

**IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT**

1891 WDA 2016

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

AVIS LEE,
Appellant.

BRIEF OF JUVENILE LAW CENTER, DEFENDER ASSOCIATION OF
PHILADELPHIA, ATLANTIC CENTER FOR CAPITAL REPRESENTATION,
AND YOUTH SENTENCING AND REENTRY PROJECT AS
AMICUS CURIAE IN SUPPORT OF APPELLANT AVIS LEE

Appeal from the Order of Dismissal entered on November 17, 2016 by the
Honorable Kevin G. Sasinowski in the Criminal Division of the Court of Common
Pleas of Allegheny County, Pennsylvania, at CC No. 198005128.

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STATEMENT OF INTEREST OF AMICI CURIAE¹

Amici are non-profit organizations that collectively work to integrate research regarding adolescent development into juvenile justice practice and policy. This research shows that young people who enter the justice system need extra protection and special care, and that adolescent immaturity often manifests in ways that implicate culpability, including a diminished ability to assess risks, make good decisions, and control impulses. For these reasons, Amici believe that young people should be held accountable, but also that they cannot be held to the same standards of blameworthiness and culpability as their mature adult counterparts.

Juvenile Law Center advocates for rights, dignity, equity and opportunity for young people in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting young people advance racial and economic equity and are rooted in research, consistent with the unique developmental characteristics of youth and young adults, and reflective of

¹ Pursuant to Rule 531, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

The **Defender Association of Philadelphia** is a private, non-profit corporation that represents a substantial percentage of the criminal defendants in Philadelphia County at trial and on appeal. The Association attempts to ensure a high standard of representation and to prevent abridgement of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania. The Association has previously participated as *amicus curiae* in numerous cases before this Court, as well as before other courts.

The **Atlantic Center for Capital Representation (ACCR)** is a non-profit death penalty and juvenile life without parole (“JLWOP”) resource center serving Pennsylvania. ACCR works to ensure that indigent defendants facing the most severe punishments in the criminal justice system are provided a constitutionally sound defense. ACCR works to achieve this goal of a level playing field by providing case specific consultation and trainings to defense teams handling death penalty and JLWOP resentencings. Additionally, ACCR engages in advocacy, systemic litigation, policy reform, and strategic communications around issues of equal justice and fairness in the administration of the death penalty and juvenile life without parole.

The **Youth Sentencing & Reentry Project (YSRP)** is a nonprofit organization based in Philadelphia that uses direct service and policy advocacy to transform the experiences of children prosecuted in the adult criminal justice system, and to ensure fair and thoughtful resentencing and reentry for individuals who were sentenced to life without parole as children (“juvenile lifers”). YSRP partners with court-involved youth and juvenile lifers, their families, and lawyers to develop holistic, humanizing narratives that mitigate the facts of each case; get cases transferred to the juvenile system or resentenced; and make crucial connections to community resources providing education, healthcare, housing, and employment. YSRP also provide trainings on mitigation, and recruit, train and supervise students and other volunteers to assist in this work. YSRP’s ultimate goals are to keep children out of adult jails and prisons and to enhance the quality of representation juvenile lifers receive at resentencing, and as they prepare to reenter the community.

SUMMARY OF ARGUMENT

In *Miller v. Alabama*, the United States Supreme Court ruled mandatory life without parole sentences unconstitutional for juveniles convicted of homicide. The Court, relying on the same underlying scientific research used to bar the death penalty for juveniles, held that children were less culpable than their adult counterparts because of their immaturity, impetuosity, susceptibility to peer influence, and greater capacity for rehabilitation. Modern research now indicates that individuals retain these characteristics well into their twenties. As young adults possess the same juvenile characteristics that the Supreme Court has determined reduce culpability, mandatory life without parole sentences for this population are also disproportionate under the Eighth Amendment. There is no penological justification for condemning a young adult to die in prison when they have the same capacity for reform as their younger counterparts and will serve a disproportionately long sentence due to their young age. Since Pennsylvania's murder statute does not allow for individualized sentencing that accounts for a young person's attendant characteristics of youth and requires mandatory imposition of life without parole, it must be ruled unconstitutional as applied to young adults.

ARGUMENT

I. BRAIN FUNCTIONS RELEVANT TO THE CHARACTERISTICS OF YOUTH RELIED UPON BY THE U.S. SUPREME COURT IN *MILLER V. ALABAMA* ARE STILL DEVELOPING IN YOUNG ADULTS

The United States Supreme Court has established, through a series of decisions issued between 2005 and 2016, that children are developmentally different from adults and that these differences require individualized consideration of their youthful characteristics prior to imposition of the harsh punishments given to adults. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that imposing the death penalty on individuals convicted as juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 82, (2010) (holding that imposing life without parole sentences on juveniles convicted of non-homicide offenses is unconstitutional); and *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding that mandatory life without parole sentences for juveniles convicted of homicide are unconstitutional).

The Court's conclusions in each of these cases were predicated on scientific research identifying three developmental differences between youth and adults: youth's lack of maturity and impetuosity; youth's susceptibility to outside influences; and youth's capacity for change. *See Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 733 (2016) (quoting *Miller*, 567 U.S. at 471). These developmental characteristics establish the diminished culpability of juvenile

defendants; their “conduct is not as morally reprehensible as that of an adult.” *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)). Empirical research now demonstrates that these physiological and psychological traits of youth are also apparent in young adults, rendering this special population less culpable and thus less deserving of the most serious punishments.

Recent research demonstrates that neurodevelopmental growth continues into a person’s mid to-late-twenties. See Christian Beaulieu & Catherine Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 J. NEUROSCIENCE 31 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 0 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176, 176-193 (2013). One longitudinal study which tracked the brain development of 5,000 children demonstrated that their brains were not fully mature until at least 25 years of age. Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1358-59 (2010). There is now a large body of scientific research confirming that the characteristics relied upon by the Supreme Court in increasing constitutional protection for juveniles continue “far later than was previously thought,” through age 21. Vincent Schiraldi & Bruce Western, *Why 21 year-old offenders should be tried in family court*, Wash. Post

(Oct. 2, 2015), https://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html?utm_term=.82fc4353830d. (“Young adults are more similar to adolescents than fully mature adults in important ways. They are more susceptible to peer pressure, less future-oriented and more volatile in emotionally charged settings.”). See, e.g., Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 163 (2016) (citing to research that found antisocial peer pressure was a highly significant predictor of reckless behavior in emerging adults 18 to 25); Alexander Weingard et al., *Effects of Anonymous Peer Observation on Adolescents’ Preference for Immediate Rewards*, 17 DEVELOPMENTAL SCI. 71 (2013) (finding that a propensity for risky behaviors, including “smoking cigarettes, binge drinking, driving recklessly, and committing theft,” exists into early adulthood past 18, because of a young adult’s “still maturing cognitive control system”); Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUSTICE: A REVIEW OF RESEARCH 577, 582 (2015) (finding that the development of the prefrontal cortex which plays an “important role” in regulating “impulse control,” decision-making, and pre-disposition towards “risk[y]” behavior, extends at least to 21); Brief for Am. Med. Ass’n & Am. Acad. Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 19-20, *Miller v. Alabama*,

567 U.S. 460 (2012) (“[R]esponse inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.” (second alteration in original) (citations omitted)).

Young adults are more prone to risk-taking, acting in impulsive ways that likely influence their criminal conduct, and are not yet mature enough to anticipate the future consequences of their actions. See Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641, 644 (2016), Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *CHILD DEV.* 28, 35 (2009).

Young adults also face the same types of susceptibility to peer pressure as younger children. See Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 *WIS. L. REV.* 729, 731-32 (2007) (“When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual’s future behavior and structural brain development.”) (citing Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 *HUM. BRAIN MAPPING* 766, 766–67 (2006)). Another study examined a sample of 306 individuals in 3 age groups—adolescents (13-16), youths (18-22), and adults (24 and older)—

and found that “although the sample as a whole took more risks and made more risky decisions in groups than when alone, this effect was more pronounced during middle and late adolescence than during adulthood” and that “the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions.” Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *DEV. PSYCHOL.* 625, 632, 634 (2005). The presence of friends has also been shown to double risk-taking among adolescents, increasing it by fifty percent among young adults, but having no effect on older adults. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *DEVELOPMENTAL REV.* 78, 91 (2008).

The existing scientific research also addresses differences in brain function development relating to activities involving informed decision-making and logical reasoning, such as voting, and brain function related to impulse control and susceptibility to peer pressure, such as capital crimes and the purchase and use of controlled substances. Specifically, research confirms that the portions of the brain associated with the former set of characteristics develop earlier and more quickly, meaning that “adulthood” begins earlier, while the latter set of characteristics—relied on by the Supreme Court—take longer to develop and require setting the age of “adulthood” past 18, until at least 21. *See, e.g.*, Alexandra O. Cohen et al., *When*

Does a Juvenile Become an Adult? Implications for Law and Policy, 88 TEMPLE L. REV. 769, 786-87 (2016) (defining “young adulthood” at 21 for purposes of cognitive capacity and the ability for “overriding emotionally triggered actions,” and finding that 21 is the “appropriate age cutoff[] relevant to policy judgments relating to risk-taking, accountability, and punishment”). As Dr. Steinberg explains:

[t]o the extent that we wish to rely on developmental neuroscience to inform where we draw age boundaries between adolescence and adulthood for purposes of social policy, it is important to match the policy question with the right science. . . . For example, although the APA was criticized for apparent inconsistency in its positions on adolescents’ abortion rights and the juvenile death penalty, it is entirely possible for adolescents to be too immature to face the death penalty but mature enough to make autonomous abortion decisions, because the circumstances under which individuals make medical decisions and commit crimes are very different and make different sorts of demands on individuals’ abilities.

Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739, 744 (2009); cf. *Roper*, 543 U.S. at 620 (O’Connor, J., dissenting) (questioning why the age for abortion without parental involvement “should be any different” given that it is a “more complex decision for a young person than whether to kill an innocent person in cold blood”).

Recently, courts and other policymakers have relied upon this research to review and update laws and policies regarding the treatment of this young adult population in the criminal justice system. For example, in *Kentucky v. Bredhold*, a Kentucky Circuit Court found that the state’s death penalty statute was

unconstitutional as applied to individuals under the age of 21 because of research demonstrating that those individuals were “psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty.” *Commonwealth of Kentucky v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 at 1* (Ky. Cir. Ct. Aug. 1, 2017).² *See also Cruz v. United States*, No. 11-CV-787(JCH), 2018 WL 1541898 (D. Conn. 2018) (Slip Copy) (applying *Miller* to vacate a life without parole sentence as applied to an 18-year-old defendant and noting that most courts who did not extend *Miller* failed to consider the adolescent development of young adults); *People v. House*, 2015 IL App (1st) 110580, 72 NE.3d 357 (Ill. Ct. App 2017) (extending the rationale of *Miller* to a 19-year-old defendant); *State v. O’Dell*, 358 P.3d 359 (Wash. 2017) (*en banc*) (permitting an 18-year-old to seek an exceptional downward departure from a standard range of sentence on the basis of his youth and the developmental attributes recognized in *Miller*). The American Bar Association analyzed the research regarding “newly-understood similarities between juvenile and late adolescent brains³” in its February 2018 resolution urging jurisdictions to prohibit the imposition of the death penalty on any individual who was 21 years old or younger

² *Commonwealth of Kentucky v. Bredhold*, No. 2017-SC-000436 (Ky. 2017), is currently on appeal before the Kentucky Supreme Court.

³ The ABA defines “late adolescence” as individuals age 18 to 21 years old. *See* ABA Resolution 111: Death Penalty Due Process Review Project Section of Civil Rights and Social Justice, Report to the House of Delegates at 2.

at the time of the offense. *See* ABA Resolution 111: Death Penalty Due Process Review Project Section of Civil Rights and Social Justice, Report to the House of Delegates *available* *at* <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf>.

II. A MANDATORY LIFE WITHOUT PAROLE SENTENCE IS DISPROPORTIONATE WHEN APPLIED TO YOUNG ADULTS AS THEY POSSESS THE SAME ATTENDANT CHARACTERISTICS OF YOUTH AS JUVENILES

The Eighth Amendment guarantees individuals the right to be free from cruel and unusual punishment, which is grounded in the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (alteration in original) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). To determine which punishments are so disproportionate as to be cruel and unusual, the Court has “established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society.’” *Roper*, 543 U.S. at 560-61 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). “This is because ‘[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.’” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J.,

dissenting)).

As in *Miller*, this Court must consider two strands of precedent to determine if mandatory life without parole sentences are disproportionate for young adults. The first line of precedent includes categorical bars to punishments that create a “mismatch[] between the culpability of a class of offenders and the severity of a penalty;” the second requires individualized sentencing before the harshest sentences are imposed. *See* 567 U.S. at 470. These lines of precedent, most notably *Roper*, *Graham*, and *Miller*, demonstrate that the Eighth Amendment requires a categorical exemption to mandatory life without parole sentences for young adults whose developmental attributes render them less culpable.

A. Because Young Adults Possess the Same Developmental Characteristics as Youth Under 18, the Imposition of Life Without Parole Sentences on Young Adults Is Categorically Barred Under the Eighth Amendment

In striking the death penalty and limiting life without parole sentences for juveniles, the Supreme Court has emphasized that “[b]ecause juveniles have diminished culpability and greater prospects for reform, . . . they are less deserving of the most severe punishments.” *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). Its decisions relied on “what any parent knows” and the science and social science regarding adolescent development. *Id.* (quoting *Roper*, 543 U.S. at 569)

In *Roper*, [the Court] cited studies showing that [o]nly a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. And in *Graham*, [it] 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. [It] 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 (second alteration in original) (internal citations and quotation marks omitted). The scientific research now shows that young adults must likewise be included in the protected class of individuals.

The Supreme Court's own evolving interpretation of the proscriptions of the Eighth Amendment illustrate why older youth must now be included in this modern framework. In first protecting youthful offenders from the death penalty, the Court limited the class to include only those youth who were under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion). The Court reasoned, "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 835. The Court then held in *Roper*:

[A] plurality of the [*Thompson*] Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles below that age. We conclude that the same reasoning applies to all juvenile offenders under 18.

543 U.S. at 570-71 (internal citation omitted). The developmental differences

between juveniles under the age of 18 and adults “render[ed] suspect any conclusion that a juvenile falls among the worst offenders . . . for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Id.* at 570.

The Court once again relied on these distinct attributes of youth in holding mandatory life without parole unconstitutional in *Miller* as “the mandatory penalty schemes . . . prevent the sentencer from taking account of these central considerations.” 567 U.S. at 474. Therefore, “[b]y removing youth from the balance,” mandatory life without parole sentences contradicted the Court’s precedent forbidding the imposition of the harshest penalties on juveniles as if they were miniature adults. *Id.* “[N]one of what [the Court] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific,” *Id.* at 473, but, as current research teaches, nor is it specific to those under 18. As our research base grows, it has become indefensible to exclude young adults, who share the identical attributes of younger teens, from the protection from certain sentences afforded to this younger population.

This extended protection is in line with the Court’s other Eighth Amendment jurisprudence which has also been modified to reflect emerging research on individual culpability. *Hall v. Florida*, 134 S. Ct. 1986 (2014) is instructive. In *Hall*, the Court found unconstitutional a Florida rule that limited evidence of qualifying intellectual disability under *Atkins*, 536 U.S. 304, to proof that the individual had an

I.Q. of 70 or lower. 134 S. Ct. at 1994, 2000. While acknowledging the important role of the medical community in defining and diagnosing the condition, the Court struck down the “rigid rule” concerning I.Q. scores because it “creates an unacceptable risk that persons with intellectual disability will be executed.” *Id.* at 1990, 1994-96, 2000-01. Just as “[i]ntellectual disability is a condition, not a number,” *id.* at 2001, “youth [also] is more than a chronological fact.” *Miller*, 567 U.S. at 476 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Youth “is a time of immaturity, irresponsibility, ‘impetuosity[,] and recklessness’” and “a moment and ‘condition of life’” that creates an unacceptable risk of a disproportionate sentence when disregarded. *Id.* (alteration in original) (first quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993), then quoting *Eddings*, 455 U.S. at 115). Just as an I.Q. score of 70 is only an approximation of intellectual disability, so too is age 18 only a proxy for the passage from adolescence to adulthood.

A review of legislative enactments across the country further demonstrates a consensus toward recognizing late adolescence as a period of increased dependence with marked similarity to childhood. Pennsylvania defines the age of majority as “the age of 21 years or over.” 18 Pa.C.S.A. § 1991 (2005). Not only has the legal drinking age been set at 21 across the country by the National Minimum Drinking Age Act, but five states now also set 21 as the legal age for the purchase of

cigarettes.⁴ Similarly, individuals typically must be 20 or 21 to rent a car and are usually assessed higher rental fees if they are under the age of 25.⁵

Even the federal government designates individuals under the age of 23 as legal dependents of their parents for purposes of the Free Application for Federal Student Aid (FAFSA), and those under the age of 24 are dependents for tax purposes.⁶ Under the Affordable Care Act, individuals are able to remain on their parents' health insurance if they are 25 or younger as part of the government's recognition of continued dependence.⁷

In child welfare and education systems nationwide, individuals are entitled to services until they reach the age of 21. Twenty-five states, including Pennsylvania, have extended the eligibility for foster-care services to youth 18-21, and the Individuals with Disabilities Education Act (IDEA) permits individuals to continue

⁴ See 23 U.S.C.A. § 158 (2012); Jenni Bergal, Oregon raises cigarette-buying age to 21, WASH. POST, (Aug. 18, 2017), https://www.washingtonpost.com/national/health-science/oregon-raises-cigarette-buying-age-to21/2017/08/18/83366b7a-811e-11e7-902a-2a9f2d808496_story.html?utm_term=.132d118c0d10.

⁵ See, e.g., *What are Your Age Requirements for Renting in the US and Canada*, ENTERPRISE.COM, <https://www.enterprise.com/en/help/faqs/car-rental-under-25.html> (last visited May 8, 2018); *Restrictions and Surcharges for Renters Under 25 Years of Age*, BUDGET.COM, <https://www.budget.com/budgetWeb/html/en/common/agePopUp.html> (last visited May 8, 2018); *Under 25 Car Rental*, HERTZ.COM, https://www.hertz.com/rentacar/misc/index.jsp?targetPage=Hertz_Renting_to_Drivers_Under_25.jsp (last visited Oct. 16, 2017).

⁶ See *Dependency Status*, FEDERAL STUDENT AID, <https://studentaid.ed.gov/sa/fafsa/filing-out/dependency> (last visited May 8, 2018); *Dependents and Exemptions 7*, I.R.S., <https://www.irs.gov/faqs/filing-requirements-statusdependents-exemptions/dependents-exemptions/dependents-exemptions-2> (last visited Sept. 21, 2017); 26 U.S.C.A. § 152 (2008).

⁷ 42 U.S.C.A. § 300gg-14 (2010).

to receive services through age 21 if they have a disability and have not earned a traditional high school diploma.⁸

Similarly, the criminal justice system increasingly reflects the continuing developmental immaturity of young adults under 21. Youth up to the age of 21 can remain under juvenile court jurisdiction in 45 states across the country, nine of which extend jurisdiction to young adults 21 years and older.⁹ Some states even allow individuals in late adolescence to receive the same juvenile justice protections, such as heightened confidentiality and record sealing in their cases, and others have created separate housing units for these young adults when they are incarcerated.¹⁰

Importantly, while these legislative trends bear on the Court's Eighth Amendment analysis, the Court in *Miller* refused to conduct such a simple legislative tally. *Miller*, 567 U.S. at 483. The Court reasoned that its decision did not altogether

⁸ See *Extending Foster Care Beyond 18*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx>; 20 U.S.C.A. § 1412 (a)(1)(A) (2016).

⁹ Jurisdictional Boundaries, *Juvenile Justice Geography, Policy, Practice & Statistics*, NAT'L CTR. FOR JUV. JUST., <http://www.jjgps.org/jurisdictional-boundaries#delinquency-age-boundaries?year=2016&ageGroup=3> (last visited May 8, 2018).

¹⁰ See FLA. STAT. § 958.04 (2008) (under 21); D.C. CODE § 24-901 *et seq.* (2012) (under 22); S.C. CODE ANN. § 24-19-10 *et seq.* (2016) (under 25); see also 33 V.S.A § 5102, 5103 (2018) (under 22); H. 95, 2016 Leg., Reg. Sess. (Vt. 2016); *Division of Juvenile Justice*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Juvenile_Justice/ (last visited on May 8, 2018); *Oregon Youth Authority Facility Services*, OR. YOUTH AUTH., http://www.oregon.gov/oya/pages/facility_services.aspx#About_OYA_Facilities (last visited on May 8, 2018); Christopher Keating, *Connecticut to Open Prison for 18-to-25 Year Olds*, HARTFORD COURANT (Dec. 17, 2015), <http://www.courant.com/news/connecticut/hc-connecticut-prison-young-inmates-1218-20151217-story.html>.

preclude life without parole, but required the consideration of youth before its imposition; and second, that its “decision flow[ed] straightforwardly from [its] precedents: specifically, the principle of *Roper*, *Graham*, and [its] individualized sentencing cases that youth matters for purposes of meting out the law’s most serious punishments.” *Id.* Furthermore, the Court noted its inability to analyze societal standards by comparing practices since the mandatory nature of the sentence “makes use of actual sentencing numbers unilluminating.” *Id.* at 484 n.11. Therefore, the Court instead relied on the scientific research and other ways in which children were protected from adult punishments to determine that a mandatory life without parole sentence would be disproportionate. This analysis is controlling here as well.

B. There Is No Penological Justification for Permitting the Imposition of Mandatory Life Without Parole Sentences on Young Adults

Proportionality analysis also requires the examination of the underlying penological justification for the sentence; “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Graham*, 560 U.S. at 71. The rationales of *Roper*, *Graham*, and *Miller* dictate a finding that the imposition of mandatory life without parole sentences on young adults whose culpability is likewise diminished must also be ruled disproportionate.

“Because [t]he heart of the retribution rationale relates to an offender’s blameworthiness, the case for retribution is not as strong with a minor as with an adult.” *Miller*, 567 U.S. at 472 (alteration in original) (internal quotation marks

omitted) (quoting *Graham*, 560 U.S. at 71). Furthermore, the Court held in *Roper* that “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” 543 U.S. at 571. “Moreover, youth crime as such is not exclusively the offender’s fault; offenses by the young also represent a failure of family, school, and the social system, which share the responsibility for the development of America’s youth.” *Eddings*, 455 U.S. at 115 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)). All of the characteristics that reduce the culpability of teens under 18 weigh just as strongly against a retributive justification for young adults.

As for deterrence, even the harshness of a mandatory life without parole sentence has no deterrent effect since “the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.” *Miller*, 567 U.S. at 472 (internal quotation marks omitted) (quoting *Graham*, 560 U.S. at 72). Research continues to demonstrate that young adults are also significantly more immature, reckless, and impetuous when compared to their older counterparts, particularly regarding consequences and long-term decision making. *See* Section I.

While incapacitation is made explicit by a life without parole sentence,

“[d]eciding that a juvenile offender forever will be a danger to society would require mak[ing] a judgment that [he] is incorrigible—but incorrigibility is inconsistent with youth.” *Miller*, 567 U.S. at 472-73 (second and third alterations in original) (internal quotation marks omitted) (quoting *Graham*, 560 U.S. at 72). It is no longer tenable to assert that a youthful offender suddenly becomes incorrigible on their eighteenth birthday, as relevant areas of their brain continue to develop and change at a comparable rate into their mid-twenties.

Finally, “[l]ife without parole ‘forfeits altogether the rehabilitative ideal’” and “reflects ‘an irrevocable judgment about [an offender’s] value and place in society,’ at odds with a child’s capacity for change.” *Miller*, 567 U.S. at 473 (second alteration in original) (quoting *Graham*, 560 U.S. at 74). Mandatory life without parole sentences for young adults unconstitutionally deny this group the same opportunity to rehabilitate themselves as those under 18, given their now-established comparable capacity for change.

Precisely because “the characteristics of youth . . . weaken rationales for punishment,” *id.*, the Supreme Court recognized that “[a]n offender’s age . . . is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Id.* at 473-74 (quotation marks omitted) (quoting *Graham*, 560 U.S. at 76). Current research requires that the mandatory sentencing scheme for young adults in Pennsylvania be

ruled unconstitutional.

C. The Eighth Amendment Requires Individualized Sentencing Before the Harshest Term of Imprisonment Can Be Imposed on a Young Adult

In striking mandatory life without parole sentences for individuals under 18, the United States Supreme Court focused on the attendant characteristics of youth that separate them from their adult counterparts and the mandatory nature of the sentence which omitted such considerations. The Court emphasized that “[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” *Miller*, 567 U.S. at 476. Even when they commit heinous crimes, the Court has reaffirmed that a young offender is entitled to an individualized sentencing hearing prior to the imposition of life without parole because their age and its attendant characteristics weigh against the proportionality of the punishment. This individualized sentencing is necessary for young adults as well to ensure they are not improperly subjected to death by incarceration.

Due to the harsh nature of life without parole, the Court has required individualized sentencing when imposed on juveniles and such protections should be extended to young adults. The Court has almost completely exempted juveniles from life without parole sentences because “[i]mprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable.’” *Miller*, 567 U.S.

at 474-75 (quoting *Graham*, 560 U.S. at 69). “[T]his lengthiest possible incarceration is an ‘especially harsh punishment for a juvenile’” when compared to his culpability “because he will almost inevitably serve ‘more years and a greater percentage of his life in prison than an adult offender.’” *Id.* at 475 (quoting *Graham*, 560 U.S. at 70). Further, the Court noted that “in practice, the sentencing schemes [for mandatory life without parole] result in juvenile homicide offenders receiving the same nominal punishment as almost all adults” because even though adults can be sentenced to death, “very few offenders actually receive that sentence.” *Id.* at 477, n.7. Therefore, when a young adult “confronts a sentence of life (and death) in prison,” they are facing the same unconstitutional punishment as their juvenile counterparts in terms of its disproportionality when compared to their culpability. *Id.* at 477.

Since life without parole is akin to the death penalty for young adults as well, a mandatory sentencing scheme results in “a sentencer miss[ing] too much,” *id.*, by omitting consideration of an individual’s age and the attendant characteristics. In *Miller*, the Supreme Court corrected this constitutional deficiency in mandatory juvenile sentencing by requiring the sentencer to consider six factors associated with one’s youth: (1) the youth’s chronological age related to “immaturity, impetuosity, and failure to appreciate risks and consequences,” (2) the juvenile’s “family and home environment that surrounds him,” (3) the circumstances of the offense,

including extent of participation in the criminal conduct, (4) the impact of familial and peer pressures, (5) the effect of the offender’s youth on his ability to navigate the criminal justice process, and (6) the possibility of rehabilitation. 567 U.S. at 477-78. As evidenced by the numerous research studies discussed in Section I, these same characteristics are also implicated for young adults who are similarly immature and whose relevant cognitive functions are still developing. Because young adults are also susceptible to outside pressures like juveniles, it is important for the courts to consider their home and family environments and the impact of familial and peer pressures on these young adults and their criminal activities. Their continuing brain development—even until age 25—demonstrates that young adults are also capable of change and rehabilitation, and this capacity must be fully considered before they are sentenced to mandatory and irrevocable sentences of life without parole.

The *Miller* Court requires consideration of these characteristics of youth so a life without parole sentence is only given to the “rare juvenile offender whose crime reflects irreparable corruption.” 567 U.S. at 479-80. The Pennsylvania Supreme Court, in *Commonwealth v. Batts*, further effectuated the *Miller* decision by recognizing a presumption against life without parole sentences for juveniles and requiring the State to prove beyond a reasonable doubt that the juvenile offender is incapable of rehabilitation. 163 A.3d 410, 415-16 (Pa. 2017) [hereinafter *Batts II*]. The *Miller* and *Batts II* decisions both stand for the principle that mandatory life

without parole is only applicable for the rarest individuals whose crimes reflect “permanent incorrigibility” and “irretrievable depravity” rather than “transient immaturity.” *Batts II* at 416. The Supreme Court emphasized that making this distinction—whether a youth committed a crime because of a depraved personality that would never change because of changing developmental characteristics—required courts to specifically consider how children are different and how those differences counsel against sentencing youth to a lifetime in prison. *Miller*, 567 U.S. at 480. Young adults, whose brains are more similar to those of adolescents rather than adults, also require the same types of individualized consideration to determine whether they have capacity for reform and change. A mandatory sentencing scheme that establishes whether someone is permanently incorrigible, irreparably corrupt, or amenable to rehabilitation based solely on their chronological age of 18 or older does not comport with overwhelming scientific research on adolescent development and the Supreme Court’s recognition of this science. Individualized consideration of young adults’ circumstances and their developmental characteristics is necessary to ensure appropriate sentencing.

CONCLUSION

For all of the foregoing reasons, this Court should find that mandatory life without parole sentences are unconstitutional for young adults and remand this case for resentencing in accordance with *Miller* and *Batts II*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 531 of the Pennsylvania Rules of Appellate Procedure. This brief contains 5,825 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Dated: May 9, 2018

/s/ Marsha L. Levick
Marsha L. Levick

2017 WL 8792559 (Ky.Cir.Ct.) (Trial Order)
Circuit Court of Kentucky.
Seventh Division
Fayette County

COMMONWEALTH of Kentucky, Plaintiff,
v.
Travis BREDHOLD, Defendant.

No. 14-CR-161.
August 1, 2017.

Order Declaring Kentucky's Death Penalty Statute as Unconstitutional

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[Ernesto Scorsone](#), Judge.

*1 This matter comes before the Court on Defendant Travis Bredhold's Motion to declare the Kentucky death penalty statute unconstitutional insofar as it permits capital punishment for those under twenty-one (21) years of age at the time of their offense. Mr. Bredhold argues that the death penalty would be cruel and unusual punishment, in violation of the Eighth Amendment, for an offender under twenty-one (21) at the time of the offense. The defense claims that recent scientific research shows that individuals under twenty-one (21) are psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty, in *Roper v. Simmons*, 543 U.S. 551 (2005). The Commonwealth in turn argues that Kentucky's death penalty statute is constitutional and that there is no national consensus with respect to offenders under twenty-one (21). Having the benefit of memoranda of law, expert testimony, and the arguments of counsel, and being otherwise sufficiently advised, the Court sustains the Defendant's motion.

FINDINGS OF FACT

Travis Bredhold was indicted on the charges of Murder, First Degree Robbery, Theft by Unlawful Taking \$10,000 or More, and three Class A Misdemeanors for events which occurred on December 9, 2013, when Mr. Bredhold was eighteen (18) years and five (5) months old.

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg in the case of Commonwealth v. Diaz, et al., No. 15-CR-584.¹ Dr. Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that

were made about sixteen (16) and seventeen (17) year olds in *Roper*.”² Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.³

*2 On May 25th and 26th, 2016, an individual assessment of Mr. Bredhold was conducted by Dr. Kenneth Benedict, a clinical psychologist and neuropsychologist. A final report was provided to the Defendant's counsel and the Commonwealth and has been filed under seal. After reviewing the record, administering multiple tests, and conducting interviews with Mr. Bredhold, members of his family, and former teachers, Dr. Benedict found that Mr. Bredhold was about four years behind his peer group in multiple capacities. These include: the development of a consistent identity or “sense of self,” the capacity to regulate his emotions and behaviors, the ability to respond efficiently to natural environmental consequences in order to adjust and guide his behavior, and his capacity to develop mutually gratifying social relationships.⁴ Additionally, he found that Mr. Bredhold had weaknesses in executive functions, such as attention, impulse control, and mental flexibility.⁵ Based on his findings, Dr. Benedict diagnosed Mr. Bredhold with a number of mental disorders, not the least being Attention Deficit Hyperactivity Disorder (ADHD), learning disabilities in reading and writing, and Post Traumatic Stress Disorder (PTSD).⁶

CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S.C.A. Const Amend, VIII. This provision is applicable to the states through the Fourteenth Amendment. The protection flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen the consistent reference to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be “cruel and unusual.” *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the “evolving standards of decency” test are: (1) objective indicia of national consensus, and (2) the Court's own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper v. Simmons*, 543 U.S. 551 (2005).

I. Objective Indicia of National Consensus Against Execution of Offenders Younger than 21

Since *Roper*, six (6) states⁷ have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states⁸ have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven⁹ (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

*3 Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.¹⁰ Those nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011 – nineteen (19) of which have been in Texas alone.¹¹ Considering Texas an outlier, there have only been fourteen (14) executions of defendants under the age of twenty-one (21) between 2011 and 2016, compared to twenty-nine (29) executions in the years 2006 to 2011, and twenty-seven (27) executions in the years 2001 to 2006 (again, excluding Texas).¹² In short, the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods.

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.¹³ Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20),

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to twenty-one (21). “[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles ... as ‘categorically less culpable than the average criminal.’” *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

2. The Death Penalty is a Disproportionate Punishment for Offenders Younger than 21

As the Supreme Court in *Roper* heavily relied on scientific studies to come to its conclusion, so will this Court. On July 17, 2017, in the case of *Commonwealth of Kentucky v. Diaz*, this Court heard expert testimony on this topic. Dr. Laurence Steinberg testified and was also allowed to supplement his testimony with a written report. The report cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable. It is based on those studies that this Court has come to the conclusion that the death penalty should be excluded for defendants who were under the age of twenty-one (21) at the time of their offense.

*4 If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late teens.¹⁴ Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.¹⁵

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.¹⁶ First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.¹⁷ Second, they are more likely to engage in “sensation-seeking,” the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).¹⁸ Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because gains in impulse control continue to occur during the early twenties (20s).¹⁹ Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally

immature.²⁰ As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.²¹ The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.²² In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).²³

***5** Recent neurobiological research parallels the above psychological conclusions. This research has shown that the main cause for psychological immaturity during adolescence and the early twenties (20s) is the difference in timing of the maturation of two important brain systems. The system that is responsible for the increase in sensation-seeking and reward-seeking—sometimes referred to as the "socio-emotional system"—undergoes dramatic changes around the time of puberty, and stays highly active through the late teen years and into the early twenties (20s). However, the system that is responsible for self-control, regulating impulses, thinking ahead, evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the "cognitive control system"—is still undergoing significant development well into the mid-twenties (20s).²⁴ Thus, during middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual's twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.²⁵

There are considerable structural changes and improvements in connectivity across regions of the brain which allow for this development. These structural changes are mainly the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, allowing for more efficient transmission of information) and myelination (insulation of neuronal connections, allowing the brain to transmit information more quickly). While synaptic pruning is mostly complete by age sixteen (16), myelination continues through the twenties (20s).²⁶ Thus, while the development of the prefrontal cortex (logical reasoning, planning, personality) is largely finished by the late teens, the maturation of connections between the prefrontal cortex and regions which govern self-regulation and emotions continues into the mid-twenties (20s).²⁷ This supports the psychological findings spelled out above which conclude that even intellectual young adults may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

Perhaps one of the most germane studies to this opinion illustrated this development gap by asking teenagers, young adults (18-21), and mid-twenties adults to demonstrate impulse control under both emotionally neutral and emotionally arousing conditions.²⁸ Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen– (18) to twenty-one– (21) year-olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens.²⁹ Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty– (20) year-old functions similarly to a sixteen– (16) or seventeen–(17) year-old.

***6** In addition to this maturational imbalance, one of the hallmarks of neurobiologies development during adolescence is the heightened plasticity—the ability to change in response to experience—of the brain. One of the periods of the most marked neuroplasticity is during an individual's late teens and early twenties (20s), indicating that this group has strong potential for behavioral change.³⁰ Given adolescents' ongoing development and heightened plasticity, it is difficult to predict future criminality or delinquent behavior from antisocial behavior during the teen years, even among teenagers accused of committing violent crimes.³¹ In fact, many researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.³²

Travis Bredhold was eighteen (18) years and five (5) months old at the time of the alleged crime. According to recent scientific studies, Mr. Bredhold fits right into the group experiencing the “maturational imbalance,” during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses. He also fits into the group described in the study above which was found to act essentially like a sixteen– (16) to seventeen– (17) year-old under emotionally arousing conditions, such as, for example, robbing a store. Most importantly, this research shows that eighteen– (18) to twenty-one— (21) year-olds are categorically less culpable for the same three reasons that the Supreme Court in *Roper* found teenagers under eighteen (18) to be: (1) they lack maturity to control their impulses and fully consider both the risks and rewards of an action, making them unlikely to be deterred by knowledge of likelihood and severity of punishment; (2) they are susceptible to peer pressure and emotional influence, which exacerbates their existing immaturity when in groups or under stressful conditions; and (3) their character is not yet well formed due to the neuroplasticity of the young brain, meaning that they have a much better chance at rehabilitation than do adults.³³

Further, the Supreme Court has declared several times that “capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (“the death penalty must be reserved for ‘the worst of the worst’”). Given Mr. Bredhold's young age and development, it is difficult to see how he and others his age could be classified as “the most deserving of execution.”

Given the national trend toward restricting the use of the death penalty for young offenders, and given the recent studies by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age. Accordingly, Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense.

*7 It is important to note that, even though this Court is adhering to a bright-line rule as promoted by *Roper* and not individual assessment or a “mental age” determination, the conclusions drawn by Dr. Kenneth Benedict in his individual evaluation of Mr. Bredhold are still relevant. This evaluation substantiates that what research has shown to be true of adolescents and young adults as a class is particularly true of Mr. Bredhold. Dr. Benedict's findings are that Mr. Bredhold operates at a level at least four years below that of his peers. These findings further support the exclusion of the death penalty for this Defendant.

So ORDERED this the 1 day of August, 2017.

<<signature>>

JUDGE ERNESTO SCORSONE

FAYETTE CIRCUIT COURT

Footnotes

- 1 See Order Supplementing the Record. *Com. v. Diaz* is also a Seventh Division case. The Commonwealth was represented by Commonwealth Attorney Lou Anna Red Corn, and her assistants ID both cases, 14-CR-161 & 15-CR-584. Dr. Steinberg was aptly cross-examined by the Commonwealth Attorney.
- 2 Hearing July 17, 2017 at 9:02:31.
- 3 Defendant's Supplement to Testimony of Laurence Steinberg, July 19, 2017.
- 4 *Id* at 6.

5 *Id* at 3.

6 *Id* at 5.

7 The states that have abolished the death penalty since *Roper* and year of abolition: Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007).

8 The governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively. The governor of Oregon extended a previously imposed moratorium in 2015. The governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013.

9 Kansas and New Hampshire have not executed anyone since 1977. Montana and Wyoming have never executed anyone who was under twenty-one (21) years of age at the time of their offenses, and they currently have no such offenders on death row. Utah has not executed anyone who was under twenty-one (21) years of age at the time of their offense in the last fifteen (15) years, and no such offender is currently on Utah's death row. Idaho and Kentucky have not executed anyone who was under twenty-one (21) years old at the time of their offense in the last fifteen (15) years.

10 Chart of Number of People Executed Who Were Aged 18, 19, or 20 at Offense from 2000 to Present, By State [current as of February 29, 2016]

11 *Id.*

12 *Id.*

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