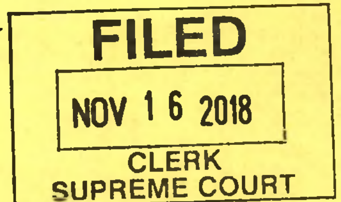
Commonwealth of Kentucky
Supreme Court

CASE NO. 2017-SC-000436-TG



COMMONWEALTH OF KENTUCKY **APPELLANT**

Appeal from Fayette Circuit Court
v. Hon. Ernesto Scorsone, Judge
Indictment No. 14-CR-161

TRAVIS M. BREDHOLD **APPELLEE**

Reply Brief for Commonwealth

Submitted by,

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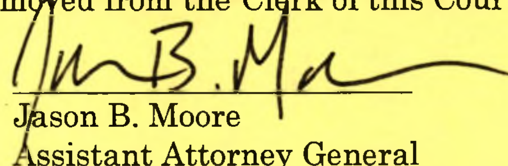
CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2018, the foregoing Brief for the Commonwealth was served, first class, postage pre-paid, U.S. mail to Hon. Ernesto Scorsone, Judge, Fayette Circuit Court, Robert F. Stephens Circuit Courthouse, 120 North Limestone, Lexington, Kentucky 40507; and via state messenger mail to Hon. Timothy G. Arnold and Hon. Brandon Neil Jewell, Asst. Public Advocates, Dept. Of Public Advocacy, 5 Mill Creek, Section 100, Frankfort, Kentucky 40601, counsel for appellee, and via electronic mail to Hon. Lou Anna Red Corn, Fayette County Commonwealth Attorney. I further certify that the record on appeal has not been removed from the Clerk of this Court's office.



Jason B. Moore
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PURPOSE OF THIS REPLY BRIEF

This Reply Brief responds to Bredhold's appellee brief. Any failure to respond to any particular argument should not be taken as a waiver of an issue or argument.

I.

THE ISSUE PRESENTED HEREIN AND THE COMMONWEALTH'S ARGUMENTS FOR REVERSAL ARE PROPERLY BEFORE THE COURT FOR REVIEW

In his brief, Bredhold asserts the arguments made in Sections I.C. and I. E. of the Commonwealth's opening brief "should be treated as unpreserved" because those arguments were purportedly not raised by the Commonwealth in opposition to Bredhold's motion in the trial court. Bredhold's assertion is simply wrong.

It is well-established that any challenge to the constitutionality of a statute begins with a basic presumption that the statute is constitutional. *See Util. Mgmt. Grp., LLC v. Pike Cty. Fiscal Court*, 531 S.W.3d 3, 12 (Ky. 2017); *Martinez v. Commonwealth*, 72 S.W.3d 581, 584 (Ky. 2002). "Because statutes are presumed constitutional, the party challenging a statute, *not the state*, bears the burden of proving the statute is unconstitutional." *Delahanty v. Commonwealth*, --- S.W.3d ---, 2018 WL 2372794 (Ky.App. 2018) (emphasis original).[1] Given the burden of proof in this matter was entirely Bredhold's

[1] This opinion became final upon this Court's denial of discretionary review on October 25, 2018. CR 76.30(2)(b).

and that the statute carries a presumption of constitutionality, the Commonwealth's arguments that the trial court erred in holding Bredhold met the high burden of proving the statute unconstitutional are properly before this Court for *de novo* review of that decision.

In Section I.C. of its opening brief, the Commonwealth laid out an extensive review of case law from this Court and other jurisdictions plainly showing there is no national trend for extending the holding of *Roper v. Simmons*, 543 U.S. 551 (2005), and the cases that followed it from the United States Supreme Court, to defendants over the age of eighteen at the time of the offense. As that case law demonstrates, arguments such as those made in this case have been raised by defendants over the age of eighteen since before the ink was hardly dry on the *Roper* opinion in 2006, *See Hill v. State*, 921 So.2d 579 (Fla. 2006); *T.C. Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006), and have persistently continued thorough the past twelve years. *See Branch v. State*, 236 So.3d 981 (Fla. 2018); *People v. Powell*, 425 P.3d 1006 (Cal. 2018). All such attempts, however, have been uniformly rejected.

In his brief, Bredhold acknowledges the Commonwealth argued the trial court should deny his motion "because no other state had made such a ruling[.]" Blue Brief, p. 13. That is precisely the argument made by the Commonwealth in Section I.C. of its opening brief. Unlike the trial court, which broke from a long line of unanimous decisional authority to the contrary, this Court should follow that line and reverse the trial court's order.

In Section I.E. of its opening brief, the Commonwealth, contrary to Bredhold's assertion, was not "attacking the testimony of Dr. Steinberg." Blue Brief, p. 35. Rather, the Commonwealth laid out for this Court the fact that Dr. Steinberg's testimony did not present "new" science that had only been developed since 2006 when *Roper* was rendered. While some of the studies and papers Dr. Steinberg authored, or relied on, in support of his testimony had been published after the rendition of *Roper*, the basic science, "that two key developmental processes, myelination ... and pruning of neural connections, continue to take place ... well into adulthood[,]" was well developed prior to 2006. See Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 Psychol. Pub. Pol'y. & L. 115, 120 (2007).

As the Commonwealth noted, this science was well-developed and has been presented to the United States Supreme Court in all of its juvenile sentencing cases via *Amici* briefs from the American Psychological Association with Dr. Steinberg being the lead of a team of scientists providing the research for those briefs. Despite this developed science, the United States Supreme Court has continued to draw the line between juveniles and adults at eighteen for sentencing purposes. The fact that studies since 2006 have continued to show what was known by the scientific community in 2007 and before, should not alter that well-established line.

II.

BREDHOLD IS NOT ENTITLED TO RELIEF UNDER SECTION 17 OF THE KENTUCKY CONSTITUTION

Bredhold also asserts a new theory for this Court to find the death penalty unconstitutional for defendant's under the age of twenty-one on the basis of Section 17 of the Kentucky Constitution. He concedes he made no such argument to the trial court below, and, therefore, this Court should not consider this newly asserted claim for relief. "Since this is an appellate court, our function is to review possible errors made by the trial court. If such court has had no opportunity to rule on a question, there is no alleged error before us to review." *Commonwealth, Dept. of Highways v. Williams*, 317 S.W.2d 482, 484 (Ky. 1958). In any event, this Court has made clear that "Section 17 of the Kentucky Constitution accords protections parallel to those accorded by the Eight Amendment to the U.S. Constitution." *Turpin v. Commonwealth*, 350 S.W.3d 444, 448 (Ky. 2011).

CONCLUSION

Thirty (30) states maintain the death penalty as a sentencing option,[2] and none of those states exclude the imposition of the penalty for offenders over the age of eighteen but less than twenty-one. The age of eighteen remains the age of majority for most purposes in our society, just as it was when *Roper* was decided. The trial court erred by extending the line drawn by the United States Supreme Court in *Roper*, and maintained in subsequent cases. Its order declaring the death penalty unconstitutional for persons under the age of twenty-one must be reversed.

Respectfully submitted,

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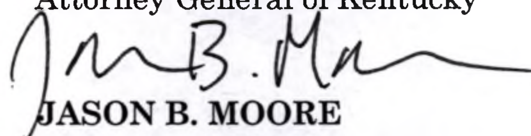

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[2] Since the filing of its opening brief in this matter, the Washington Supreme Court held capital punishment was unconstitutional under its state constitution, *State v. Gregory*, 427 P.3d 621 (Wash. 2018), bringing the number of states with outright bans on the death penalty to twenty (20).

Bredhold maintains that Delaware has also abolished the death penalty, but that is not correct. Rather, in *Rauf v. State*, 145 A.3d 430 (Del. 2016), the Delaware Supreme Court struck down the state's death penalty statute because it violated the Sixth Amendment as set forth in *Hurst v. Florida*, 136 S.Ct. 616 (2016). Despite this, Delaware should still be counted as a death penalty state for purposes of determining a national consensus under the Eighth Amendment. *See Roper*, 543 U.S. at 579, Appendix A.II. (including Kansas and New York as "states that retain the death penalty, but set minimum age at 18" despite "decisions by the highest courts of [each state] invalidat[ing] provisions in those States' death penalty statutes.").