COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2017-SC-000436

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. ERNESTO SCORSONE, JUDGE
INDICTMENT NO. 2014-CR-00161

TRAVIS M. BREHOLD — APPELLEE

BRIEF FOR APPELLEE, TRAVIS M. BREDHOLD

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Ernesto Scorsone, Circuit Judge, Robert F. Stephens Circuit Courthouse, 120 North Limestone, Lexington, Kentucky 40507; the Hon. Lou Anna Red Corn, Commonwealth's Attorney, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507-1330; to be electronically mailed to the Hon. Joanne Lynch, Assistant Public Advocate; the Hon. Audrey Woosnam, Assistant Public Advocate; the Hon. Robert Friedman, Assistant Public Advocate; and to be served by messenger mail to Hon. Jason B. Moore, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on October 12, 2018. The record on appeal has been returned to the Kentucky Supreme Court.

Timothy G. Arnold

Introduction

After hearing substantial scientific evidence, the trial court concluded that a scientific consensus has emerged that the brains of older adolescents (i.e., individuals aged 18-20) suffered from the same psychological and neurological deficiencies a juvenile offenders. Based on this finding, and a finding that a national consensus had emerged against its use on older adolescents, the trial court declared the death penalty unconstitutional for individuals who were 18-20 at the time of their offense. This Commonwealth took this interlocutory appeal to challenge that ruling.

Statement Concerning Oral Argument

Mr. Bredhold agrees with the Commonwealth that oral argument is appropriate in this case.

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Counterstatement of the Case

The Commonwealth's Statement of the Case fails to address the scientific testimony that lies at the heart of this case in any substantial way. As such, while Bredhold does not dispute the Commonwealth's description of the procedural history of this case, he cannot accept the Statement of the Case as a fair basis on which to adjudicate his claims.

Mr. Bredhold ("Travis") is presently charged with murder and robbery in the first degree, along with other lesser offenses, arising out of a robbery that resulted in the death of a store clerk. The offense occurred when Travis was eighteen (18) years and five and one-half (5 ½) months of age.[1] Less than three months after the indictment, the Commonwealth filed notice of its intention to seek the death penalty.[2] In response, Travis filed a motion seeking to declare the death sentence unconstitutional for older adolescents.[3] Similar motions were filed in the cases of *Commonwealth v. Efrain Diaz* and *Commonwealth v. Justin Smith*.[4] Smith and Diaz were heard together on July 17, 2017. At that time, lawyers for those defendants presented the testimony of Dr. Laurence Steinburg, whose testimony the trial court later incorporated into the record of this case.[5]

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[1] TR 1, 41.
[2] TR 1, 99
[3] TR 3, 422 – TR IV, 485.
[4] Diaz and Smith are co-defendants who are before the Fayette Circuit Court in case nos. 15-CR-584-001 and 002. Similar orders were entered in those cases, and both were appealed by the Commonwealth and transferred to this Court in *Commonwealth v. Diaz*, 2017-SC-536, and *Commonwealth v. Smith*, 2017-SC-537.
[5] VR 7/7/17, 8:33:20-9:31:21. TR V, 660, 687 (orders incorporating and filing record). While the video record of the hearing was filed in this case, a transcript of Dr. Steinburg's testimony was prepared and filed in the record in *Commonwealth v. Diaz*. That transcript is included in the Appendix ("Apx.") at Tab 2. For the

Dr. Steinburg directed the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Brain Development from 1997-2007, and authored or co-authored approximately 400 scientific articles and 17 books on the subject of Adolescent Brain Development.[6] An article he co-wrote with Elizabeth Scott on the relationship between brain development and culpability was quoted repeatedly by the majority opinion in *Roper v. Simmons*, 543 U.S. 551, 569-573 (2005), and cited again by the majority in *Miller v. Alabama*, 567 U.S. 460, 471 (2012).[7] Dr. Steinburg is eminently qualified to describe the state of the science on brain development in older adolescents (i.e., those 18-20 years of age) and how the scientific consensus has emerged during the years after *Roper*.

At the time Dr. Steinburg began his career over 40 years ago, scientists believed that the brain stopped developing around the time it reached full size, i.e., around 10 years of age.[8] This conclusion began to be challenged in the late 1990's, as a result of the emergence of new technologies, most significantly Functional Magnetic Resonance Imaging (fMRI) that permitted scientists to see the brains of living individuals and observe their responses to stimuli.[9] The first major fMRI study of young adolescents (i.e., those under 18) was published in 1999.[10]

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purposes of this brief, references to Dr. Steinburg's testimony are cited as "Tr., [pg. #]." Dr. Steinburg was permitted to supplement his testimony in writing, which he did several days later. TR V, 691 *et seq.*, included in the Appendix at Tab 3.

[6] TR V, 691-692, ¶¶ 3-6.

[7] *See* Steinberg, L. & Scott, E., Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 *Am. Psychologist* 1009 (2003).

[8] Tr. 3-4.

[9] Tr. 4.

[10] *Id.*

Studies focusing on older adolescents (18-20 year olds) did not begin to emerge until the years after *Roper*, many supported by funding from the National Institutes for Health.[11] As a result, in contrast to the state of the science at the time of *Roper*, today "there are literally thousands more studies of adolescent brain development . . . [and] multiple . . . scientific journals that are devoted exclusively to the study of adolescent brain development."[12] While "it hadn't been known at the time of *Roper* that there was this brain maturation that extended past eighteen . . . that is now well established in the scientific literature."[13]

This evolution in scientific thinking is due to the fact that today,

> [w]e know much, much more about the timetable of different aspects of brain maturation. . . . [O]ne of the important lessons we've learned in the last ten years is that the maturation that is taking place during the teen years continues to take place as people move into their early and towards their mid 20's. . . . [A]t the same time there's been a lot of psychological research on development during this time period as well. . . . [I]n our studies of young people both in the United States and around the world we have found that the psychological capacities that are thought to be influenced by this brain development are also maturing during this time too . . ..[14]

Specifically, scientists have learned that different areas of the brain mature at different rates, resulting in what Dr. Steinburg describes as a "maturational imbalance."[15] This imbalance, and in particular the imbalance between the structures of the brain related to rewards, and those related to self-control,

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[11] Tr. 5.
[12] Tr. 9.
[13] Tr. 4.
[14] *Id.*
[15] TR V, 699, ¶ 21.

"inclines adolescents toward sensation seeking and impulsivity."[16] This effect is particularly pronounced in situations of emotional arousal.[17]

There are several distinct ways in which older adolescents are more like juveniles than adults. First, adolescents are more likely to "underestimate the number, seriousness and likelihood of risks involved in a given situation."[18] Second, older adolescents are "more likely than older individuals to engage in what psychologists call 'sensation seeking,' the pursuit of arousing, rewarding, exciting or novel experiences."[19] Third, older adolescents are "less able than older individuals to control their impulses and consider the future consequences of their actions and decisions."[20] Fourth, while older adolescents are intellectually mature, they tend to be emotionally immature.[21] This results in individuals being "more focused on rewards, more impulsive, and more myopic" when they are acting under circumstances of emotional arousal.[22] All of "these inclinations are exacerbated by the presence of peers."[23]

As a result of these characteristics, at this stage there is "greater risk taking than at any other stage of development", with studies showing that the peak age of risk taking is between ages 19 and 21.[24] This finding "has been demonstrated both

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[16] *Id.*
[17] TR V, 699, ¶ 22.
[18] TR V, 695, ¶ 13.
[19] *Id.*, at 696, ¶ 14.
[20] *Id.*, ¶ 15.
[21] *Id.*, at 697, ¶ 16.
[22] *Id.*, ¶ 17.
[23] *Id.*, ¶ 18.
[24] *Id.*, at 698, ¶¶ 19-20.

in studies of risk taking in psychological experiments . . . and in the analysis of risk behavior in the real world."[25]

The fifth and final similarity between older adolescents and juveniles is that both have a high degree of neuroplasticity during this period, meaning that they have substantial capacity for behavioral change. As Dr. Steinburg candidly pointed out, this can be a "dual edge sword. . . . It means the brain is more susceptible to positive influence but it means the brain is more susceptible to toxic influence as well. And the brain can't tell the difference between good influences and bad influences and if it's plastic it's influenced by both."[26] However, given the right environment an older adolescent would be more amenable to rehabilitation than a 25 year old.[27]

Based on the foregoing, Dr. Steinburg testified that the characteristics which the *Roper* court relied upon in finding that youth were categorically less culpable than their adult counterparts, i.e., impetuosity and impulsivity, susceptibility to coercive influences, especially from peers, and amenability to rehabilitation, apply to the same extent to adolescents under 21. As a result, "if a different version of *Roper* was heard today, knowing what we know now, one could've made the very same arguments about eighteen, nineteen and twenty year olds that were made about sixteen and seventeen year old's in *Roper*."[28]

Travis also presented the report of Dr. Kenneth Benedict, a clinical psychologist and neuropsychologist. Dr. Benedict examined Travis and

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[25] *Id.*, ¶ 19.
[26] Tr., 14.
[27] *Id.*
[28] Tr., 12.

investigated his mental status.[29] After reviewing his status Dr. Benedict diagnosed Travis with a number of mental disorders, including Post-Traumatic Stress Disorder, Attention Deficit Hyperactivity Disorder, and learning disabilities.[30] Based on this diagnosis, Dr. Benedict found that Travis was functioning about four years behind his peer group (i.e., at the level of a 14 year old) in multiple areas, including the capacity to control his emotions and behaviors, the ability to respond to natural consequences, and the capacity to develop healthy relationships.[31]

The Commonwealth presented no proof on the issue.

After the close of the evidence, the trial court issued a ruling finding that it violated the Eighth Amendment to apply the death penalty to older adolescents, such as Travis. In support of this conclusion, the trial court first reviewed the evidence of national consensus that the death sentence was inappropriate for offenders in this age group. The trial court found that "it appears that 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."[32] The court based its conclusion primarily on the following factors:

- "[T]here 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."[33]

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[29] TR V, 664
[30] *Id.*
[31] *Id.*
[32] *Id.*, 667.
[33] *Id.*, 665.

- "[O]nly nine (9) [states] have executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016."
- Outside of Texas, "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) in the years 2006 to 2011, and twenty-seven (27) in the years 2001 to 2006."[34]

In short, the trial court found that the nation was moving in a uniform direction against the death penalty for this population, including both a reduction in the number of states where such a sentence is possible, and a reduction in the number of sentences imposed.[35]

Further, the Court found that "[i]f the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling."[36] The Court began by describing how fMRI technology enabled scientists of the late 1990's and early 2000's to learn about the development of the juvenile brain, "[f]urther 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)", a conclusion that "is now widely accepted among neuroscientists."[37]

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[34] *Id.* 666.
[35] *Id.*
[36] *Id.* 667.
[37] *Id.*, citing N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using MRI*, 329 SCI. 1358-1361 (2011); D. Fair, et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); A. Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies*, 33

The Court then made detailed and specific findings about the psychological and neurobiological deficiencies of older adolescents: [38]

> 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.[39] First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.[40] 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).[41] 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).[42] 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

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HUM. BRAIN MAPPING 1987-2002 (2012); A. Pfefferbaum, et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176-193 (2013); D Simmonds, et al., *Developmental Stages and Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*. 92 NEUROIMAGE 356-368 (2014); L. Somerville, et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental cues*, 72 BRAIN & COGNITION 124-133 (2010).

[38] TR V, 668-672 (the footnotes have been renumbered, but otherwise are as they appear in the trial court's order).

[39] For a recent review of his research, see: LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

[40] T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents" and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).

[41] E. Cauffman, et al., *Age Differences in Affective Decision Making as by Performance on the Iowa Gambling Task,* 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc. 12532. (2017).

[42] L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 2844 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.[43] 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.[44] 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.[45] In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).[46]

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).[47] Thus, during

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43 L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop."* 64 AM. PSYCHOLOGIST 583-594 (2009).

44 A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non Emotional* 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

45 D. Albert, et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114-120 (2013).

46 B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

47 B. J. Casey, et al., *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEV. PSYCHOL 225-235 (2010); L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78-106 (2008); L. Van Leijenhorst, et al., *Adolescent Risky Decision-making:*

middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive 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.[48]

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).[49] 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).[50] 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.[51] Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control

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Neurocognitive Development of Reward and Control Regions, 51 NEUROIMAGE 345-355 (2010).

48 D. Albert & L. Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211-224 (2011); S-J Blakemore & T. Robbins, *Decision-Making in the Adolescent Brain*, 15 NAT. NEUROSCIENCE 1841-1191 (2012).

49 S-J, Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397406 (2012); R. Engle, The Teen Brain, 22(2) CURRENT DIRECTIONS PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions,* 72(2) BRAIN & COGNITION (whole issue) (2010).

50 L. Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NAT. REV. NEUROSCIENCE 513-518 (2013).

51 A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOL. SCI. 549-562 (2016).

> 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.[52] 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.
>
> In addition to this maturational imbalance, one of the hallmarks of neurobiological 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.[53] 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.[54] 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.[55]

Finally, having found that both the scientific evidence and information concerning national consensus warranted prohibiting the death penalty on this population, the trial court concluded that:

> [i]t is important to note that, even though this Court is adhering to the bright-line rule as promoted by *Roper* and not an 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

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52 *Id.*

53 Laurence Stenberg, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

54 T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, DEV. & PSYCHOPATHOLOGY (2016).

55 K. Monahan, et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093-1105 (2013); E. Mulvey, et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453-475 (2010).

> findings are that Mr. Bredhold operates at a level at least four years before that of his peers. These findings further support the exclusion of the death penalty for this Defendant.[56]

The Commonwealth filed an interlocutory appeal from this decision, and this Court granted transfer. This appeal follows.

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[56] TR V, 673.

Argument

I. Imposition of a Death Sentence for a Crime Committed by an Adolescent Under Age 21 is Cruel and Unusual Punishment Prohibited by the Eighth Amendment to the United States Constitution.

Proportionality of the punishment, both to the gravity of the offense and the culpability of the offender, lies at the core of the Eighth Amendment. Based on this principle, the United States Supreme Court has clearly stated that "[c]apital 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) (emphasis added) As the trial court's findings clearly demonstrate, the scientific consensus is that older adolescents like Travis function as poorly as juveniles do, especially under stressful conditions or in the presence of peers. They simply do not possess the level of forethought, self-control or maturity to be considered the "worst of the worst." As older adolescents would not be eligible for the death penalty in a majority of jurisdictions, and are increasingly unlikely to receive that penalty in those remaining jurisdictions that would permit it, the trial court was correct to declare the penalty unconstitutional for this class of individuals.

A. Preservation and Standard of Review

In the trial court, the Commonwealth filed a four-page response to Travis' extensively researched and developed motion, primarily arguing that the trial court was without authority to adjudicate the constitutionality of the death penalty because no other state had made such a ruling, and the decision was reserved for the United States Supreme Court. TR IV, 486-490. The closest the Commonwealth came to arguing a position that it has taken in this appeal was

saying that "this Court is in no position to find a national consensus based upon the authority cited by the Defendant." *Id.* 488. At the subsequent hearing, the Commonwealth largely restated its argument that the trial court was without authority to decide whether a national consensus exists. VR 6/9/17, 11:14:00-11:14:55. The Commonwealth never addressed the merits of Dr. Steinburg's testimony or the conclusions that should be drawn from that testimony, nor did it ask questions of Dr. Steinburg that would have supported the scientific assertions it has made in the Brief for Appellant.

This Court has traditionally held that it is "not at liberty to review alleged errors when the issue was not presented to the trial court for decision." *Henson v. Commonwealth*, 20 S.W.3d 466, 470 (Ky. 1999). Or, as the Court has more colorfully put it, "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky.1976), *overruled on other grounds by*, *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky.2010). As such, all of Sections I. C. and E. of the Brief for Appellant should be treated as unpreserved. The Commonwealth has not requested palpable error review, so this Court should limit its review to the arguments in Section I.D. ("The trial court erred in finding a national consensus against imposing the death penalty on persons under the age of twenty-one.")

Finally, while the Commonwealth states correctly that the trial court's legal conclusions are reviewed *de novo*, "the trial court's findings of fact are reviewed for clear error and are deemed conclusive if supported by substantial evidence." *Barrett v. Commonwealth*, 470 S.W.3d 337, 341 (Ky. 2015). If any of the

Commonwealth's claims are reviewed as palpable error, they should only be reversed if a "manifest injustice" occurred. It did not.

B. Standard for Evaluating Claims under the Eighth Amendment

In determining whether a punishment violates the Eighth Amendment prohibition against "cruel and unusual punishments," courts have referred to "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons,* 543 U.S. 551, 561 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1985). Prior to *Moore v. Texas*, ___ U.S. ___, 137 S.Ct. 1039 (2017) cases finding an Eighth Amendment violation have relied on both "objective indicia of consensus" that the practice is excessive, ***and*** a finding in the Court's "independent judgment" that the punishment practice at issue does not serve a legitimate penological purpose. *Roper*, 543 U.S. at 564.[57] In *Moore,* the Court

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[57] The significant Eighth Amendment opinions rendered from the U.S. Supreme Court state that these considerations are to be taking into account regarding claims that a punishment against a certain class of offenders violates the Eighth Amendment. E.g., *Miller v. Alabama*, 567 U.S. 460, 469-470, 482-485 (2012) (mandatory life without parole sentences for homicide offenders under 18 violates the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48, 61 (2010) (Eighth Amendment prohibits imposition of life without parole sentences on juvenile offenders who did not commit homicide); *Kennedy v. Louisiana*, 554 U.S. 407, 420-422 (2008) (the death penalty is not a proportional punishment for the rape of a child); *Atkins v. Virginia*, 536 U.S. 304, 312-313 (2002) (execution of intellectually disabled offenders is prohibited by the Eighth Amendment).

While *Miller* and *Graham* dealt with life without parole sentences regarding juvenile offenders, they utilized the exact same aforementioned considerations under the Eighth Amendment and thus their logic is applicable to death penalty cases. This is because the death penalty and life without parole "share some characteristics ... that are shared by no other sentences." *Miller*, 567 U.S. at 474 (quoting *Graham*, 560 U.S. at 69). "In part because we viewed [life without parole] as akin to the death penalty, we treated it similarly to that most severe punishment" and "the bar we adopted ***mirrored*** a proscription first established in the death penalty context." *Miller*, 567 U.S. at 475 (citing *Graham*, 560 U.S. at

found that Texas' method of determining intellectual disability violated the Eighth Amendment, without reference to whether any consensus existed as to its use. Whether was a function of the facts of that case, or a determination by the majority that the consensus analysis has outlived its usefulness,[58] remains to be seen. As the evidence of a consensus in this case is at least as strong as in prior cases where an Eighth Amendment violation has been found, however, this Court need not reach that question.

C. The Death Penalty Serves No Legitimate Penological Purpose for Youthful Offenders who were Under 21 Years Old at the Time of an Offense.

"'[T]he Constitution contemplates that in the end [a Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment'" *Roper*, 543 U.S. at 563 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977). The Supreme Court has found that "there are two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes by prospective offenders." *Roper, supra*, 543 U.S. at 571 (quoting *Atkins, supra*, 536 U.S. at 319 and *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)) (internal quotation marks omitted). "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Likewise, the *Roper* Court found that deterrence was also not an

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60, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and *Coker v. Georgia*, 433 U.S. 584 (1977)) (emphasis added).

[58] In principal, the consensus analysis would require that a punishment practice which lacks any legitimate penological purpose be saved from the historical dust heap merely because a substantial majority of states still approve of its use. It is difficult to see the value of that approach, which may explain the United States Supreme Court's quiet abandonment of it.

effective justification because "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Roper* 543 U.S. at 571-72, (quoting *Thompson*, 487 U.S., at 837)

A review of the recent psychological and neuroscientific research reveals that offenders under 21 years old have the exact same vulnerabilities as those under 18 years old, and they cannot be condemned as the "worst of the worst."

1. *Roper* and its progeny's findings regarding person's under 18 years old.

In *Roper*, the Court found that there are "[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S. at 569. These differences have to do with immaturity and reckless behavior, susceptibility to negative influences and peer pressure, and underdeveloped character and transitory personality traits.

The first difference identified by the *Roper* Court is that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993) and citing *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982)).

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, [445 U.S. at 115] ("[Y]outh is more than a chronological fact. It is a time

and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstances that juveniles have less control, or less experience with control, over their own environment. *Roper*, 543 U.S. at 569 (citing Steinberg and Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. *Roper*, 543 U.S. at 569-570 (citing E. Erikson, *Identity: Youth and Crisis* (1968).

Roper concluded that "[t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835). The Court further concluded:

> [t]heir 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. 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 deprived 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. Indeed, [t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that ma dominate in younger years can subside. ... see also Steinberg and Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal

> activities develop entrenched patterns of problem behavior that persist into adulthood."). *Roper*, 543 U.S. at 570 (certain internal quotation marks and citations omitted).

While the Supreme Court has made clear that "[r]ehabilitation . . . is not an applicable rationale for the death penalty," *see Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986 (2014) (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)), the fact that a class of individuals will naturally cease their antisocial behavior is a strong indication that their behavior is not a function of irrevocably bad character, but if immaturity and impetuosity.

2. *Roper* and its Progeny Made Clear that Legitimate Penological Interests are Not Served by Executing Individuals who were under 18 Years Old at the Time of an Offense.

The *Roper* court began its analysis by finding that the goal of deterrence is not served by executing juveniles. This is because "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 (quoting *Graham*, 560 U.S. at 72 and *Roper* 543 U.S. at 571) (internal quotation marks omitted). The absence of evidence of deterrent effect to the contrary is of special concern. *Roper*, 543 U.S. at 571. *Roper* also stated that "the same characteristics that render juveniles less culpable than adults suggest... that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571; see also *Graham*, 560 U.S. at 72 (quoting the same). "Because juveniles' lack of maturity and underdeveloped sense of responsibility... often result in impetuous and ill-considered actions and decisions... they are less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72 (quoting *Johnson*, 509 U.S. at 467) (internal quotation marks omitted). Regarding

the possibility that a punishment could have a deterrent effect, the Court in *Graham* noted that such an "argument does not overcome other objectives" and even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered." 560 U.S. at 72 (quoting *Kennedy*, 554 U.S. at 441) (internal quotation marks omitted).

Finally, the goal of retribution is not served by executing juveniles either. As the *Roper* Court found, "[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. As similarly stated in *Graham*, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." 560 U.S. at 71. Clearly, juvenile offenders are less culpable than adult offenders.

Thus, *Roper* and its progeny held that legitimate penological interests are not served by executing individuals who were under 18 years old at the time of an offense.

3. Executing Those who were under 21 at the Time of an Offense Also Serves No Legitimate Penological Purpose.

After hearing the evidence, the trial court made substantial and detailed findings concerning brain function in older adolescents. The trial court described the physical changes the brain undergoes through this period, which results in a "maturational imbalance" where the systems which process rewards are very well

developed, while the systems for cognitive control lag behind.[59] As a result of these physiological changes, older adolescents do not grow out of the mental deficiencies that typify youth until much later than previously thought. Consequently, as a class, older adolescents function similarly to juveniles in that they are:

- "[M]ore likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation."[60]
- "[M]ore likely to engage in 'sensation seeking,' the pursuit of arousing, rewarding, exciting, or novel experiences, [especially] among individuals between the ages of eighteen (18) and twenty-one (21)."[61]
- "[L]ess 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)."[62]

As with juveniles, "these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including

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[59] TR V, 669-671.
[60] TR V, 668, citing T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents" and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).
[61] *Id.*, citing E. Cauffman, et al., *Age Differences in Affective Decision Making as by Performance on the Iowa Gambling Task,* 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc. 12532. (2017).
[62] *Id.*, citing L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 2844 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

those that generate negative emotions, such as fear, threat, anger, or anxiety," or in the presence of peers.[63] Also similar to juveniles, older adolescents also possess a substantial capacity for reform, including the tendency to cease antisocial behavior even without state intervention. As such, "the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21)."[64]

In light of the foregoing, executing those who were under 21 at the time of an offense serves no legitimate penological purpose. As with juveniles, executions do not serve a retributive purpose. When it comes to the domains of self-control, risk analysis, resistance to peer pressure, and other areas, older adolescents are as impaired – or in some cases more impaired – than their juvenile counterparts. As such, they are also "categorically less culpable" and therefore the exercise of the state's harshest sanction is inappropriate when applied to them.

For the same reasons, there is no reason to believe that the death penalty deters crimes within this population. As with juveniles, especially in periods of arousal, the science overwhelmingly shows that older adolescents act in haste, without forethought or significant analysis. The presence or absence of the death penalty in their cases will make no substantial difference on their criminal conduct.

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[63] *Id.*, 668-669, citing A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non Emotional* 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[64] *Id.*, 669, citing B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

Finally, studies now establish that older adolescents behavior is clearly more a function of neurological and psychological deficiencies consistent with their stage of life, than it is a function of hardened antisocial attitudes. As with juveniles, most older adolescents will cease antisocial behavior within a matter of a few years, and possess the same amenability to rehabilitation that juveniles do.

In short, the trial court correctly found that the science in 2017 mandated the same finding today that the *Roper* court made about juveniles in 2005: the death penalty served no penological purpose for the class of offenders who are 18 and older, but not yet 21.

D. The Trial Court Correctly Found that There is a Sufficient National Consensus that Individuals under Twenty-One Years Old at the Time of the Offense Should Not be Executed.

The Supreme Court has not identified a single formula for establishing a consensus that a punishment is excessive. The Court has recognized that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham v. Florida*, 560 U.S. 48, 62 (2010)(quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) and *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). However, it has gone on to say that "[t]here are measures of consensus other than legislation." *Graham*, 560 U.S. at 62 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008). Accordingly, the Supreme Court also looks to actual state practices, including past usage and jury verdicts, a punishment's frequency, as well as trends and the consistency of the direction of the change. *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("Central to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment. Such as, indicia

of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations.") (citations omitted); *Thompson v. Oklahoma*, 487 U.S. 815, 822 (1988) ("[W]e first review relevant legislative enactments, then refer to jury determinations."); *Atkins*, 536 U.S. at 316 ("[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades."). In addition, the Supreme Court has also looked to "views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community" when considering indicia of consensus.[65] *Thompson*, 487 U.S. at 830); see also *Roper*, 543 U.S. at 561, 575-579 (evaluating international opinion). Evaluating all of these areas, it is clear that a sufficient consensus exists to support the trial court's finding.

1. The Evidence of Consensus in this Case is Similar to Other Cases Where a Consensus was Found.

The Commonwealth suggests that a majority of jurisdictions must preclude the practice at issue in order to trigger an Eighth Amendment claim. CW Brief, pp. 18-19. However, this reasoning is contradicted by the United States Supreme Court's rulings in *Graham* and *Miller*. Using the correct standard, it is clear that the trial court's conclusion was right.

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[65] This is undoubtedly due to the fact that the Eighth Amendment has its roots and language directly taken from the English Declaration of Rights of 1688 and that the principle it represents can be traced back to the Magna Carta. *Trop*, 356 U.S. at 100.

First, merely comparing the number of states involved in *Roper*, *Graham* and *Miller* to the current case makes clear that a sufficient consensus against this practice already exists:

	Roper v. Simmons	*Graham v. Florida*	*Miller v. Alabama*	Current Case
Number of States Prohibiting Sentence?	30	13	22	31[66]
Number of States Actually Imposing Sentence w/in Last 5 Years?	3	11	Unk.	9
Has One State Carried Out the Majority of Sentences?	Yes-Tex.	Yes-Fla.	Unk.	Yes-Tex.
Is the Use of the Sentence Declining Significantly?	Yes.	Unk.	Unk.	Yes

This conclusion is consistent with the holdings of the cases themselves. In *Graham*, the Supreme Court used the same Eighth Amendment analysis at issue in the case at bar to determine whether the Eighth Amendment prohibits imposition of a life without parole sentence on juvenile offenders who did not commit homicide. 560 U.S. at 61. The Court noted that only six jurisdictions excluded life without parole sentence for any juvenile offenders while seven permitted it for juveniles convicted of homicide and that thirty-seven states as well as the District of Columbia and Federal law permitted it for some juvenile non-homicide offenders. *Id.* at 62. The State argued that, given this metric, there was no consensus against the sentencing practice at issue. *Id.* The Court found that argument "incomplete and unavailing" and stated that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Id.* The Court, acknowledging the statistics may be flawed, found that only 123 juvenile

[66] Though the trial court found that 30 states prohibited the death sentence, that finding is clearly erroneous, as the trial court neglected to include the state of Delaware, whose state supreme court found the death sentence unconstitutional in 2016. *See Powell v. Delaware*, 153 A.3d 69 (Del. 2016).

non-homicide offenders were serving sentences of life without parole. *Id.* at 64-65. Thus, the Court concluded that because the sentencing practice at issue was exceedingly rare, "it is fair to say that a national consensus has developed against it." *Id.* at 67 (quoting *Atkins*, 536 at 316).[67]

After the opinion in *Graham* was rendered, the Supreme Court, in *Miller*, held that a mandatory life without parole sentence imposed on juvenile homicide offenders violates the Eighth Amendment. *Miller*, 567 U.S. at 479. The Court acknowledged that 28 states and the Federal law make a life without parole sentence mandatory for some juvenile homicide offenders. *Id.* at 482. However, the Court stated that this holding followed directly from the principles of *Roper* and *Graham* and stated that "in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which less than half of the States that permitted capital punishment for whom the issue existed had previously chosen to do so." *Id.* at 484 (internal quotations and citations omitted).[68]

Moreover, since the opinion in *Roper* was rendered, the trend against the death penalty has continued. To break it down by jurisdiction: seven[69] more states have abolished the death penalty, making a total of nineteen states and the District of Columbia without a death penalty statute.[70] These states, along with the dates of abolition, are Delaware (2016)[71], Maryland (2013), Connecticut (2012), Illinois

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[67] In *Atkins*, the Court held that the execution of intellectually disabled offenders is prohibited by the Eighth Amendment.
[68]The considerations taken into account under *Miller* and *Graham* mirror those taken into account in death penalty cases.
[69] The trial court incorrectly stated six instead of seven states.
[70] TR V, 665.
[71] The trial court failed to mention Delaware in its order.

(2011), New Mexico (2009), New York (2007), and New Jersey (2007).[72] The states that had abolished the death penalty prior to *Roper*, along with the dates of abolition, are Rhode Island (1984), Massachusetts (1984), North Dakota (1973), Iowa (1965), West Virginia (1965), Vermont (1964), Alaska (1957), Hawaii (1957), Minnesota (1911), Maine (1887), Wisconsin (1853), and Michigan (1846) and the District of Columbia abolished the death penalty in 1981.[73]Regarding the nineteen states that have abolished the death penalty, this has been done either by the state's highest court or by the state's legislature.

Also, the death penalty is prohibited in four of the five inhabited U.S. territories. Under the constitutions of Puerto Rico and the Commonwealth for the Northern Mariana Islands, the death penalty is prohibited. P.R. Const. Art. II § 7 ("The death penalty shall not exist."); C.N.M.I. Const. Art. I § 4(i) ("Capital punishment is prohibited."). In Guam and the U.S. Virgin Islands, the death penalty is not a possible sentence. G.C.A. § 16.39(b) (punishment for aggravated murder is life); 14 V.I.C. § 923(a) (providing for life in prison as punishment for murder). It should be also be noted that the death penalty has not been carried out or imposed in the remaining inhabited U.S. territory since the 1930s. While the death penalty is still a possible sentence in theory in America Samoa, the last execution there was in 1939 and no death sentence has been imposed since the 1930s.

In *Hall*, the Supreme Court also characterized the moratorium states as being on the defendant's "side of the leger" in the indicia of consensus

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[72] TR V, 665.
[73] *Id.*

consideration. 134 S.Ct. at 1997. Currently, the governors of four states have imposed moratoriums on executions in the last five years.[74] The Governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively.[75] The governor of Oregon extended a previously imposed moratorium in 2015, while the governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013. All of these have been imposed in the last five years.

Also, as the trial court found, seven states have de facto prohibitions on the death penalty as they have not executed offenders under the age of twenty-one years old in the last fifteen years and have not imposed any new death sentences on offenders in that age group in the last twenty years.[76] These states are Kansas, New Hampshire, Montana, Wyoming, Utah, Idaho, and Kentucky.[77]

Furthermore, as the trial court found, "since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to twenty-one" and "the infrequency of [the death penalty's] use even where it remains on the books" are to be considered in regard to indicia of consensus as are "actual sentencing practices."[78] Again, the trial court's conclusion was right.

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[74] TR V, 665. The Commonwealth argues that these four states should not be considered because the moratoriums do not preclude new death sentences from being imposed. CW Brief, pg. 20. However, this ignores *Hall* and the fact that, regarding indicia of consensus, actual practices and the frequency of death sentences being carried out is to be considered. *Atkins*, 536 U.S. at 316

[75] *Id.*

[76] *Id.*,note 9.

[77] *Id.*

[78] TR V, 666-667 (citing *Roper*, 543 U.S. at 567 and *Graham*, 560 U.S. at 62.)

2. Evidence of Other Social Practices Also Support a Finding that there is Now a Consensus Against the Execution of Older Adolescents.

In *Roper*, the Supreme Court considered state statutes imposing minimum age requirements in concluding that the death penalty was a prohibited punishment for juvenile offenders: "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." 543 U.S. at 569.

Likewise, in the context of offenders under 21 years old, state and federal laws impose a minimum age of 21 years old for various activities and extend the age of "minority" to 21 years old for other activities. For example, all 50 states, as well as the District of Columbia, impose a minimum age restriction of 21 years old for the consumption, purchase, or possession of alcohol or recreational marijuana.[79]

Most states also impose minimum ages related to handguns: 41 states, including Kentucky, impose a minimum age of 21 years old to obtain concealed carry permits.[80] Table C. Also, federal law outright prohibits licensed gun dealers from selling handguns and handgun ammunition to people under 21 years old. 18 U.S.C. § 922(b)(1), (c)(1); 27 C.R.R. § 478.99(b).

In addition, federal immigration law permits a parent who is a United States citizen to petition for an immigration visa for any "unmarried children the under

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[79] Memorandum in Support of Renewed Motion to Exclude the Death Penalty, ("Memorandum"), TR III 422 – TR IV 483, at TR IV 473. This document is included in the Appendix at Apx. Tab 5.
[80] *Id.*, at Table C, pp. 470-472

the age of 21." 8 U.S.C. § 1151(b)(2)(A)(i). A child can likewise petition for an immigrant visa for his parents, but only if he is at least 21 years old. *Matter of Hassan*, 16 I&N Dec. 16(1976). Although a United States citizen of any age may petition for immigration benefits for "alien" children, prospective adoptive parents must be married, or at least 25 years old if unmarried to obtain immigration benefits under the Hague Convention of Protection of Children and Co-operation in Respect of Inter-country Adoptions. Indeed, some states impose heightened age requirements on prospective adoptive parents. See, e.g., Colo. Rev. Stat. §§ 19-8-3 (25 years old or married); Okla. Stat. Tit. 10 § 7503-1.1 (21 years old). And some states allow for the adoption of children up to the age of 21 years old. See, e.g., Colo. Rev. Stat. § 19-5-201, 14-1-101. Most states allow for the adoption of any person regardless of age. See, e.g., Alaska Stat. § 25.23.010; Ark. Code § 9-9-203.

That youths under 21 years old should not be treated the same as those 21 and older finds support in the various laws that protect those under 21 years old the same way that children under 18 are protected. For example, the Credit Card Act of 2009 bans credit cards for people under the age of 21 unless they have a co-signer age 21 or older, or show proof that they have the means to repay the debt. See, e.g., 15 U.S.C. § 1637(c)(8); 15 U.S.C. § 1637(p). Consistent with this rule, 42 states and the District of Columbia impose a minimum age of 21 to transfer gifts.[81] That is, by law in a majority of states, people under 21 years old cannot dispose of, or use, their property outright; transfers of "gifts" to "minors" must be subject to approval by a custodian until the "minor" reaches the required age: most often, 21

[81] Id., Table E at 475-478

years old. *Id.*. Also, 31 states provide free public education up to age 21 years old; two states have higher age maximums; and 10 states provide free education up to age 20. Motion, Table F.

Furthermore, 40 States and the District of Columbia impose a minimum age of 21 years old to become a foster parent (Motion, Table G), and several states extend foster-care benefits to children ages 18, 19, or 20 years old. See, e.g., Cal. Fostering Connections to Success Act, Assembly Bill 12 (2010) (extending foster care benefits up to 21 years old); Ind. Collaborative Care Program (extending foster care benefits up to 20 years old and extending voluntary services until 21 years old); Minn. Stat. § 260C.451, subdivision 1 (extending foster care benefits to 21 years old); Va. Code § 63.2-905.1 (extending independent living services to former foster kids). Kentucky law allows a child to extend her commitment to the Commonwealth's Cabinet for health and Family Services in order to purse educational goals or acquire independent living skills to age 21. KRS 625.025. In 2008, the federal Social Security Act was amended to extend eligibility for certain foster care, adoption assistance and kinship guardianship payments for foster kids and adoptees up the age of 21. Pub. Law 110-351 §§ 201, 202.

There are also categorical age-based limits affecting professional activities, further corroborating scientific observations about the immaturity and impulsivity of those under 21 years old. For example, federal law requires a person to be at least 21 years old to drive a commercial vehicle interstate, transport passengers intrastate, or transport hazardous materials intrastate. See 49 C.F.R §§ 391.11(b)(1), 390.3(f), 391.2. The age of 23 is the minimum to become a Federal

Bureau of Investigation agent and 21 years old is the minimum age to become a special agent with the Drug Enforcement Agency.

Finally, the federal and various state constitutions impose age-of candidacy requirements for public office. For example, the minimum age to run for the U.S. House of Representatives is 25 years old. U.S. Const. Art. I § 2 cl. 2. Also, 27 states have even higher age restrictions.[82] Individuals are categorically barred from holding such an office in 33 states if he or she is under 21 years old.

In sum, it appears that where activities clearly require a certain level of responsibility, American jurisdictions are comfortable setting the minimum age at 21 or higher, rather than at 18. Likewise, state and federal laws extend protections to persons under 21 that might otherwise only apply to juveniles because of the vulnerability of these individuals and the need for society to protect this class. Tables A through G of the Memorandum[83] set forth the various age minimums and maximums for each state for selected activities.

3. In 2018, the American Bar Association published a Resolution urging every jurisdiction to prohibit the death penalty for offenders who were 21 years old or younger at the time of an offense.

The opinions of respected professional organizations are to also be considered by the Courts in evaluating whether a consensus is emerging. *Thompson*, 487 U.S. at 830. Along those lines, in February of 2018, the American Bar Association (ABA) published a Resolution and stated the following:

> RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to prohibit the

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[82] *Id.*, Table B, 468-469.
[83] *Id.*, 465-483

> imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense.

ABA Resolution, preface. (ABA Resolution attached in appendix). This resolution was based on legal, scientific and societal developments, including new understandings of brain science, since the opinion in *Roper* was rendered. Some of these were discussed in Section I.C. above. This Resolution consisted of a 17 page report and concluded as follows:

> In the decades since the ABA adopted it policy opposing capital punishment for individuals under the age of 18, legal, scientific and societal developments strip the continued application of the death penalty against individuals in late adolescence of its moral or constitutional justification. The rationale supporting the bans on executing either juveniles, as advanced in *Roper v. Simmons*, or individuals with intellectual disabilities, as set forth in *Atkins v. Virginia*, also apply to offenders who are 21 years old or younger when they commit their crimes. Thus, this policy proposes a practical limitation based on age that is supported by science, tracks many other areas of our civil and criminal law, and will succeed in making the administration of the death penalty fairer and more proportional to both the crimes and the offenders.
>
> In adopting this revised position, the ABA still acknowledges the need to impose serious and severe punishment on these individuals when the take the life of another person. Yet at the same time, this policy makes clear our recognition that individuals in late adolescence, in light of their ongoing neurological development, are not among the worst of the worst offenders, for whom the death penalty must be reserved. *Id.* at 12-14.

The opinion of numerous respected professional organizations, as expressed through the ABA and numerous *amici* briefs filed in this case that there is an indicia of consensus that the older adolescents herein should not be subject to execution.

The Commonwealth is incorrect in its representation of the indicia of consensus at issue regarding this case. As outlined above, a national consensus have been developing against executing offenders who were under 21 years old at

the time of an offense. Nineteen states and the District of Columbia and four of the five U.S. territories ban the death penalty (seven of these states have abolished the Death penalty since *Roper*). Four states have imposed moratoriums on executions during the past five years and during approximately the past 15 years, seven states have demonstrated an actual practice of neither executing nor sentencing to death offenders who were under 21 years old when they committed an offense. Furthermore, executions of individuals in this age range are rare in the states that continue to execute the death penalty. Moreover, respected national organizations, including the ABA, have voiced their opposition to executions of individuals who were under the age of 21 at the time of an offense and backed such opposition with reliable scientific and sociological studies. As such, the trial court was correct when it found that "the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).[84]

E. The Commonwealth's Unpreserved Objections to this Ruling Should Be Rejected.

As noted above, in the trial court the Commonwealth's objections were considerably less robust then they are here. In particular, the Commonwealth now argues that (a) other jurisdictions have already considered and rejected this claim, and (b) the scientific facts underlying this claim were known and considered at the time *Roper* was initially decided. Neither argument has merit, but this Court should reject both of them as unpreserved. First, if this Court wants to ensure that important issues of this nature are fully and completely litigated in the future, it

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[84] TR V, 667.

should act today to reaffirm the principle that the Commonwealth, like the defense, is obligated to make its case in the first instance to the trial court. Especially given how the trial court poured over thousands of pages of scientific information, all the while inviting the Commonwealth to participate much more than it did, it deserved the benefit of understanding the Commonwealth's position before it ruled. There will be no manifest injustice if the maximum penalty Mr. Bredhold faces is life without parole.

Second, to the extent that the Commonwealth is now attacking the testimony of Dr. Steinburg, it is not only asking this court to completely ignore the trial court's factual findings and the substantial evidence supporting them, it is asking this Court engage in rank speculation on what Dr. Steinburg might have said if he had been confronted with these issues when he was on the stand. Dr. Steinburg presented his testimony under oath, and supported it with dozens of studies published *after Roper*. The Commonwealth had plenty of opportunity to cross examine Dr. Steinburg on that point, or to present their own testimony which could have been cross examined by the defense. This Court has previously found that a factual finding is conclusive if it is supported by "evidence that a reasonable mind would accept as adequate to support a conclusion, or evidence that has sufficient probative value to induce conviction in the minds of reasonable men." *Johnson v. Commonwealth*, 412 S.W.3d 157, 166 (Ky. 2013). The same ruling should apply here.

That said, even if the Court considers the merits of the Commonwealth's arguments, they should be rejected.

1. This Claim Has Not Been Decided in Other Jurisdictions

While the Commonwealth claims that other courts have already rejected this claim, that greatly overstates its case. What is unprecedented about this case is that after hearing extensive evidence, the trial court made a clear factual finding that the scientific consensus today is that older adolescents suffer the same cognitive and decision-making limitations as juvenile offenders. None of the Commonwealth's cases contains such a factual finding. Indeed, most of the cases the Commonwealth relies upon do not even address this argument at all.

Among the cases the Commonwealth cites, *Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006), hits closest to home. There, this Court was asked to apply *Roper* to an individual based on his "mental age," as opposed to his chronological age. While this Court did not believe that the "mental age" evidence was sufficient to warrant relief, it was at pains not to reject the argument Mr. Bredhold is making today, stating that "[w]e do not necessarily disagree that, in theory, the broad concepts espoused by the Supreme Court could pertain to those who function at the mental level of a juvenile." *Id.* at 582. As this case was decided in the immediate aftermath of *Roper*, at that time there were no new scientific considerations to take into account that might have triggered an expansive view of *Roper*.

Out-of-state cases that followed *Bowling* also do not stand for the proposition that the *Roper* findings could never be extended to older individuals based on updated science. To the contrary, they seem to be little more than boilerplate efforts to raise some variation of Bowling's "mental age" claim. For example, *Mitchell v. State*, 235 P.3d 640, 658-660 (Okla. Crim. App. 2010) followed *Bowling* without any real independent analysis after an Appellant, in his

11th proposition of error, argued that *Roper* should apply to him even though he was over 18 at the time of the offense. All indications are that this issue was one of a plethora raised in a capital case and that no new arguments were made regarding indicia of consensus or new scientific research. Similarly, in *Thompson v. State*, 153 So.3d 84 (Ala.Ct.Crim.App. 2012), the issue appeared to also have been raised apparently as a boilerplate issue because it was summarily rejected without any real analysis on the 94th page of a 108 page opinion in a capital case. *Id.* at 178. Certainly neither of these cases involved direct evidence of categorical neurological similarities between 18-20 years olds and juveniles.

The Commonwealth also points to decisions in other jurisdictions that were decided after the order in the instant case, implying that these cases reject the conclusion that there has been a change in the scientific consensus. However, the Commonwealth's arguments regarding these cases are incredibly misleading. First, both cases were dismissed for procedural reasons, without a ruling on the merits of the claim. *See Otte v. State*, 96 N.E.3d 1288, 1293 (Ohio Ct.App.8th 2017) (dismissing the case "because Otte has no right to file a declaratory judgment action to challenge his death sentence"); *Branch v. State*, 236 So. 3d 981, 986 (Fla. 2018) (Rejecting the claim because "this claim is waived as it could have been raised previously.") Second, the Commonwealth implies that these courts rejected the factual findings made by the lower courts, but that is not accurate. In *Otte*, the majority opinion mentioned the order in this case, but only for the purpose of pointing out that as a Kentucky Circuit Court order, it did not meet the legal standards to reopen a post-conviction claim. That said, one of the judges in the case clearly was moved by the order, stating that "*I would suspend implementation*

of capital punishment for those who committed capital crimes before 21 years old." *Id.* at 1294 (McCormack, J., concurring) (emphasis added).

By contrast, *Branch* did not mention the order in this case, but did include a discussion of whether a brain study would qualify as "newly discovered evidence" for post-conviction purposes. Relying on *Morton v. State*, 995 So.2d 233 (Fla. 2008), the Court opined that it would not. However, what constitutes "newly discovered evidence" for post-conviction purposes is completely different than asking whether the science has progressed enough to demonstrate a new consensus regarding brain development in older adolescents at the trial level.

The remaining cases are also inapplicable to this issue. *See Hill v. State*, 921 So.2d 579 (Fla. 2006) (Summarily rejecting argument without analysis because Hill was 23 – a claim that would have been rejected by the trial court in this case as well); *Romero v. State*, 105 So.3d 550 (2012)(not a death penalty case); *United States v. Marshall*, 736 F.3d 492 (6th Cir. 2013)(same); *United States v. Lopez-Cabrera*, 2015 WL 3880503 (S.D.N.Y. June 23, 2015)(same).

2. The Scientific Evidence was Not Available at the Time of Roper

The Commonwealth's only argument regarding the scientific evidence in this case is that it was already available at the time of *Roper* and therefore *Roper* should be construed to have rejected this claim. CW Brief, pg. 24-27. That argument fails for a number of reasons. First, the statement is contradicted by the trial court's factual findings. As noted above, factual findings are conclusive when they are supported by substantial evidence. *Johnson*, 412 S.W.3d at 166.

Here, the trial court repeatedly found that the scientific consensus had changed in the years following *Roper*, such that "if the science in 2005 mandated

the ruling in *Roper,* the science in 2017 mandates this ruling". TR 5, pg. 667. "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 (20's); this notion is now widely accepted among neuroscientists." *Id.* pg. 668 (emphasis added). The trial court based its findings on "[r]ecent psychological research" and "[r]ecent neurobiological research." *Id.*, pp. 668 and 669. The evidence presented to the Court supports this finding. Not only did Dr. Steinburg testify directly to the scientific understanding had changed, but of the thirty (30) studies cited by the trial court in its findings related to the current science, all but one was published after *Roper* was decided. This completely contradicts the Commonwealth's assertion that "the research laid out in the *amicus* brief in *Roper* is the same as what Dr. Steinburg presented to the trial court in this matter." CW Brief, pg. 25. Quite the contrary – none of the research presented was available at the time.

Second, the Commonwealth's underlying legal contention – that *Roper* considered and rejected a bright line above 18 – is simply false. The Rules of the United States Supreme Court are clear that "[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court." Rules of the United States Supreme Court, Rule 14.1(a). As a corollary principle, the Supreme Court "does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Relevant to this case, the question raised by the case was "Is the imposition of the death penalty on a person who commits a murder at age seventeen 'cruel and unusual,' and thus barred by the Eighth and Fourteenth Amendments?." *Roper v. Simmons*, petition for

certiorari, 2003 WL 26089783 (U.S.), pg. i. That question did not permit the Supreme Court to venture into unexplored territory and consider any line above age 18. Not only was the science

F. Conclusion: The Trial Court's Ruling is Right and Should Be Affirmed

In an unbroken line of cases starting with *Atkins*, continuing through *Roper* and its progeny, and culminating in *Hall v. Florida* and *Moore v. Texas*, the United States Supreme Court has regularly rejected the arguments like those made by the Commonwealth in this case, which ask the Court to reject current science in favor of maintaining a bright line rule. *Roper* and *Atkins* both overturned recent precedents which had approved of execution of juveniles or the intellectually disabled, because changes in our scientific understanding of how juveniles or the intellectually disabled functioned, demanded it. Similarly, *Graham* and *Miller* adopted Eighth Amendment restrictions in an area that had never had them before, again because the science required it.

Very recent precedents continue to adopt this approach. In *Hall*, the Supreme Court rejected Florida's attempt to limit application of *Atkins* to those whose IQ score on standard tests were below 70. In rejecting that bright line rule, the Court noted that "[i]t is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Hall*, 5134 S. Ct. at 2000. That philosophy was reaffirmed in *Moore*, when the Court found that courts did not have "leave to diminish the force of the medical community's consensus." *Moore*, 137 S.Ct. at 1044. In both cases, what mattered to the Court was not preserving a bright line rule, it was

ensuring that the punishment at issue is justifiable in light of the best available scientific thinking.

Applying the best available scientific thinking to this case, this Court has no other choice but to affirm the lower courts' ruling. The scientific evidence is simply overwhelming that older adolescents perform no better than juveniles perform, and often perform worse. Older adolescents may function like kids, but they are often treated as adults, and so the risk that an older adolescent will be sentenced to death in error is even greater than what motivated the Court to act in *Roper*. Finally, the practice of executing older adolescents has been substantially abandoned throughout most of the nation, with only a handful of jurisdictions continuing to do it. In light of all of this, the trial court was completely correct to declare that older adolescents are categorically barred from the death penalty. The judgment should be affirmed.

II. Imposition of a Death Sentence for a Crime Committed by an Adolescent Aged 18-20 is Cruel Punishment Prohibited by § 17 of the Kentucky Constitution.

A. Preservation

This issue is not preserved for appellate review, in that no specific state constitutional argument was made within Mr. Bredhold's motion. However, it should be reviewed for palpable error under RCr 10.26. Having an unconstitutionally severe sentence imposed is clearly a "manifest injustice", and given the similarities between the Eighth Amendment analysis and the analysis under §17 of the Kentucky Constitution, there is no prejudice to the Commonwealth by deciding this claim for the first time on appeal.

B. Argument

"Section 17 of the Kentucky Constitution accords protections parallel to those accorded by the Eighth Amendment to the U.S. Constitution." *Turpin v. Commonwealth*, 350 S.W.3d 444, 448 (Ky. 2011). As with the United States Constitution, a punishment offends state constitutional provisions if it is "contrary to evolving standards of decency that mark the progress of a maturing society." *Baze v. Rees*, 217 S.W.3d 207, 211 (Ky. 2006), *aff'd*, 553 U.S. 35 (2008), citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *See also Harrison v. Commonwealth*, 858 S.W.2d 172, 177 (Ky. 1993)(employing same analysis to claims brought under § 17 of the Kentucky Constitution and claims brought under the Eighth Amendment to the U.S. Constitution); *Hampton v. Commonwealth*, 666 S.W.2d 737, 740-41 (Ky. 1984)(same); *Workman v. Commonwealth*, 429 S.W.2d 374, 377 (Ky. 1968)("[w]hat constitutes cruel and unusual punishment .... changes with the continual development of society and with sociological views concerning the punishment for crime.").

One test for whether a punishment practice comports with the Constitution is when there is objective indicia of a societal consensus rejecting the practice. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002). In determining whether there is a consensus rejecting a particular punishment, "actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62. As with claims under the Eighth Amendment, after the Court reviews the societal consensus in favor of or against a punishment, it applies its own judgment and independently "ask[s] whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313. Importantly,

this analysis can come to a different conclusion with reference to the state community standard than what was contemplated when reviewing a national community standard. *See State v. Santiago*, 318 Conn. 1, 20-29 (2015)(examining the societal consensus against the death penalty within Connecticut in holding the death penalty violates the state constitution); *State v. Lyle*, 854 N.W. 378, 389 (Iowa 2014)(relying, in part, on the consensus "building in Iowa in the direction of eliminating mandatory minimum sentencing" in holding the application of mandatory minimums to juvenile offenders violates the Iowa Constitution); *Van Tran v. State*, 66 S.W.3d 790, 804 (Tenn. 2001)(examining consensus within Tennessee to determine the execution of intellectually disabled persons violates the Tennessee State Constitution), *State v. Campbell*, 691 P.2d 929, 947-48 (Wash. 1984) (looking to "current community standards" within Washington in analyzing a state constitutional challenge to Washington's death penalty). This is due to the fact that the Court is looking only at the practices within the state when making its decision.

To that end, this Court has struck down punishments for violating the Kentucky Constitution, even when those practices were considered proper under the Eighth Amendment. *See, e.g., Workman, supra* (striking down life without parole for a juvenile non-homicide offense approximately 40 years before it was struck down under the Eighth Amendment.) If this Court concludes that the Eighth Amendment does not prohibit capital punishment for older adolescents, then it should make a decision similar to the holding in *Workman*, and find that the capital punishment violates the Kentucky Constitution.

Proceeding to declare the death sentence unconstitutional with relation to this population on state law grounds alone would have the salutary effect of avoiding having to unwind this penalty at a later time. The testimony in this case makes clear that it is supported by a strong scientific consensus, based on conclusions that are now regarded as established scientific fact. Eventually this fact will lead society away from this penalty for this population. Making the change today will spare the Commonwealth much needless expense for litigating crimes that should not be tried as capital cases.

The cost of not making this change is evident in this individual case. Travis is clearly not the "worst of the worst". His offense does not appear to have elements of premeditation or cold-bloodedness, but appears to be more in the nature of a "robbery gone wrong." The trial court found that Travis was functioning at the level of a 14 year old at the time of the offense, making him neither a hardened criminal nor a criminal mastermind. Nevertheless, the Commonwealth has sought the death penalty against him. The taxpayers will pay the extra cost of a capital prosecution in this case even though Travis is not an appropriate person to receive that penalty. Even if the jury reaches that conclusion, the expense will have already been borne by society.

Rather than continue this practice, this Court should declare that the death sentence violates § 17 of the Kentucky Constitution when imposed upon individuals under the age of twenty-one (21) at the time of the offense.

Conclusion

For the foregoing reasons, the judgment of the Fayette Circuit Court should be affirmed.

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