

CAPITAL CASE
IMMINENT EXECUTION SCHEDULED FOR MAY 4, 2018, 7:00 P.M. EDT

No. _____

**In the
Supreme Court of the United States**

ROBERT EARL BUTTS, JR.,

PETITIONER,

v.

ERIC SELLERS, WARDEN,

GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

On Petition For a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

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May 4, 2018

QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

In determining whether the Eighth Amendment prohibits an individual's execution based on his characteristics as an offender, this Court has assessed whether the individual's execution would be cruel and unusual punishment in light of society's evolving standards of decency—including standards that evolved between the time of the offense and the time of the execution. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (1993 offense; relying on societal trends and scientific research from 1995 through 2005); *Atkins v. Virginia*, 536 U.S. 304 (2002) (1996 offense; relying in part on legislative trends from 1998 through 2001); *Hall v. Florida*, 134 S. Ct. 1986 (2014) (1978 offense; relying on legislative trends through 2013 and scientific research through 2012).

According to the state habeas court here, however, Georgia law effectively bars an individual from asserting a claim that the Eighth Amendment prohibits his execution based on standards of decency that have evolved in the years preceding his scheduled execution. This case exemplifies the issue. Petitioner filed an initial state habeas petition in 2002. In the 16 years since the filing of that petition: this Court decided *Roper*, holding that the Eighth Amendment bars the execution of juvenile offenders; scientific researchers have made breakthroughs in studying the mental development of adolescents and young adults; and societal norms about who should and may be executed have changed significantly. Recognizing these subsequent developments, on April 27, 2018, Petitioner sought state habeas relief, claiming that based on standards of decency that have evolved from the time his

sentence was imposed in 1998 up to today, the Eighth Amendment bars his execution because he was an 18-year-old with a mental age of approximately 15.07 years at the time of his offense. The state habeas court, however, held that Georgia law bars Petitioner from raising his claim, and alternatively that Petitioner's claim was "non-cognizable" and failed on the merits. The Supreme Court of Georgia denied a Certificate of Probable Cause to Appeal. Without offering analysis, the Supreme Court affirmed the Superior Courts' procedural and merits rulings. However, the Supreme Court noted that "the habeas court erred to the extent that it dismissed Butts's petition on the ground that his constitutional cruel and unusual punishment claim was not cognizable in habeas corpus." The State has scheduled Petitioner's execution for May 4, 2018 at 7:00 p.m.

The questions presented in this case are:

1. Does the Eighth Amendment prohibit the execution of an individual who had a chronological age of 18 years and a mental age of approximately 15.07 years at the time of his capital offense?
2. Does a State procedural rule abridge an individual's Eighth Amendment rights by barring a death-row inmate from asserting that the Eighth Amendment bars his execution based on standards of decency that have evolved since the offense, his criminal trial, or an initial habeas petition?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Earl Butts, Jr., respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Georgia, entered in the above case on May 4, 2018. *See* Appendix A.

OPINIONS BELOW

The decision of the Supreme Court of Georgia, entered May 4, 2018, denying Mr. Butt's Application for a Certificate of Probable Cause to Appeal is not yet reported, but is attached hereto as Appendix A. The unpublished decision of the Superior Court of Butts County, denying Butts's Petition for a Writ of Habeas Corpus, dated May 2, 2018, is appended as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia denying Application for a Certificate of Probable Cause to Appeal was entered on May 4, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), as Petitioner asserts a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Eighth and Fourteenth Amendments to the United States Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

"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" U.S. Const. amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

This petition challenges the constitutionality of O.C.G.A. § 9-14-51, as applied by the courts below in this case:

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

O.C.G.A. § 9-14-51.

STATEMENT OF THE CASE

A. Procedural History

On April 2, 1996, eighteen-year-old Robert Butts, Jr., and Marion Wilson were arrested in connection with the murder of Donovan Parks, which occurred on March 28, 1996. Wilson and Butts were charged with six offenses, including malice murder and felony murder.¹ The State sought the death penalty against both defendants based on a single aggravating circumstance: that “[t]he offense of murder . . . was committed while [he] was engaged in the commission of another capital felony,” O.C.G.A. § 17-10-30(b)(2), namely armed robbery.

Wilson was convicted on all counts and sentenced to death on November 7, 1997. Butts was convicted on all counts on November 20, 1998, and sentenced to death by electrocution a day later. Butts’s conviction and sentence were upheld on

¹ Wilson and Butts were charged with malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. *See Butts v. State*, 273 Ga. 760, 760 n.1, 546 S.E.2d 472, 477 (Ga. 2001), *cert. denied Butts v. Georgia*, 534 U.S. 1086 (Ga. 2002), *reh’g denied*, 535 U.S. 922 (2002).

direct appeal. *Butts v. State*, 273 Ga. 760, 546 S.E.2d 472 (Ga. 2001). This Court denied Butts’s petition for a writ of certiorari. *See Butts v. Georgia*, 534 U.S. 1086 (Ga. 2002), *reh’g denied*, 535 U.S. 922 (2002).

On August 30, 2002, Butts timely filed a Petition for a Writ of Habeas Corpus in the Superior Court for Butts County (the “first state habeas petition”). Following a three-day evidentiary hearing on the first state habeas petition, the court denied relief as to both conviction and sentence on April 7, 2011. Butts then filed a timely notice of appeal and an Application for Certificate of Probable Cause to Appeal the denial of habeas corpus relief. On January 22, 2013, the Supreme Court of Georgia denied the Application.

Butts subsequently sought habeas corpus relief in federal court. The United States District Court for the Middle District of Georgia denied relief, *Butts v. Warden*, No. 5:13-cv-194 (MTT), 2015 WL 6126830 (M.D. Ga. Oct. 16, 2015), as did the United States Court of Appeals for the Eleventh Circuit, *Butts v. Warden*, 850 F.3d 1202 (11th Cir. 2017). Butts filed a petition for certiorari in this Court, which this Court denied. *Butts v. Sellers*, No. 17-512, 138 S. Ct. 925 (Mem.), 2018 WL 491544 (U.S. Jan. 22, 2018).

On April 27, 2018, shortly after the State of Georgia set a date for his execution, Petitioner filed a second Petition for a Writ of Habeas Corpus (“second state habeas petition”). Petitioner sought relief based on the United States and Georgia Constitutions and the holding and reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005). On April 30, 2018, Respondent filed a brief in opposition to Petitioner’s

second state habeas petition and submitted a proposed order denying this Petition. On May 1, 2018, Petitioner filed a Reply in support of his second habeas petition. On May 2, the Superior Court denied Petitioner's second state habeas petition, signing the proposed order prepared by Respondent. That same day, Petitioner filed an Application for a Certificate of Probable Cause to Appeal the Superior Court's order in the Supreme Court of Georgia.

On May 4, the Supreme Court of Georgia denied Petitioner's Application for a Certificate of Probable Cause to Appeal. *See* Appendix A. The Supreme Court's order contained no reasoning or analysis, but stated that Petitioner's appeal "lack[ed] arguable merit because of procedural bars under Georgia law and, alternatively, on the merits." Appendix A, at 1. However, the Supreme Court concluded that "the habeas court erred to the extent that it dismissed Butts's petition on the ground that his constitutional cruel and unusual punishment claim was not cognizable in habeas corpus." *Id.* The Supreme Court did not address Petitioner's argument that the Superior Court's application of O.C.G.A. § 9-14-51 was unconstitutional as applied. *See id.*

B. Factual History

Born May 14, 1977, Butts had what can only be described as a horrific childhood. In addition to his youth, four factors combined to deprive Butts of a stable foundation: (1) "a father who was seriously mentally ill, with over 30 admissions to a mental hospital," and who was "in and out of jail, sometimes homeless, sometimes in halfway houses"; (2) "a crack-addicted mother, whose addiction was chronic and severe and lasted over time . . . and who would disappear

for days and weeks at a time, essentially leaving both parents ineffective to take care of their children”; (3) Butts “being left by the time he was nine or ten years old as the primary caretaker of a younger brother who was diagnosed as severely mentally disturbed”; and (4) the “series of violent and drug abusing men who were in and out of [Butts] home, . . . most of whom were drug users.” See Testimony of Jan Vogelsang, attached as Appendix C.

Not surprisingly, the chaos in Butts’s life stunted his intellectual, social, and psychological growth. When an older Marion Wilson convinced Robert Butts to participate in a car theft, which then turned into a carjacking, which then led to Donovan Parks’ murder, Butts was only 18 years old. But his mental age and maturity trailed his chronological age significantly. In 1997, while Butts was incarcerated and awaiting trial, a psychologist examined him and found that Butts’s reading and spelling were consistent with an IQ of about 80. See Dr. Stark Assessment, at 4, attached as Appendix D. An individual with a chronological age of 18 years and 10 months (18.83 years, Butts’s age at the time of the offense) and an IQ of 80 would have a mental age of approximately 15.07 years. See, e.g., Barbara Caplan et al., *Developmental Level and Psychopathology: Comparing Children with Developmental Delays to Chronological and Mental Age Matched Controls*, 37 RES. IN DEVELOPMENTAL DISABILITIES 143, 146 (2015) (calculating mental age using the formula $MA = IQ/100 \times CA$, where CA is chronological age).

HOW THE FEDERAL QUESTION WAS RAISED BELOW

On April 27, 2018, Petitioner filed his second state habeas petition. In that petition, Petitioner sought relief based on the United States and Georgia

Constitutions, and the holding and reasoning of *Roper*. On May 2, the Superior Court of Butts County denied Butts’s second state habeas petition. *See* Appendix B. On May 4, the Supreme Court of Georgia denied Butts’s Application for a Certificate of Probable Cause to Appeal. *See* Appendix A.

REASONS WHY THE PETITION SHOULD BE GRANTED

“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*, 543 U.S. at 568 (internal case citations omitted). The death penalty is categorically barred for certain groups of offenders if a national consensus develops against executing the particular group because they are not possessed of this “extreme culpability.” *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 311 (2002). A national and scientific consensus has now developed that offenders like Robert Butts, Jr.—offenders whose chronological age falls just above *Roper*’s bright line cutoff of 18 years, and whose cognitive and intellectual age falls well below that of a typical 18 year old—do not possess sufficient moral culpability to be eligible for execution.

In determining whether the Eighth Amendment prohibits an individual’s execution, this Court has assessed whether the individual’s execution would be cruel and unusual punishment in light of evolving standards of decency—including standards that evolved between the time of the offense and the time that the Constitutional challenge was brought. *See, e.g., Roper*, 543 U.S. 551 (1993 offense; relying on societal trends and scientific research from 1995 through 2005); *Atkins v. Virginia*, 536 U.S. 304 (1996 offense; relying in part on legislative trends from 1998

through 2001); *Hall v. Florida*, 134 S. Ct. 1986 (1978 offense; relying on legislative trends through 2013 and scientific research through 2012).

Here, however, the Superior Court of Butts County and the Supreme Court of Georgia applied a Georgia procedural rule in a way that wholly prevented Petitioner from raising a claim that the Eighth Amendment prohibits his execution based on standards of decency that had evolved significantly in the 16 years since his initial state habeas petition in 2002 and the 11 years since the evidentiary hearing on his first state habeas petition. The Supreme Court of Georgia denied Butts's request for a Certificate of Probable Cause to Appeal. This Court should grant the Petition because the application of Georgia's procedural rule in this manner will result in the State executing an individual who otherwise would be entitled to relief under the Eighth Amendment if his claim were heard on the merits and properly decided.

ARGUMENT

I. Pursuant to the Logic and Reasoning of *Roper*, the Eighth Amendment Prohibits Petitioner's Execution.

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. "The provision is applicable to the States through the Fourteenth Amendment." *Roper*, 543 U.S. at 560.

"The prohibition against 'cruel and unusual punishments' . . . 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." *Id.*

The Eighth Amendment “draw[s] 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) (plurality opinion). Accordingly, the Eighth Amendment guarantee is not restricted by those punishments deemed unconstitutional during the eighteenth century when the Bill of Rights was originally drafted. *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). The standard is ever-changing as “public opinion becomes enlightened by a humane justice,” *id.* at 171 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)), and it is a well-established principle that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” *Trop*, 356 U.S. at 101. “[E]volving standards of decency” necessarily change over time, and what may have been acceptable to the courts and society at large historically may not prove acceptable later in time. Compare *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding constitutional the execution of intellectually disabled people), with *Atkins*, 536 U.S. at 319 (prohibiting the execution of intellectually disabled people); compare *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding constitutional the execution of offenders under 18 years), with *Roper*, 543 U.S. at 560 (prohibiting the execution of offenders under 18 years).

A. *Roper* Confirms That the Constitution Bars the Execution of Individuals with Diminished Moral Culpability.

In light of the principles set forth above, this Court has followed a two-step analysis when faced with claims alleging that the death penalty is excessive in particular circumstances. The Court first looks to “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to

executions.” *Roper*, 543 U.S. at 563. To make this assessment, the Court generally considers “the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made” *Enmund v. Florida*, 458 U.S. 782, 788 (1982). After reviewing these objective indicia, this Court moves to the second step, which considers proportionality in light of the “standards elaborated by controlling precedents and on the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.” *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008). This second step is the more dominant factor. *See Enmund*, 458 U.S. at 797 (“Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty.”).

By using this approach, this Court has found the death penalty unconstitutionally excessive when used against those who have not committed homicide, *see Kennedy*, 554 U.S. at 421; *Enmund*, 458 U.S. at 801; *Coker v. Georgia*, 433 U.S. 584, 592 (1977); those with intellectual disabilities, *see Atkins*, 536 U.S. at 321; and individuals who were under 18 at the time of their offense, *see Roper*, 543 U.S. at 578. Such decisions are made in light of the underlying principles of narrowing the death penalty’s use and exercising restraint on potential brutality, and in doing so courts must ensure that a given offender can **“with reliability be classified among the worst offenders.”** *Id.* at 569 (emphasis added).

The evolving standards of decency are overwhelmingly formed by consensus emanating from the medical community and scientific data in determining where to draw the lines of culpability. This principle was illustrated in *Hall v. Florida*, 134 S. Ct. 1986 (2014), a case in which this Court relied heavily on the standards the medical community had devised for determining intellectual disability. As the Court explained:

That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Hall, 134 S. Ct. at 1993.

The Court found that Florida's bright-line test precluding anyone with an IQ score of over 70 from introducing additional evidence of intellectual disability ignored the medical consensus that IQ score alone is not conclusive evidence of a person's intellectual functioning. *Id.* at 1995. The Court reiterated the gravity of a death sentence, stating: "[t]he death penalty is the gravest sentence our society may impose. **Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.**" *Id.* at 2001 (emphasis added). For this reason, the Court found that "Florida's [bright line cutoff] contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Id.* The Court explained that the "States are laboratories for experimentation, but those experiments may not deny the basic

dignity the Constitution protects.” *Id.* Thus, when confronted with medical indicia of a person’s moral culpability, or lack thereof, courts cannot choose to ignore any scientific consensus. *See id.*

In *Roper*, the Court explained, “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.” *Roper*, 543 U.S. at 572–73. Relying on scientific studies, the Court observed that “[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” *Id.* at 569. First, “[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.” *Id.* (citation omitted). Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” as “youth is more than a chronological fact” and is also “a time and condition of life when a person may be most susceptible to influence and to psychological damage.”² *Id.* (alterations accepted). Third, “the character of a juvenile is not as well formed as that of an adult,” as the “personality traits of juveniles are more transitory, less fixed.” *Id.* at 570. “These differences render suspect any conclusion that a juvenile falls among the worst offenders.” *Id.*

² “This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.” *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

The Court applied this same reasoning seven years later when it held unconstitutional the imposition of mandatory life without parole sentences on individuals who were under 18 at the time of the offense. *Miller v. Alabama*, 567 U.S. 460 (2012). In explaining its reasoning, the Court stated:

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.

Id. at 471–72 (citations omitted) (internal quotation marks omitted).

As explained below, this Court should allow Butts to demonstrate that the Eighth Amendment and the Georgia Constitution prohibit his execution.

B. The Logic and Reasoning of *Roper* Demonstrate that Petitioner Is Constitutionally Exempt from Execution Due to His Diminished Moral Culpability.

The reasons why this Court in *Roper* concluded that individuals under 18 at the time of the offense were exempt from capital punishment apply with equal force to Petitioner. From the standpoint of moral culpability, and considering the concerns discussed in *Roper*—as reflected in the science—there is no meaningful difference between an 18 year old and a 17 year old; the law should treat them equivalently.

Since this Court’s decision in *Roper*, scientific and social-science research has demonstrated that people around Petitioner’s chronological age at the time of his offense—and even those slightly older, in their early twenties—do not have fully developed brains, are immature, and are vulnerable to peer pressure and risk-taking behavior. As Chief Judge Cole of the United States Court of Appeals for the Sixth Circuit recently explained, “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.” *In re Phillips*, No. 17-3729, 2017 WL 4541664, at *4 (6th Cir. July 20, 2017) (Cole, C.J., concurring). “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.” *Id.*

In *Roper*, the first category of traits this Court cited as grounds for treating juveniles differently than adults includes immaturity, irresponsibility, and impulsivity. *Roper*, 543 U.S. at 569. “The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’” *Id.* at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). Adolescent brains are immature—an immaturity that extends into early adulthood. This includes the frontal lobes, which play a crucial role in making good decisions, controlling impulses, focusing attention for planning, and managing emotions. See Sara B. Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health*

Policy, 45 J. Adolesc. Health 216, 216 (2009). As a consequence of their immature brains, adolescents seek risk. Research has shown that “individuals in the young adult period (i.e., ages 18-21)” are at a greater risk to engage in risky behavior than younger adolescents, which indicates “that this period of development is an important transition.” M. Rudolph, *At Risk of Being Risky: The Relationship between ‘Brain Age’ under Emotional States and Risk Preference*, Dev. Cognitive Neurosci. 24:93-106 at 102 (2017).

The second category of traits upon which this Court relied for treating juveniles differently than adults includes vulnerability and susceptibility. *Roper*, 543 U.S. at 569. “Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” *Id.* at 570. Mr. Butts, just 18 at the time of the crime and with the mental age of a 15-year-old, shared these same vulnerabilities. On the night in question, Mr. Wilson proposed the criminal plan to Mr. Butts, who foolishly agreed to it; and throughout the evening, Mr. Wilson was the leader, and Mr. Butts the follower.

The third category of traits this Court cited as grounds for treating juveniles differently than adults includes transitory personality and unfixed character. *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. From a moral standpoint it would be

misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

As this Court explained in *Hall*, "[t]he Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall*, 134 S. Ct. at 1992 (quoting *Weems*, 217 U.S. at 378). In *Hall*, the Court stated that "it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*." *Hall*, 134 S. Ct. at 1993. And in *Miller*, the Court discussed that the decisions in *Roper* and *Graham* "rested not only on common sense . . . but on science and social science . . . and 'developments in psychology and brain science.'" *Miller*, 567 U.S. at 471 (citations omitted).

Similarly, it is appropriate for this Court to consider scientific and social science studies to assess the age and neurological development of defendants who committed crimes at the same age as Mr. Butts. This research demonstrates that an eighteenth birthday is far from a magic switch. There is no basis to justify a rule that allows an 18-year-old to be executed, let alone one with the mental age of 15, but exempts all 17-year-olds, no matter what their intellectual development, from the death penalty. And, when viewed as a group generally, 18-year-olds are identical to 17-year-olds in all the relevant respects. *See, e.g.,* Elizabeth S. Scott et al., *Young Adulthood As A Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 645, 650 (2016) (citing Alexandra O. Cohen et al., *When Is an Adolescent an Adult?: Assessing Cognitive Control in Emotional*

and Nonemotional Contexts, 27 PSYCHOL. SCI. 549, 559–60 (2016) (finding that emerging adults aged 18 to 21 exhibited no better impulse control than 13- to 17-year-old adolescents when confronted with negative stimuli)). Both have brains that have not fully developed; both are prone to immaturity, recklessness, and impulsivity. See Johnson, *supra*, at 216. Both are still in the neurological development phase; both are vulnerable, have transitory personality traits, and have yet to form a stable, authentic identity. See, e.g., *id.*; Rudolph, *supra*, at 102.

A Sixth Circuit concurrence recognized instances where an individual may have reached a chronologically predetermined age, while in actuality, still possessed traits similar to juveniles. *United States v. Marshall*, 736 F.3d 492, 502–04 (6th Cir. 2013) (Lawson, D.J., concurring). The concurring opinion finds that “children are constitutionally different from adults not because they are under 18 years of age, but because they have not attained the level of maturity that characterizes adult mentation.” *Id.* at 503 (quoting *Miller*, 567 U.S. at 471). “[T]he obvious fact that these features of adolescence do not instantly disappear upon the arrival of one’s eighteenth birthday, which presumably prompted the Court to observe that ‘youth is more than a chronological fact.’” *Id.* at 503 (quoting *Miller*, 567 U.S. at 476). The opinion also likens the diminished culpability of young adults to the mentally disabled individuals protected in *Atkins*—both juveniles and mentally disabled individuals are “categorically less culpable than the average criminal.” *Id.* (quoting *Roper*, 543 U.S. at 567).

The logic and legal principles articulated in *Roper* thus plainly apply to Petitioner's case. As outlined above, Butts suffered through a horrifying childhood. Researchers believe that chronic stress during adolescence may induce prefrontal cortex (PFC) hyperdopaminergia, which can have the ultimate effect of limiting an individual's ability to engage in adaptive behaviors and predispose the individual to aggression. See Jorim J Tielbeek, et al., *The Impact Of Chronic Stress During Adolescence On The Development Of Aggressive Behavior: A Systematic Review On The Role Of The Dopaminergic System In Rodents*, 34 Neuroscience & Biobehavioral Reviews 1 (2016). In addition, Mr. Butts scored low on IQ tests while he was awaiting trial—an IQ of about 80. This places his actual age in relation to his IQ at approximately 15.07 years at the time of the offense, confirming that Mr. Butts suffered from the same developmental issues that render an individual “categorically less culpable than the average criminal,” due to his stage of mental development at the time of the crime. Taking into account both the trauma from his childhood, along with low IQ scores indicating mental age of approximately 15.07 years old, carrying out the death penalty on Mr. Butts would be cruel and unusual punishment. Indeed, there is no basis to exempt all 17-year-olds from the death penalty, but to allow the execution of Butts or similarly situated 18-year-olds.

The reasons why this Court in *Roper* concluded that individuals under 18 at the time of the offense were exempt from capital punishment apply with equal force to Petitioner.

C. Rejecting Petitioner’s Claim Merely Because He Crossed an Artificial Boundary of 18 Chronological Years Would Ignore the Relevant Science and Contradict This Court’s Holding in *Hall*.

A better scientific understanding of brain development, coupled with society’s progress, demand that this Court revisit the bright-line cutoff for capital punishment at eighteen. This Court should allow Petitioner to “have a fair opportunity to show that the Constitution prohibits their execution.” *See Hall*, 134 S. Ct. at 2001.

In *Hall*, the Court addressed the necessity of avoiding the “unacceptable risk” that death sentences could be imposed on those who lacked the culpability for capital punishment. 134 S. Ct. at 1990. This Court held unconstitutional Florida’s bright line requirement that defendants present a threshold IQ test score of 70 or below before being permitted to present any additional evidence of intellectual disability. *Id.* at 2001.

The *Hall* Court evaluated scientific evidence and concluded that those within the standard error measurement on IQ tests may also be intellectually disabled and should be allowed to present evidence of intellectual disability. In reaching its conclusion, the Court relied on a variety of academic papers, explaining “it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*.” *Id.* at 1993. In particular the Court critiqued Florida’s failure to recognize this scientific evidence stating:

Florida’s rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence

of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

Id. at 1995. By “disregard[ing] established medical practice,” Florida “had violated the Eighth Amendment,” *Moore v. Texas*, 137 S. Ct. 1039, 1049 (U.S. 2017) (describing the ruling in *Hall*). The *Hall* Court found that, because the “death penalty is the gravest sentence our society may impose[,] [p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.” *Hall*, 134 S. Ct. at 2001.

Present-day science holds that bright-line cutoffs for individuals around the age of Petitioner at the time of the offense, merely eighteen, creates an unacceptable risk that the death penalty will be imposed against individuals who lack the requisite culpability and who should not be subjected to that most severe punishment. In *Hall*, this Court recognized that “[i]ntellectual disability is a condition, not a number.” *Hall*, 134 S. Ct. at 2001. This rejection of bright-line rules based on arbitrary numbers applies just as well to moral culpability. Indeed, “youth 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.” *Eddings*, 455 U.S. at 115.

In many legal decisions today, individuals with IQ scores slightly higher than the number 70 may demonstrate that they are ineligible for the death penalty based on the rationale of *Hall*. Just like in *Hall*, individuals like Petitioner, with a chronological age slightly higher than age eighteen, should be afforded an

opportunity to demonstrate that *Roper*'s protections should extend to them because they occupy a space in human development where they may lack the culpability for capital punishment.

The Court should allow individuals around the age of Petitioner the opportunity to present such evidence. While this Court has taken steps to protect juveniles under eighteen, individuals around Petitioner's age who are similarly in need of protection remain overlooked. Because the "death penalty is the gravest sentence our society may impose," defendants in this category "must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001.

II. The Georgia Courts' Application of O.C.G.A. § 9-14-51 Is Unconstitutional as Applied in This Case.

Although the Supreme Court of Georgia's order appears to rest partially on state-law waiver grounds, this Court can and should grant this petition and reverse the state court judgment because the application of the state procedural bar unconstitutionally abridges Petitioner's Eighth Amendment rights. Consistent with this Court's precedents, Petitioner seeks relief based on the standards of decency as they exist *today*—16 years after he filed his initial state habeas petition and 11 years after the state habeas court held an evidentiary hearing on that petition.³

³ Petitioner includes both of these dates because Respondent appears to contend that Petitioner could have amended his initial state habeas petition until the evidentiary hearing in 2007. To the extent the parties disagree over whether the Georgia courts' application of the procedural bar prohibits consideration of societal trends after 2002 (when Petitioner filed his initial state habeas petition) or 2007 (when the state habeas court held an evidentiary hearing), the disagreement is immaterial to the outcome of this petition. Regardless of whether the procedural rule here barred Eighth Amendment claims based on standards of decency that have changed over the past 16 years or over the past 11 years, the result is the same: The application of the procedural rule

But the state courts held that Petitioner was procedurally barred from even raising such a claim, pursuant to its application of O.C.G.A. § 9-14-51. Despite Petitioner’s proffer of significant evidence of how standards of decency have evolved significantly in the past 11-to-16 years—including considerable changes in the past four to five years—the state courts held that Petitioner’s opportunity to raise an Eighth Amendment claim was limited to his initial habeas petition. Put simply, the state courts concluded that Section 9-14-51 barred Petitioner from raising an Eighth Amendment claim based on evidence of standards of decency as they now exist—and effectively froze Petitioner’s Eighth Amendment rights to where they were 11 or 16 years earlier. Under the view of the Georgia courts, the only standards of decency that matter are those that existed at the time of the initial habeas proceedings—not those that exist at the time Petitioner will actually be executed.

This application of O.C.G.A. § 9-14-51 cannot stand because it renders Petitioner’s Eighth Amendment rights unenforceable, and therefore meaningless. Given that this Court has repeatedly held that Eighth Amendment claims are based on “evolving standards of decency,” and given that this Court has measured executions against those standards at the time of the Eighth Amendment claim, not at the time the sentence is imposed, the state courts’ interpretation simply cannot withstand constitutional scrutiny. Since being sentenced to death, Petitioner has pursued his appellate and habeas claims diligently, but it has taken approximately

unconstitutionally prohibits Petitioner from raising his Eighth Amendment claim based on *current* standards of decency, recent trends, and contemporary societal norms.

twenty years for his various claims to be resolved, over which time societal norms and understanding of the adolescent brain have changed considerably. Now that the State of Georgia has sought a warrant of execution, this Court should hold that his Eighth Amendment claim is not barred, and certiorari review is warranted.

A. The Eighth Amendment Prohibits the Execution of Certain Classes of Individuals, as Informed by Evolving Standards of Decency Measured at the Time the Execution Is to Be Carried Out.

As noted above, in Eighth Amendment cases, this 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’ to determine which punishments are so disproportionate as to be cruel and unusual.” *Roper*, 543 U.S. at 560–61 (citing *Trop*, 356 U.S. at 100–101).

This Court has recognized that standards of decency can evolve quickly—sometimes in just a matter of years. For example, in 1989, this Court held that the Eighth Amendment, as informed by evolving standards of decency, did not prohibit the execution of all individuals with intellectual disabilities (then referred to as “mentally retarded”).⁴ *Penry*, 492 U.S. at 340. Only 13 years later, however, this Court in *Atkins* recognized the significant change in societal norms, overruled *Penry*, and held that the Eighth Amendment did prohibit the execution of the intellectually disabled. *See Atkins*, 536 U.S. at 321.

⁴ Although this Court formerly employed the terms “mentally retarded” and “mental retardation,” the Court now uses the term “intellectual disability” to describe the same condition. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2274 n. 1 (2015).

Likewise, on the same day that this Court decided *Penry* in 1989, it also decided *Stanford*. In that case, the Court held that States could execute 16- and 17-year-old offenders consistent with evolving standards of decency. *Stanford*, 492 U.S. at 380. Like the standards of decency considered in *Atkins*, however, the societal norms regarding the execution of 16- and 17-year-old offenders evolved quickly. Only 16 years after this Court held that the Eighth Amendment did *not* bar the execution of 16- or 17-year-old offenders, this Court recognized the significant intervening societal change, overruled *Stanford*, and held in 2005 that the Constitution prohibits the execution of *anyone* who was under the age of 18 at the time of his offense. *See Roper*, 543 U.S. at 578.

The speed with which Eighth Amendment jurisprudence can change—13 years in the case of *Atkins*; 16 years in the case of *Roper*—demonstrates how an individual on death row might have an Eighth Amendment claim that this Court would reject at the time of his trial or initial state habeas petition, but that same claim could be meritorious at the time of his execution. While this Court has never squarely decided the issue, the Court has implicitly recognized that the Eighth Amendment requires an analysis of the evolving standards of decency at the time the claim is brought or at the time of the scheduled execution. *See, e.g., Roper*, 543 U.S. 551 (1993 offense; relying on societal trends and scientific research from 1995 through 2005); *Atkins*, 536 U.S. 304 (1996 offense; relying in part on legislative trends from 1998 through 2001); *Hall v. Florida*, 134 S. Ct. 1986 (1978 offense; relying on legislative trends through 2013 and scientific research through 2012).

For example, in *Roper*, this Court relied on societal trends and evolving standards of decency that long post-dated the petitioner's conviction and sentence. The petitioner in *Roper* committed the underlying murder in 1993 and was sentenced to death in 1994. Brief of Petitioner at 15, *State of Missouri ex rel. Christopher Simmons, Petitioner, v. Al Luebbbers, Respondent*, No. SC84454, 2003 WL 24219767 (Mo. Jan. 21, 2003). But when this Court decided *Roper* in 2005, it relied on data of juvenile executions from 1995 to 2004. *See Roper*, 543 U.S. at 565 (explaining that “[i]n the past 10 years, only three [states] have” executed juvenile offenders).

Moreover, this Court has never held that a state or federal procedural rule can bar or effect a waiver of a petitioner's Eighth Amendment claim where the petitioner contends that he is in a class of individuals exempt from the death penalty. Put simply, the Georgia courts' application of O.C.G.A. § 9-14-51 abridged Petitioner's Eighth Amendment rights. Accordingly, the Superior Court's waiver holding, affirmed by the Supreme Court of Georgia, does not constitute an adequate and independent state law grounds precluding relief here.

B. Permitting States to Bar Petitioners from Raising Eighth Amendment Claims Based on Standards of Decency That Have Evolved Since the Initial Sentence or Since an Initial Habeas Petition Will Lead to the Execution of Individuals Exempt from the Death Penalty.

If upheld, the Georgia courts' application of O.C.G.A. § 9-14-51 would give Georgia carte blanche to ignore the Eighth Amendment under the guise of a state-law procedural rule. The courts below appear to have applied O.C.G.A. § 9-14-51 as an automatic bar to Butts's claim without considering the evidence he submitted

concerning society’s evolving standards of decency.⁵ Taken to its logical conclusion, the Georgia courts’ application of this procedural rule would deny relief to nearly limitless categories of individuals whose characteristics make them exempt from the death penalty—a result that this Court has called a miscarriage of justice. *See Bell v. Thompson*, 545 U.S. 794, 812 (2005) (explaining that “evidence that affects a defendant’s eligibility for the death penalty . . . can support a miscarriage of justice claim in the capital sentencing context”).

Take the example of a 17-year old who filed an initial habeas petition challenging his death sentence in 1990 after this Court held in *Stanford v. Kentucky*, 492 U.S. 361 (1989), that the Eighth Amendment permitted the execution of offenders under 18 years of age. This hypothetical petitioner could not have asserted an Eighth Amendment challenge to his death sentence based on his age in 1990 given this Court’s holding in *Stanford*. And under the rule adopted by the Georgia courts in Butts’s case, this hypothetical petitioner could not have raised an Eighth Amendment claim based on his age in a second habeas petition at any time in the following 15 years, even on the day before this Court decided that evolving standards of decency had changed in *Roper*. The Constitution does not permit such a patently unjust result, yet that is exactly what the Georgia courts’ application of O.C.G.A. § 9-14-51 portends if this Court does not intervene to address it. *Contra*

⁵ Of course, if the Georgia courts had considered and rejected Butts’ claim based on this evidence, their decision would not be based on a state law procedural rule, but rather, on the merits of Butts’s constitutional claim. To the extent the state court’s decision was based on the merits of Petitioner’s constitutional claim, this Court has jurisdiction to review the constitutional claim. *See Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016). For the reasons explained above, the state court erred in concluding that Petitioner’s constitutional claim failed on the merits. *See supra*, Part I.

Veal v. State, 298 Ga. 691, 703, 784 S.E.2d 403, 412 (Ga. 2016) (vacating sentence based on *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *as revised* (Jan. 27, 2016), even though those cases had not decided the specific issue raised by the petitioner's Eighth Amendment claim).

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari in order to ensure that Georgia courts do not abridge Petitioner's constitutional rights—or the constitutional rights of any other individual—by applying procedural rules that bar an individual from bringing a Eighth Amendment meritorious claim based on standards of decency that have evolved since the individual's offense, trial, or initial habeas petition.

Respectfully submitted,



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