interpretation, exclude[d] juveniles from its reach.” *Simmons*, 543 U.S. at 564; *see also Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008) (noting the consistent approach of measuring the objective indicia of consensus).

The Court has also rejected the death penalty for intellectually disabled offenders after detecting a national consensus against the practice. *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002). In addition to the 30 states that had formally barred the death penalty at the time of *Atkins*—either generally or specifically for the intellectually disabled—the Court also noted states like New Hampshire and New Jersey: though such states “continue[d] to authorize executions,” neither one had performed an execution in decades, which meant “there [was] little need to pursue legislation barring the execution of the mentally retarded in those States.” *Id.*; *see also Kennedy*, 554 U.S. at 433 (“There are measures of consensus other than legislation. Statistics about

the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society.”).

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court also indicated that long-term disuse coupled with executive action counted against the permissibility of a challenged punishment practice. *Id.* at 1997 (placing on the abolitionist side of the “ledger” the “18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years.”). In each of these opinions, the Court recognized that the risk of cruel and unusual punishment was sufficient to warrant prohibiting the execution of an entire class.<sup>3</sup>

---

<sup>3</sup> In *Simmons*, *Atkins*, and *Hall*, the Court recognized that not all juvenile or all intellectually disabled offenders had diminished culpability in a way that required exemption from execution; rather, in each instance, the Court recognized that the *risk* of executing individuals in a manner that was cruel and unusual required exemption of the entire class. For example, in *Simmons*, the Court interpreted the consensus against the juvenile death penalty to flow not necessarily from the rigid belief that no juvenile could ever possess sufficient culpability to warrant a death sentence, but rather as a marker that society cannot tolerate the risk that “a youthful person” might “receive the death penalty despite insufficient culpability.” *Id.* at 572–73.

## II. THE EXECUTION OF 21-YEAR- OLDS IS EXCESSIVE

Reviewing the “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions,” *Kennedy*, 554 U.S. at 408, reveals a growing consensus that executing 21-year –olds is excessive.

Of the fifty-two jurisdictions in the United States (fifty states, the District of Columbia, and the Federal government), there is no reasonable likelihood of executing a 21-year-old in thirty-two jurisdictions.

### A. *Twenty-Four Jurisdictions Have Removed the Death Penalty Entirely as A Possible Punishment.*

Twenty-four jurisdictions have removed the death penalty as a possible punishment.

#### 1. *Twenty jurisdictions do not have the death penalty.*

Nineteen states<sup>4</sup> plus the District of Columbia do not have the death penalty.<sup>5</sup> Seven of these states

---

<sup>4</sup> See Appendix at 1a noting abolition in Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

<sup>5</sup> The death penalty is also prohibited under the constitutions of Puerto Rico and the Commonwealth for the Northern Mariana Islands. See P.R. Const. Art. II § 7 (“The death penalty

have rejected capital punishment in the past ten years: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013); Delaware (2016).<sup>6</sup>

*2. Four additional jurisdictions have suspended the death penalty and exhibit long-term disuse.*

Four additional jurisdictions have moratoria in place, suspending use of the death penalty, and a long history of disuse consistent with the measure the Court used in *Hall*. As the Court observed in *Hall*, states that have suspended use of the death penalty, coupled with long-term disuse are similar to those that have abolished the punishment. *Id.* at 1997 (placing “on the abolitionist side of the ledger” “Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years.”).

The growing concern over the ability of states to identify the most culpable offenders contributed

---

shall not exist.”); C.N.M.I. Const. Art. I § 4(i) (“Capital punishment is prohibited.”). In Guam and the U.S. Virgin Islands, the death penalty is not a possible sentence. See, e.g., 9 G.C.A. § 16.39(b) (punishment for aggravated murder is life); 14 V.I. C. § 923(a) (providing for life in prison as punishment for murder).

<sup>6</sup> Of those seven states, only New Mexico still has individuals on death row. Neither of the two individuals on New Mexico’s death row were twenty-one years old or younger.



to formal moratoriums in four states: Colorado,<sup>7</sup> Oregon,<sup>8</sup> Pennsylvania,<sup>9</sup> and Washington.<sup>10</sup>

Colorado has executed one individual since 1967. Oregon has executed two individuals since 1962—both were volunteers; one was 29 and the other was 51 at the time of the offense. Pennsylvania has executed only three individuals since 1962—each was a volunteer; the youngest was 24 at the time of the offense. Washington has executed five individuals since 1963.<sup>11</sup> Moreover, Washington

---

<sup>7</sup> See Governor John W. Hickenlooper, Executive Order D-2013-006, May 22, 2013 *available at* <https://deathpenaltyinfo.org/documents/COexecutiveorder.pdf>.

<sup>8</sup> See Governor John Kitzhaber, Executive Order, November 22, 2011, *available at* <https://deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions>. Governor Kate Brown has continued this moratorium.

<sup>9</sup> See Governor Tom Wolf, Memorandum of Moratorium, February 13, 2015.

<sup>10</sup> See Governor Inslee, Statement of February 11, 2014.

<sup>11</sup> All data concerning the date of last execution and the number of executions is drawn from The Espy File, which catalogs all executions in the United States between 1608 and 2002. M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608–2002: The ESPY File*, DEATH PENALTY INFO. CTR., *available at* [www.deathpenaltyinfo.org/documents/ESPYstate.pdf](http://www.deathpenaltyinfo.org/documents/ESPYstate.pdf). Counsel also draws from the searchable database for all executions between 1976 and the current date. *Executions in the U.S.*

currently has no individual who was under the age of 24 on death row and has never executed someone younger than 25.

***B. Eight Additional Jurisdictions Have Exhibited Long-Term Disuse And Have Little Or No Prospect Of Executing 21-Year - Olds***

Eight states have exhibited long-term disuse and have little or no potential prospect of executing 21-year-olds. Most of these states have no individual on death row who was 21 years of age or younger, and have not in the modern era executed someone who was that young at the time of the offense. A small handful may have a single young person on death row, sentenced decades ago, reflecting the broad trend towards disuse, and the evolving consensus that executing 21-year-olds is excessive.

i. New Hampshire. Though it retains the death penalty by statute, New Hampshire has not performed an execution in 86 years. New Hampshire has one person on the row, and he was 26 at the time of the offense.

ii. Wyoming has executed one person in the last 50 years. Wyoming has one person on death row and he was 43 at the time of the offense.

iii. Montana has two individuals on death row; one was 24 and one was 26 at the time of the offense. In the last 50 years, it has executed three people—all older than 30 at the time of the offense.

iv. Kansas, as the *Hall* Court noted, “has not had an execution in almost five decades.” *Hall*, 134 S. Ct. at 1997. Kansas has ten people on death row, but only one individual under the age of 23.

v. Utah has nine people on death row, none under the age of 22. Two of the nine people executed in Utah over the last 50 years were 21 years-old or younger; however, those executions occurred over 25 years ago.

vi. Idaho has executed two offenders in the last 15 years. Neither was under the age of 21 years old at the time of his offense. Currently, Idaho has nine people on death row. Only James Hairston was under 22 years old. His sentence was imposed more than 20 years ago.

vii. South Dakota has three people on its row, one under the age of 22. South Dakota has not sentenced a young person to death in over 15 years.

viii. Kentucky has executed three individuals since 1968. Each was well older than 22 at the time of offense. Kentucky has thirty-three people on death row. Only two were under the age of 22. One, Ronnie Lee Bowling, was sentenced to death for an offense in 1989; the other, Karu Gene White, was sentenced to death for an offense in 1979.

This reflects the broad consensus that the death penalty should be reserved for the most culpable offenders – and the recognition that 21-year-old individuals are not the most culpable.

***C. Even in States that have Executed Young People, The Trend Strongly Leads Towards Exempting 21-Year-Olds from Execution.***

Even in states that continue to execute and sentence individuals to death, there is a strong trend towards exempting young adults from execution. The broad trend is reflected in the aggregate numbers. In 2007, 30 individuals under the age of 22 were sentenced to death. In 2017, that number was eight.

The trend is also reflected in the states. Nebraska has not executed a person in 20 years. It has executed three individuals since 1959, the youngest of whom was 20-years-old at the time of the offense. This execution occurred in 1996. There are currently twelve people on Nebraska's death row. Two of these individuals were under the age of 22 at the time of the offense; however, the offenses for which death sentences were imposed occurred in 1979 and 2002.

Similarly, Arkansas has sentenced one person under the age of 22 to death since 2000. Indiana has sentenced one person under the age of 22 since 2002.

Missouri has sentenced no individual under the age of 22 to death in the last ten years. South Carolina has sentenced none since 2005. Tennessee has sentenced one person under the age of 22 to death since 2000. Virginia has no one on death row who was under the age of 21 at the time of the offense. This trend – even in the face of death qualification and other practical effects that increase the chance that young adults face execution – reflects the on-the-ground consensus that executing individuals for what they have done at age 21 is excessive, and precludes the possibility of rehabilitation and redemption.

As this Court explained in *Graham v. Florida*, 560 U.S. 48 (2010):

[T]he many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And it is fair to say that a national consensus has developed against it.

560 U.S. at 67 (internal quotation marks omitted).

***D. The American Bar Association Has Called For Exempting 21-Year-Olds From Capital Punishment***

On February 5, 2018, the ABA House of Delegates called on all death penalty jurisdictions to ban capital punishment for any offender who committed their crime at the age of 21 or younger. See American Bar Association, Resolution 111, February, 2018.<sup>12</sup> The report accompanying the resolution provided:

Findings demonstrate that 18- to 21-year-olds have a diminished capacity to understand the consequences of their actions and control their behavior in ways similar to youth under 18. Additionally, research suggests that late adolescents, like juveniles, are more prone to risk-taking and that they act more impulsively than older adults in ways that likely influence their criminal conduct....

More recent research shows that profound neurodevelopmental growth continues even into a person's mid to late twenties.... A widely-cited longitudinal study sponsored by the

---

<sup>12</sup> Available at <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf>.

National Institute of Mental Health tracked the brain development of 5,000 children, discovering that their brains were not fully mature until at least 25 years of age.

ABA, Resolution 111, Report at 6-7. The ABA Report accompanying Resolution 111, makes the clear observation that penological justifications for death penalty are at their nadir when individuals are 21 years old or younger.

### **III. SCIENTIFIC EVIDENCE NOW DEMONSTRATES THAT 21-YEAR-OLDS ARE NOT FULLY MATURE**

Scientific understanding evolves. In this case the Florida Supreme Court nonetheless explained that “we have previously rejected recognizing ‘new research studies’ as newly discovered evidence if based on previously available data.” *Branch*, Nos. SC18-190, SC18-218, 2018 Fla. LEXIS 400, at \*8 (citing *Morton v. State*, 995 So. 2d 233, 245 (Fla. 2008)). But science builds on itself. What is suspected in one generation may either be rejected or become certain in the next.

A report of the Surgeon General from 2016 makes clear that the evidence is now in: “The brain is the last organ in the human body to develop fully. Brain development continues until the early to mid-20s.” Surgeon General Vivek Murthy, *E-Cigarette*

*Use Among Youth and Young Adults: A Report of the Surgeon General—Executive Summary*, Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2016, Fact Sheet 508; *see also* Bradley Taber-Thomas and Koraly Perez-Edgar, *Emerging Adulthood, Brain Development*, in Jeffrey Jensen Arnett (Ed.), The Oxford Handbook of Emerging Adulthood, Oxford University Press (1st ed. pp. 126-131), Oxford England, 2016 (observing “neurodevelopment in EA [early adulthood] involves prominent changes in association cortices and the frontolimbic systems involved in executive attention, regard and social processes. In addition, alterations in neurodevelopment trajectories in EA may underlie differences in functioning and new vulnerabilities to psychopathology evident in this developmental window.”).

Scientific evidence concerning brain development and its effects on behavior in the late teens and early twenties demonstrates that the protections announced in *Roper v. Simmons* should be applied to individuals 21 years old and younger. See B.J. Casey, et al., *How Should Justice Policy Treat Young Offenders?* U of Pen Law School, Public Law Research Paper, No. 17-17. April 2017, at 3 (noting discoveries in both neuroscience and the behavioral sciences that identify differences in brain development for individuals 18- to 22-years-old that “differentiate” the period from “later stages of adulthood.”). In *Miller v. Alabama*, this Court elucidated:



Our decisions rested not only on common sense—on what any parent knows— but on science and social science as well. In *Roper*, we cited studies showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. And in *Graham*, we noted that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control. We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed.

*Miller v. Alabama*, 567 U.S. 460, 471 (2012) (quoting *Simmons*, 543 U.S. at 570). This dual principal of diminished moral culpability and an enhanced prospect of reformation applies to young adults like the Petitioner in this case.

One of the most prominent researchers on brain development, Dr. Jay Giedd, explained the physiology this way:

The most recent studies indicate that the riskiest behaviors (among adolescents) arise from a mismatch between the maturation of networks in the limbic system, which drives emotions and becomes turbo-boasted in puberty, and the maturation of networks in the prefrontal cortex, which occurs later and promotes sound judgment and the control of impulses. Indeed, we now know that the prefrontal cortex continues to change prominently until well into a person's 20s.

Giedd, Jay. *The Amazing Teen Brain*, Scientific American, Vol. 312 32-37 (2015), at 3. The full development of crucial executive functioning – the moral aspect of a person's brain that renders them fully culpable – does not occur until a person's 20s.

Indeed, the full development of gray matter “peaks latest in the prefrontal cortex, crucial to executive functioning, a term that encompasses a broad array of abilities, including organization, decision making and planning, along with the regulation of emotion.” “The prefrontal cortex functions are not absent in teenagers; they are just not as good as they are going to get. Because they do not fully mature until

a person's 20s, teens may have trouble controlling impulses or judging risks and rewards.”

*Id.* at 5. Similarly, Professor Laurence Steinberg details findings that neurological processes that account for the decline in risky behavior do not arrive until the mid-20s:

[T]he development of self-regulatory capacities [] occurs over the course of adolescence and during the 20s. Considerable evidence suggests that higher level cognition, including the uniquely human capacities for abstract reasoning and deliberative action, is supported by a recently evolved brain system including the lateral prefrontal and parietal association cortices and parts of the anterior cingulate cortex to which they are highly interconnected.

Steinberg, Laurence, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, *Developmental Review*: DR 28.1 (2008): 78–106. PMC. Web. 15 Feb. 2018.

Research suggesting that neurobiological maturity generally occurs by age 22 gives rise to questions concerning public policy. Steinberg, Laurence, *Should the Science of Adolescent Brain Development Inform Public Policy*, Vol. XXVIII,

Issue 3, Spring 2012.<sup>13</sup> As Dr. Steinberg makes clear:

There is now incontrovertible evidence that adolescence is a period of significant changes in brain structure and function. Although most of this work has appeared just in the past 15 years, there is already strong consensus among developmental neuroscientists about the nature of this change. And the most important conclusion to emerge from recent research is that important changes in brain anatomy and activity take place far longer into development than had been previously thought.

*Id.* Dr. Steinberg further noted: “Reasonable people may disagree about what these findings may mean as society decides how to treat young people, but there is little room for disagreement about the fact that adolescence is a period of substantial brain maturation with respect to both structure and function.” *Id.* Research sponsored by the *MacArthur Foundation Research Network on Law and Neuroscience* has found that while lack of self-control was a characteristic feature of adolescents between 13 and 17, young adults (those 18 through 21) “evinced decreased activation in cognitive control networks and increased activation in brain

---

<sup>13</sup> Available at <http://issues.org/28-3/steinberg/>

regions implicated in emotional processing; this combination is thought to have contributed to poorer performance on the self-control task.” Elizabeth S. Scott, Natasha Duell, & Laurence Steinberg, *Brain Development, Social Context and Justice Policy*, Washington University Journal of Law and Policy, Forthcoming (February 6, 2018).<sup>14</sup>

In addition to the findings of the MacArthur Research Network, a large body of research reflecting the manner in which brain development occurs is housed at the *MIT Young Adult Development Project*, created in 2006 to capture new research findings concerning brain development. As the project describes:

The years from 18 to 25 are a time of stunning accomplishments and chilling risks, as a roller coaster of internal and external changes, including brain changes, propels young adults from adolescence toward full maturity.

See Rae Simpson, Massachusetts Institute of Technology, *Young Development Project, Summary*.<sup>15</sup> Embarking on a course of research in 2008, the Project noted that the brains of young

---

<sup>14</sup> Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3118366](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118366)

<sup>15</sup> Available at <http://hrweb.mit.edu/worklife/youngadult/about.html#summary>

adults are changing and do not reach maturity until well into the 20s:

[S]pecific changes that follow young adulthood are not yet well studied, but it is known that they involve increased myelination and continued adding and pruning of neurons. As a number of researchers have put it, "the rental car companies have it right." The brain isn't fully mature at 16, when we are allowed to drive, or at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.

*Id.* This research "suggests that young adulthood is a distinct developmental period.... Researchers have found that in young adulthood, as in adolescence, areas of the brain that regulate functions like judgment and self-control are still not fully mature. In certain emotionally charged situations, the capacity of young adults to regulate their actions and emotions appears more like teens than that of adults in their mid-20s or older." B. J. Casey, et al. *How Should Justice Policy Treat Young Offenders*. U of Penn Law School, Public Law Research Paper 17-17, April 26, 2017 at 3. *See also* B.J. Casey, et al. *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, Association of Psychological Science, 2016. In

another study by fifteen psychologists, the conclusion was that “individuals in the young adult period (i.e. ages 19-21)...were at the greatest risk to be risky. Rudolph, Marc & Miranda Dominguez, et al, *At Risk Of Being Risky: The Relationship Between “Brain Age” Under Emotional Stress And Risk Preference*, *Developmental Cognitive Neuroscience* 24 (2017)) at 93. In other words, the results suggest that this period of development is an important transition. These results support and extend previous studies assessing young adults (between 18 and 22 years-old), documenting developmental and behavioral differences aligning their behavior more closely to adolescents than fully matured adults.

There are significant legal implications from the emerging science on 18- to 21-year-olds. Scott, Bonnie and Steinberg, Laurence, *Young Adulthood As a Transitional Legal Category: Science, Social Change and Justice Policy*, *Fordham Law Review* Vol 85, 641. (2016). Steinberg, et al. conclude that 18- to 21-year-old adults are more like younger adolescents than older adults in their impulsivity under conditions of emotional arousal. “We conclude that the research supports a regime that recognizes young adults as a transitional category between juveniles and older adult offenders.” *Id.* at 644.

Importantly, these developmental changes, which continue into the early twenties, are now viewed as normative, driven by the process of brain maturation that are not under the control of young people. *Id.* at 647. Finally, the research reflects “individuals mature intellectually before they mature emotionally or socially and that emotional and social development continues past age eighteen in realms that are legally relevant.” *Id.* at 648.

Specifically, in the last two years, the medical and psychological community has now explicitly recognized that “young adults are distinct from older adults in terms of both their needs and their outcomes.” House of Commons Justice Committee, (2016), *The Treatment of Young Adults in the 2016-17*, (p. 7 ¶7). As the House of Commons report observed, recent scientific evidence has identified “a distinctive phase of development occurring between the ages of 18 and 24.” *Id.* at p. 6, ¶ 5. “Young adults are still developing neurologically up to the age of 25 and have a high prevalence of atypical brain development[.]” *Id.* at p. 61 ¶ 2. Recent scientific research makes clear that “neurobiological maturation is incomplete” in individuals “18-22 years old”:

[I]n the functioning of key brain areas such as the dorsolateral prefrontal



cortex, the 18-21 year-olds' brain activity during threat conditions was more similar to a 13-17 year-old reference group than a 22-25 year-old reference group.

Somerville, Leah H. *Searching for Signatures of Brain Maturity: What are we Searching For?* 92 *Neuron*, 1164, 1165 (2016).

These findings conclusively demonstrate that 21-year-olds are not fully mature, and as such are not fully culpable. While these findings do not warrant exempting young adults from criminal responsibility, they explicate that young adults are by definition not the most culpable.

The Florida Supreme Court has declared that “unless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended, we will continue to adhere to *Roper*.” *Branch*, Nos. SC18-190, SC18-218, 2018 Fla. LEXIS 400, at \*12. As such, it is ultimately this Court’s independent judgment that must be brought to bear on whether the Eighth Amendment precludes the death penalty as punishment for young adults who we now know have not yet reached the true age of maturity.

**CONCLUSION**

For the forgoing reasons, amicus respectfully suggests that the Court grant certiorari in this case and consider whether evolution in the standards of decency that mark a civilized society render the execution of 21-year-olds excessive, unnecessary, and as such, cruel and unusual punishment.

Respectfully submitted,

G. Ben Cohen,\*  
Nishi Kumar  
*The Promise of Justice  
Initiative*  
636 Baronne Street  
New Orleans, La. 70115  
504-529-5955  
benc@thejusticecenter.org

\*COUNSEL OF RECORD

---

---

**JURISDICTIONS WITHOUT CAPITAL  
PUNISHMENT**

<b>State</b>	<b>Date of Abolition</b>
Michigan <sup>1</sup>	1847
Wisconsin <sup>2</sup>	1853
Maine <sup>3</sup>	1887
Minnesota <sup>4</sup>	1911
Alaska <sup>5</sup>	1957
Hawaii <sup>6</sup>	1957
Iowa <sup>7</sup>	1965
West Virginia <sup>8</sup>	1965
Vermont <sup>9</sup>	1972
North Dakota <sup>10</sup>	1973
District of Columbia <sup>11</sup>	1981
Massachusetts <sup>12</sup>	1984
Rhode Island <sup>13</sup>	1984
New Jersey <sup>14</sup>	2007
New York <sup>15</sup>	2007
New Mexico <sup>16</sup>	2009
Illinois <sup>17</sup>	2011
Connecticut <sup>18</sup>	2012
Maryland <sup>19</sup>	2013
Delaware <sup>20</sup>	2016

**JURISDICTIONS WITH MORATORIUM**

State	Date of Moratorium	Date of Last Executions
Colorado <sup>21</sup>	5/22/2013	2/06/1967 10/13/1997
Oregon <sup>22</sup>	11/22/2011	8/20/1962 5/16/97 (V) 9/06/96 (V)
Pennsylvania <sup>23</sup>	2/15/2015	2/4/1962 5/02/95 (V) 8/15/95 (V) 7/06/99 (V)
Washington <sup>24</sup>	2/11/ 2014	6/20/1963 1/05/93 (V) 5/27/94 10/13/98 8/21/01 (V) 9/10/10

**JURISDICTIONS WITH LONG-TERM  
DISUSE AND NO NEAR-TERM  
PROSPECTIVE USE**

State	Size of Death Row (number 21 years old or younger on row – date of offense)	Last Executions (v=volunteer) (# = age if less than 22)
N.H. <sup>25</sup>	1 (0)	1/15/1918 7/14/1939
Wyo. <sup>26</sup>	1 (0)	4/27/1945 12/10/1965 1/22/1992
Mont. <sup>27</sup>	2 (0)	9/10/1943 5/10/1995 2/24/1998 8/11/2006 (V)
Kan. <sup>28</sup>	10 (1-12/15/2000)	6/22/1965
Utah <sup>29</sup>	9 (0)	6/10/1988 (V) <b>7/30/1992 (19)</b> 1/26/1996 (V) 10/15/1999 (V) 6/18/2010
Idaho <sup>30</sup>	9 (1 – 1/6/1996)	10/18/1957 1/06/1994 (V) 11/18/2011 6/12/2012
South Dakota <sup>31</sup>	3 (1 - 3/13/2000)	8/4//1947 7/11/2007 (V) <b>(19)</b>

4a

		10/15/2012 (V) 10/30/2012
Ky. <sup>32</sup>	35 (2 – 1/20/1989 2/12/1979)	2/3/1962 7/19/1997 5/25/1999 (V) 11/21/2008 (V)
Neb. <sup>33</sup>	12 (2 – 8/2/1979 9/26/2002)	6/25/1959 9/02/1994 7/17/1996 ( <b>20</b> ) 12/02/1997

## ENDNOTES FOR APPENDIX

---

<sup>1</sup> Michigan has not had the death penalty since 1847. *See* [www.deathpenaltyinfo.org/states-and-without-death-penalty](http://www.deathpenaltyinfo.org/states-and-without-death-penalty).

<sup>2</sup> Wisconsin has not had the death penalty since 1853. *Id.*

<sup>3</sup> Maine has not had the death penalty since 1887. *Id.*

<sup>4</sup> Minnesota has not had the death penalty since 1911. *Id.*

<sup>5</sup> Alaska has not had the death penalty since 1957. *Id.*

<sup>6</sup> Hawaii has not had the death penalty since 1957. *Id.*

<sup>7</sup> Iowa has not had the death penalty since 1965. *Id.*

<sup>8</sup> West Virginia has not had the death penalty since 1965. *Id.*

<sup>9</sup> Vermont has not had the death penalty since 1972. *Id.*

<sup>10</sup> North Dakota has not had the death penalty since 1973. *Id.*

<sup>11</sup> The District of Columbia has not had the death penalty since 1981. *Id.*

<sup>12</sup> Massachusetts has not had the death penalty since 1984. *Id.*

<sup>13</sup> Rhode Island has not had the death penalty since 1984. *Id.*

<sup>14</sup> New Jersey has not had the death penalty since 2007. *Id.*

<sup>15</sup> New York has not had the death penalty since 2007. *Id.*

<sup>16</sup> New Mexico has not had the death penalty since 2009. *Id.* It has no protocol in place.

---

<sup>17</sup> Illinois has not had the death penalty since 2011. *Id.* A moratorium was imposed in 2000 and all subsequent death sentences commuted; last execution 3/17/99. John Schwartz, *Illinois Governor Signs Capital Punishment Ban*, NY TIMES, Mar. 9, 2011, available at [www.nytimes.com/2011/03/10/us/10illinois.html](http://www.nytimes.com/2011/03/10/us/10illinois.html); Cornelia Grumman and Rick Pearson, *Ryan Agonized, But Confident He 'Did the Right Thing,'* CHICAGO TRIBUNE, Mar. 18, 1999, available at [articles.chicagotribune.com/1999-03-18/news/9903180130\\_1\\_case-of-anthony-porter-penalty-lorraine-borowski](http://articles.chicagotribune.com/1999-03-18/news/9903180130_1_case-of-anthony-porter-penalty-lorraine-borowski).

<sup>18</sup> Connecticut abolished the death penalty in 2012. State of Connecticut, Governor Dannel P. Malloy, *Gov. Malloy on Signing Bill to Repeal Capital Punishment*, Apr. 25, 2012, available at [www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122](http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122)). See also *State v. Santiago*, 122 A. 3d 1 (Conn. 2015) (holding death penalty unconstitutional as applied retroactively because capital punishment no longer measurably contributed to the legitimate penological goals of deterrence and retribution).

<sup>19</sup> Maryland abolished the death penalty in 2013. See Associated Press, *Maryland: Governor Signs Repeal of the Death Penalty*, N.Y. TIMES, May 2, 2013, available at [www.nytimes.com/2013/05/03/us/maryland-governor-signs-repeal-of-the-death-penalty.html](http://www.nytimes.com/2013/05/03/us/maryland-governor-signs-repeal-of-the-death-penalty.html)); Alan Binder, *Life Sentences for Last Four Facing Death in Maryland*, N.Y. TIMES, Dec. 31, 2014 (available at [www.nytimes.com/2015/01/01/us/maryland-governor-omalley-commutes-death-sentences-emptying-death-row.html](http://www.nytimes.com/2015/01/01/us/maryland-governor-omalley-commutes-death-sentences-emptying-death-row.html)).

<sup>20</sup> See *Rauf v. State*, 145 A. 3d 430 (De. 2016).

<sup>21</sup> Office of the Governor, Executive Order D 2013-006: Death Sentence Reprieve, May 22, 2013, available at [www.scribd.com/doc/143073608/Hickenlooper-Death-Sentence-Reprieve-for-Nathan-Dunlap](http://www.scribd.com/doc/143073608/Hickenlooper-Death-Sentence-Reprieve-for-Nathan-Dunlap).

<sup>22</sup> Helen Jung, *Gov. John Kitzhaber Stops Executions in Oregon, Calls System 'Compromised and Inequitable'*, THE OREGONIAN, Nov. 22, 2011, available at



---

[www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov\\_john\\_kitzhaber\\_stops\\_all\\_e.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_stops_all_e.html).

<sup>23</sup> Press Release, Governor Tom Wolf Announces a Moratorium on the Death Penalty in Pennsylvania, Feb. 13, 2015, *available at* [www.governor.pa.gov/Pages/Pressroom\\_details.aspx?newsid=1566#.VQCp4vnF98E](http://www.governor.pa.gov/Pages/Pressroom_details.aspx?newsid=1566#.VQCp4vnF98E); *see also* Associated Press, *Pennsylvania Governor Imposes Moratorium on Death Penalty*, N.Y. TIMES, Feb. 13, 2015.

<sup>24</sup> Ian Lovett, *Executions are Suspended by Governor in Washington*, NY TIMES, Feb. 11, 2014.

<sup>25</sup> All of the data concerning dates of execution derive from *The Espy File, Executions in the U.S. 1608-2002: Executions by State*, located at [www.deathpenaltyinfo.org/documents/ESPY\\_state.pdf](http://www.deathpenaltyinfo.org/documents/ESPY_state.pdf) and the searchable database of executions located at [www.deathpenaltyinfo.org/views-executions](http://www.deathpenaltyinfo.org/views-executions) (hereinafter the “*Espy File*”). All data concerning death row is derived from Death Row USA or the state Department of Corrections.

<sup>26</sup> *Espy File*, *supra* n.25; Death Row USA.

<sup>27</sup> *Espy File*, *supra* n.25; Death Row USA.

<sup>28</sup> *Espy File*, *supra* n.25; Death Row USA.

<sup>29</sup> *Espy File*, *supra* n.25; Death Row USA.

<sup>30</sup> *Espy File*, *supra* n.25; Idaho Department of Correction, *available at* <https://www.idoc.idaho.gov/content/prisons/deathrow>.

<sup>31</sup> *Espy File*, *supra* n.25; Death Row USA.

<sup>32</sup> *Espy File*, *supra* n.25; Kentucky Department of Corrections, *available at* <https://corrections.ky.gov/depts/AI/Pages/DeathRowInmates.aspx>.

<sup>33</sup> *Espy File*, *supra* n.25; Death Row USA.