ADOPTED

AMERICAN BAR ASSOCIATION

DEATH PENALTY DUE PROCESS REVIEW PROJECT
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

REPORT

Introduction

The American Bar Association (ABA) has long examined the important issue of the death penalty and has sought to ensure that capital punishment is applied fairly, accurately, with meaningful due process, and only on the most deserving individuals. To that end, the ABA has taken positions on a variety of aspects of the administration of capital punishment, including how the law treats particularly vulnerable defendants or those with disabilities. In 1983, the ABA became one of the first organizations to call for an end of using the death penalty for individuals under the age of 18.[1] In 1997, the ABA called for a suspension of executions until states and the federal government improved several aspects of their administration of capital punishment, including removing juveniles from eligibility.[2]

Now, more than 35 years since the ABA first opposed the execution of juvenile offenders, there is a growing medical consensus that key areas of the brain relevant to decision-making and judgment continue to develop into the early twenties. With this has come a corresponding public understanding that our criminal justice system should also evolve in how it treats late adolescents (individuals age 18 to 21 years old), ranging from their access to juvenile court alternatives to eligibility for the death penalty. In light of this evolution of both the scientific and legal understanding surrounding young criminal defendants and broader changes to the death penalty landscape, it is now time for the ABA to revise its dated position and support the exclusion of individuals who were 21 years old or younger at the time of their crime.

The ABA has been – and should continue to be – a leader in supporting developmentally appropriate and evidence-based solutions for the treatment of young people in our criminal justice system, including with respect to the imposition of the death penalty. In 2004, the ABA filed an amicus brief in *Roper v. Simmons,* in which the U.S. Supreme Court held that the Eighth Amendment prohibited the imposition of the death penalty on individuals below the age of 18 at the time of their crime.[3] It also filed an amicus brief in 2012 in *Miller v. Alabama,* concerning the constitutionality of mandatory life without parole sentences for juveniles convicted of homicides.[4] The ABA's brief in *Roper*

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[1] ABA House of Delegates Recommendation 117A, (adopted Aug. 1983), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/juvenile_offenders_death_penalty0883.authcheckdam.pdf.

[2] ABA House of Delegates Recommendation 107 (adopted Feb. 1997), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/aba_policy_consistency97.authcheckdam.pdf.

[3] Brief for the ABA as Amicus Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005).

[4] Brief for the ABA as Amicus Curiae Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012).

emphasized our long-standing position that juvenile offenders do not possess the heightened moral culpability that justifies the death penalty.[5] It also demonstrated that under the "evolving standards of decency" test that governs the Eighth Amendment, over 50 percent of death penalty states had already rejected death as an appropriate punishment for individuals who committed their crimes under the age of 18.[6] In *Miller*, the ABA stressed that mandatory life without parole sentences for juveniles, even in homicide cases, were categorically unconstitutional because "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation."[7]

Not only has the U.S. Supreme Court held that there is a difference in levels of criminal culpability between juveniles and adults generally,[8] but the landscape of the American death penalty has changed since 1983. Fifty-two out of 53 U.S. jurisdictions now have a life without parole (LWOP) option, either by statute or practice;[9] and the overall national decline in new death sentences corresponds with an increase in LWOP sentences in the last two decades.[10] In 2016, 31 individuals received death sentences,[11] and only two of those individuals were under the age of 21 at the time of their crimes.[12] As of the date of this writing, 23 individuals had been executed in 2017, further reflecting a national decline in the imposition of capital punishment.[13] The U.S. Supreme Court has also recognized that the Eighth Amendment's evolving standards of decency has made other groups categorically ineligible for the death penalty – most notably individuals with intellectual disability.[14]

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[5] Brief for the ABA as Amicus Curiae Supporting Respondent at 5-11, *Roper v. Simmons*, 543 U.S. 551 (2005).
[6] Brief for the ABA as Amicus Curiae Supporting Respondent at 18, *Roper v. Simmons*, 543 U.S. 551 (2005).
[7] Brief for the ABA as Amicus Curiae Supporting Petitioners at 12*, Miller v. Alabama*, 567 U.S. 460 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 79 (2010)).
[8] *See, e.g., Miller v. Alabama,* 567 U.S. 460, 474 (2012); *Graham v. Florida ,* 560 U.S. 48, 50, 76 (2010); *Roper v. Simmons*, 543 U.S. 551, 553 (2005).
[9] *See Life Without Parole,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/life-without-parole (last visited Sept. 28, 2017).
[10] Notes, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1845- 47 (2006).
[11] *Facts about the Death Penalty,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Nov. 7, 2017).
[12] Damantae Graham was under the age of 19 at the time of his crime. *See* Jen Steer, *Man Sentenced to Death in Murder of Kent State Student,* FOX 8 (Nov. 15, 2016), http://fox8.com/2016/11/15/man-sentenced-to-death-in-murder-of-kent-state-student. Justice Jerrell Knight was under the age of 21 at the time of his crime. *See* Natalie Wade, *Dothan Police Arrest Teenager in Murder of Dothan Man; Another Suspect Still at Large,* AL.COM (Feb. 8, 2012), http://blog.al.com/montgomery/2012/02/dothan_police_arrest_teenager.html.
[13] *See Searchable Execution Database,* DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2017&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply (last visited Nov. 13, 2017).
[14]*See Atkins v. Virginia*, 536 U.S. 306 (2002). The ABA was at the forefront of this movement as well, passing a resolution against executing persons with intellectual disability in 1989. *See* ABA House of Delegates Recommendation 110 (adopted Feb. 1989),

Furthermore, the scientific advances that have shaped our society's improved understanding of the human brain would have been unfathomable to those considering these issues in 1983. In 1990, President George H.W. Bush launched the "Decade of the Brain" initiative to "enhance public awareness of benefits to be derived from brain research."[15] Advances in neuroimaging techniques now allow researchers to evaluate a living human brain.[16] Indeed, neuroscience "had not played any part in [U.S. Supreme Court] decisions about developmental differences between adolescents and adults," likely due to "how little published research there was on adolescent brain development before 2000."[17] These and other large-scale advances in the understanding of the human brain, have led to the current medical recognition that brain systems and structures are still developing into an individual's mid-twenties.

It is now both appropriate and necessary to address the issue of late adolescence and the death penalty because of the overwhelming legal, scientific, and societal changes of the last three decades. The newly-understood similarities between juvenile and late adolescent brains, as well as the evolution of death penalty law and relevant standards under the Eighth Amendment lead to the clear conclusion that individuals in late adolescence should be exempted from capital punishment.[18] Capital defense attorneys are increasingly making this constitutional claim in death penalty litigation and this topic has become part of ongoing juvenile and criminal justice policy reform conversations around the country. As the ABA is a leader in protecting the rights of the vulnerable and ensuring that our justice system is fair, it is therefore incumbent upon this organization to recognize the need for heightened protections for an additional group of individuals: offenders whose crimes occurred while they were 21 years old or younger.

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http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_retardation_exemption0289.authcheckdam.pdf; *see also Kennedy v. Louisiana,* 554 U.S. 407, 413 (2008) (holding that the Eighth Amendment prohibits execution for crime of child rape, when victim does not die and death was not intended).

[15] *Project on the Decade of the Brain*, LIBR. OF CONGRESS, http://www.loc.gov/loc/brain/ (last visited Oct. 6, 2017).

[16] B.J. Casey, *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104,104-10 (2005).

[17] Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions about Adolescents' criminal Culpability*, 14 NATURE REVIEWS NEUROSCIENCE 513, 513-14 (2013).

[18] Earlier this year, a Kentucky Circuit Court held pre-trial evidentiary hearings in three cases and found that it is unconstitutional to sentence to death individuals "under twenty-one (21) years of age at the time of their offense."*See Commonwealth v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 14-CR-161, *1, 12 (Fayette Circuit Court, Aug. 1, 2017); *Commonwealth v. Smith*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 15-CR-584-002, *1, 12 (Fayette Circuit Court, Sept. 6, 2017); *Commonwealth v. Diaz*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 15-CR-584-001, *1, 11 (Fayette Circuit Court, Sept. 6, 2017).).

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Major Constitutional Developments in the Punishment of Juveniles for Serious Crimes

The rule that constitutional standards must calibrate for youth status is well established. The U.S. Supreme Court has long recognized that legal standards developed for adults cannot be uncritically applied to children and youth.[19] Although "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[20] the Court has held that "the Constitution does not mandate elimination of all differences in the treatment of juveniles."[21]

As noted above, between 2005 and 2016, the U.S. Supreme Court issued several landmark decisions that profoundly alter the status and treatment of youth in the justice system.[22] Construing the Eighth Amendment, the Court held in *Roper v. Simmons* that juveniles are sufficiently less blameworthy than adults, such that the application of different sentencing principles is required under the Eighth Amendment, even in cases of capital murder.[23] In *Graham v. Florida*, the Court, seeing no meaningful distinction between a sentence of death or LWOP, found that the Eighth Amendment categorically prohibited LWOP sentences for non-homicide crimes for juveniles.[24]

Then, in *Miller v. Alabama,* the U.S. Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."[25] Justice Kagan, writing for the majority*,* was explicit in articulating the Court's rationale: the mandatory imposition of LWOP sentences "prevents those meting out punishment from considering a juvenile's 'lessened culpability 'and greater 'capacity for change,'[26] and runs afoul of our cases 'requirement of individualized sentencing for defendants facing the most serious penalties.'"[27] The Court grounded its holding "not only on common sense…but on science and social science as

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[19] *See, e.g.*, *May v. Anderson*, 345 U.S. 528, 536 (1953) ("Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State 's duty towards children."); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) ("[A child] cannot be judged by the more exacting standards of maturity.").

[20] *In re Gault*, 387 U.S. 1, 13 (1967).

[21] *Schall v. Martin*, 467 U.S. 253, 263 (1984) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)) (holding that juveniles have no right to jury trial).

[22] Apart from the sentencing decisions discussed herein, the Court, interpreting the Fifth and Fourteenth Amendments, held in *J.D.B. v. North Carolina,* that a juvenile's age is relevant to the *Miranda* custody analysis. 564 U.S. 261, 264 (2011). In all of these cases, the Court adopted settled research regarding adolescent development and required the consideration of the attributes of youth when applying constitutional protections to juvenile offenders.

[23] 543 U.S. 551, 570-71 (2005).

[24] 560 U.S. 48, 74 (2010).

[25] 567 U.S. 460, 479 (2012).

[26] *Miller v. Alabama,* 567 U.S. 460, 465 (2012) (citing *Graham* v. *Florida*, 560 U.S. 48, 68, 74 (2010)).

[27] *Miller,* 567 U.S. at 480.

well,"[28] all of which demonstrate fundamental differences between juveniles and adults.

The Court in *Miller* noted the scientific "findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"[29] Importantly, the Court specifically found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific."[30] Relying on *Graham*, *Roper*, and other previous decisions on individualized sentencing, the Court held "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."[31] The Court also emphasized that a young offender's moral failings could not be comparable to an adult's because there is a stronger possibility of rehabilitation.[32]

In 2016, the U.S. Supreme Court in *Montgomery v. Louisiana* expanded its analysis of the predicate factors that the sentencing court must find before imposing a life without parole sentence on a juvenile.[33] *Montgomery* explained that the Court's decision in *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.[34] The Court held "that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption*,"* noting that a life without parole sentence "could [only] be a proportionate sentence for the latter kind of juvenile offender."[35]

Collectively, these decisions demonstrate a distinct Eighth Amendment analysis for youth, premised on the simple fact that young people are different for the purposes of criminal law and sentencing practices. Relying on prevailing developmental research and common human experience concerning the transitions that define adolescence, the Court has recognized that the age and special characteristics of young offenders play a critical role in assessing whether sentences imposed on them are disproportionate under the Eighth Amendment.[36] More specifically, the cases recognize three key characteristics that distinguish adolescents from adults: "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more

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[28] *Id.* at 471.
[29] *Id.* at 472 (quoting *Graham,* 560 U.S. at 68; *Roper,* 543 U.S. at 570).
[30] *Id.* at 473.
[31] *Id.* at 477.
[32] *Miller 567* U.S. at 471 (citing *Roper,* 543 U.S. at 570).
[33] *Montgomery v. Louisiana,* 577 U.S. __, 136 S. Ct. 718 (2016).
[34] *Id*. at 734 (emphasis added).
[35] *Id.* (emphasis added).
[36] *See Graham*, 560 U.S. at 68; *see also Miller*, 567 U.S. at 471-72.

vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'"[37]

As both the majority and the dissent agreed in *Roper* and *Graham*, the U.S. Supreme Court has supplanted its "death is different" analysis in adult Eighth Amendment cases for an offender-focused "kids are different" frame in serious criminal cases involving young defendants.[38] Indeed, in *Graham v. Florida*, the Court wrote "criminal procedure laws that fail to take defendants' 'youthfulness into account at all would be flawed."[39]

Increased Understanding of Adolescent Brain Development

American courts, including the U.S. Supreme Court, have increasingly relied on and cited to a comprehensive body of research on adolescent development in its opinions examining youth sentencing, capability, and custody.[40] The empirical research shows that most delinquent conduct during adolescence involves risk-taking behavior that is part of normative developmental processes.[41] The U.S. Supreme Court in *Roper v. Simmons* recognized that these normative developmental behaviors generally lessen as youth mature and become less likely to reoffend as a direct result of the maturational process.[42] In *Miller and Graham,* the Court also recognized that this maturational process is a direct function of brain growth, citing research showing that the frontal lobe, home to key components of circuitry underlying "executive functions" such as planning, working memory, and impulse control, is among the last areas of the brain to mature.[43]

In the years since *Roper*, research has consistently shown that such development actually continues beyond the age of 18. Indeed, the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development. While there were findings that pointed to this conclusion prior to 2005,[44] a wide body of research has since provided us with an

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[37] *Miller,* 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569-70).
[38] *See Graham v. Florida*, 560 U.S. 48, 102-103 (2010) (Thomas, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 588-89 (2005) (O'Connor, J., dissenting).
[39] 560 U.S. at 76.
[40] *See, e.g.*, *Roper v. Simmons,* 543 U.S. 551, 569-70 (2005); *Graham v. Florida*, 560 U.S 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012).
[41] NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 66-74 (Joan McCord et al. eds., National Academy Press 2001).
[42] *See Roper*, 543 U.S. at 570-71; *see also* NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 91 (Richard J. Bonnie et al. eds., Nat'l Acad. Press, 2013).
[43] *See Miller v. Alabama*, 567 U.S. 460, 472 (2012); *Graham* v. *Florida,* 560 U.S. 48, 68 (2010).
[44] *See, e.g.,* Graham Bradley & Karen Wildman, *Psychosocial Predictors of Emerging Adults' Risk and Reckless Behaviors*, 31 J. YOUTH & ADOLESCENCE 253, 253–54, 263 (2002) (explaining that, among emerging adults in the 18-to-25-year-old age group, reckless behaviors—defined as those actions that are not socially approved–were found to be reliably predicted by antisocial peer pressure and stating that "antisocial peer pressure appears to be a continuing, and perhaps critical, influence upon [reckless] behaviors well into the emerging adult years"); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 AM.

expanded understanding of behavioral and psychological tendencies of 18 to 21 year olds.[45]

Findings demonstrate that 18 to 21 year olds have a diminished capacity to understand the consequences of their actions and control their behavior in ways similar to youth under 18.[46] Additionally, research suggests that late adolescents, like juveniles, are more prone to risk-taking and that they act more impulsively than older adults in ways that likely influence their criminal conduct.[47] According to one of the studies conducted by Dr. Laurence Steinberg, a leading adolescent development expert, 18 to 21 year olds are not fully mature enough to anticipate future consequences.[48]

More recent research shows that profound neurodevelopmental growth continues even into a person's mid to late twenties.[49] A widely-cited longitudinal

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PSYCHOLOGIST 1009, 1013, 1016 (2003) ("[T]he results of studies using paper-and-pencil measures of future orientation, impulsivity, and susceptibility to peer pressure point in the same direction as the neurobiological evidence, namely, that brain systems implicated in planning, judgment, impulse control, and decision making continue to mature into late adolescence. . . . Some of the relevant abilities (e.g., logical reasoning) may reach adult-like levels in middle adolescence, whereas others (e.g., the ability to resist peer influence or think through the future consequences of one's actions) may not become fully mature until young adulthood.").

[45] *See* Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731 (2007) ("When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual's future behavior and structural brain development.") (citing Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766, 766–67 (2006)); Damien A. Fair et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization,* 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 626, 632, 634 (2005) (examining a sample of 306 individuals in 3 age groups—adolescents (13-16), youths (18-22), and adults (24 and older) and explaining that "although the sample as a whole took more risks and made more risky decisions in groups than when alone, this effect was more pronounced during middle and late adolescence than during adulthood" and that "the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions"); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91 (2008) (noting that "the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults").

[46] *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 343 (1992); Kathryn L. Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 L. & HUM. BEHAV. 78, 79 (2008) ("In general, the age curve shows crime rates escalating rapidly between ages 14 and 15, topping out between ages 16 and 20, and promptly deescalating.").

[47] *See* Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy,* 85 FORDHAM L. REV. 641, 644 (2016).

[48] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 (2009).

[49] *See* Christian Beaulieu & Catherine Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood, 27* J. OF NEUROSCIENCE 31 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women*

study sponsored by the National Institute of Mental Health tracked the brain development of 5,000 children, discovering that their brains were not fully mature until at least 25 years of age.[50] This period of development significantly impacts an adolescent's ability to delay gratification and understand the long-term consequences of their actions.[51]

Additionally, research has shown that youth are more likely than adult offenders to be wrongfully convicted of a crime.[52] Specifically, an analysis of known wrongful conviction cases found that individuals under the age of 25 are responsible for 63 percent of false confessions.[53] Late adolescents' propensity for false confessions, combined with the existing brain development research, supports the conclusion that late adolescents are a vulnerable group in need of additional protection in the criminal justice system.[54]

Legislative Developments in the Legal Treatment of Individuals in Late Adolescence

The trend of treating individuals in late adolescence differently from adults goes well beyond the appropriate punishment in homicide cases. As noted, scientists, researchers, practitioners and corrections professionals are all now recognizing that individuals in late adolescence are developmentally closer to their peers under 18 than to those adults who are fully neurologically developed. In response to that understanding, both state and federal legislators have created greater restrictions and protections for late adolescents in a range of areas of law.

For example, in 1984, the U.S. Congress passed the National Minimum Drinking Age Act, which incentivized states to set their legal age for alcohol purchases at age 21.[55] Since then, five states (California, Hawaii, New Jersey, Maine, and Oregon) have also raised the legal age to purchase cigarettes to age 21.[56] In addition to restrictions on purchases, many car rental companies have

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(Ages 0 to 85 Years) Measures with Atlas-Based Parcellation of MRI, 65 NEUROIMAGE 176. 176-193 (2013).

[50] Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1358–59 (2010).

[51] *See* Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 28 (2009).

[52] *Understand the Problem*, BLUHM LEGAL CLINIC WRONGFUL CONVICTIONS OF YOUTH, http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem/ (last visited Nov. 10, 2017).

[53] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004).

[54] *See Atkins v. Virgina*, 536 U.S. 304, 320-21 (2002) (possibility of false confessions enhances the imposition of the death penalty, despite factors calling for less severe penalty).

[55] 23 U.S.C. § 158 (1984).

[56] Jenni Bergal, *Oregon Raises Cigarette-buying age to 21*, WASH. POST, (Aug. 18, 2017), https://www.washingtonpost.com/national/health-science/oregon-raises-cigarette-buying-age-to-21/2017/08/18/83366b7a-811e-11e7-902a-2a9f2d808496_story.html?utm_term=.132d118c0d10.

set minimum rental ages at 20 or 21, with higher rental fees for individuals under age 25.[57] Under the Free Application for Federal Student Aid (FASFA), the Federal Government considers individuals under age 23 legal dependents of their parents.[58] Similarly, the Internal Revenue Service allows students under the age of 24 to be dependents for tax purposes.[59] The Affordable Care Act also allows individuals under the age of 26 to remain on their parents' health insurance.[60]

In the context of child-serving agencies, both the child welfare and education systems in states across the country now extend their services to individuals through age 21, recognizing that youth do not reach levels of adult independence and responsibility at age 18. In fact, 25 states have extended foster care or state-funded transitional services to late adolescents through the Fostering Connections to Success and Increasing Adoptions Act of 2008.[61] Under the Individuals with Disabilities Education Act (IDEA), youth and late adolescents (all of whom IDEA refers to as "children") with disabilities who have not earned their traditional diplomas are eligible for services through age 21.[62] Going even further, 31 states allow access to free secondary education for students 21-years-old or older.[63]

Similar policies protect late adolescents in both the juvenile and adult criminal justice systems. Forty-five states allow youth up to age 21 to remain under the jurisdiction of the juvenile justice system.[64] Nine of those states also allow individuals 21 years old and older to remain under the juvenile court's jurisdiction, including four states that have set the maximum jurisdictional age at 24.[65] A number of states have created special statuses, often called "Youthful

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

[58] *See Dependancy Status,* FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/fafsa/filling-out/dependency (last visited Sept. 21, 2017).

[59] *See Dependants and Exemptions 7,* I.R.S, https://www.irs.gov/faqs/filing-requirements-status-dependents-exemptions/dependents-exemptions/dependents-exemptions-7 (last visited Sept. 21, 2017); 26 U.S.C. § 152 (2008).

[60] 42 U.S.C. § 300gg-14 (2017).

[61] *See Extending Foster Care to 18*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx.

[62] 20 U.S.C. § 1412 (a)(1)(A) (2017).

[63] *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2015*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp.

[64] Jurisdictional Boundaries, *Juvenile Justice Geography, Policy, Practice & Statistics*, NAT'L CTR. FOR JUV. JUST.,http://www.jjgps.org/jurisdictional-boundaries#delinquency-age-boundaries?year=2016&ageGroup=3 (last visited Nov. 8, 2017).

[65] *Id.*

Offender" or "Serious Offender" status that allows individuals in late adolescence to benefit from similar protections to the juvenile justice system, specifically related to the confidentiality of their proceedings and record sealing.[66]

For example, in 2017, the Vermont legislature changed the definition of a child for purposes of juvenile delinquency proceedings in the state to an individual who "has committed an act of delinquency after becoming 10 years of age and prior to becoming 22 years of age."[67] This change affords late adolescents access to the treatment and other service options generally associated with juvenile proceedings.[68] In 2017, Connecticut, Illinois, and Massachusetts legislators were considering similar efforts to provide greater protections to young adults beyond the age of 18.[69] Notably, even when late adolescents enter the adult criminal justice system, some states have created separate correctional housing and programming for individuals under 25.[70]

Furthermore, several European countries maintain similarly broad approaches to treatment of late adolescents who commit crimes. In countries like England, Finland, France, Germany, Italy, Sweden, and Switzerland, late adolescence is a mitigating factor either in statute or in practice that allows many 18 to 21 year olds to receive similar sentences and correctional housing to their peers under 18.[71]

There has thus been a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18. These various laws and policies, designed to both restrict and protect individuals in this late adolescent age group, reflect our society's evolving view of the maturity and culpability of 18 to 21 year olds, and beyond. Virtually all of these important reforms have come after 1983, when the ABA first passed its policy concerning the age at which individuals should be exempt from the death penalty.

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[66] *See* FLA. STAT. § 958.04 (2017) (under 21); D.C. CODE § 24-901 *et seq.* (2017) (under 22); S.C. CODE ANN. § 24-19-10 *et seq.* (2017) (under 25); *see also* 33 V.S.A § 5102, 5103 (2017) (under 22).

[67] The legislature made this change in 2017 in order to make Vermont law consistent, as it had also expanded its Youthful Offender Status in 2016 so that 18-to-21-year-olds would be able to have their cases heard in the juvenile court versus the adult court. *See* H. 95, 2016 Leg., Reg. Sess. (Vt. 2016); S. 23, 2017 Leg., Reg. Sess. (Vt. 2017).

[68] *Id.*

[69] *See* H.B. 7045, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017); H.B. 6308, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); H. 3037, 190th Gen. Ct., Reg. Sess. (Mass. 2017).

[70] *See* S.C. CODE Ann. § 24-19-10; H. 95, 2016 Leg., Reg. Sess. (Vt. 2016); *Division of Juvenile Justice,* CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Juvenile_Justice/ (last visited on Oct. 16, 2017); *Oregon Youth Authority Facility Services*, OR. YOUTH AUTH., http://www.oregon.gov/oya/pages/facility_services.aspx#About_OYA_Facilities (last visited on Oct. 18, 2017), Christopher Keating, *Connecticut to Open Prison for 18-to-25 Year Olds*, HARTFORD COURANT (Dec. 17, 2015), http://www.courant.com/news/connecticut/hc-connecticut-prison-young-inmates-1218-20151217-story.html.

[71] Ineke Pruin & Frieder Dunkel, TRANSITION TO ADULTHOOD & UNIV. OF GREIFSWALD, BETTER IN EUROPE? EUROPEAN RESPONSES TO YOUNG ADULT OFFENDING: EXECUTIVE SUMMARY 8-10 (2015).

Purposes Served by Executing Individuals in Late Adolescence

Regardless of whether one considers the death penalty an appropriate punishment for the worst murders committed by the worst offenders, it has become clear that the death penalty is indefensible as a response to crimes committed by those in late adolescence. As discussed in this report, a growing body of scientific understanding and a corresponding evolution in our standards of decency undermine the traditional penological purposes of executing defendants who committed a capital murder between the ages of 18 and 21. Just as the ABA has done when adopting earlier policies, we must consider the propriety of the most common penological justifications for the death penalty: "retribution and deterrence of capital crimes by prospective offenders."[72]

Capital punishment does not effectively or fairly advance the goal of retribution within the context of offenders in late adolescence. Indeed, the Eighth Amendment demands that punishments be proportional and personalized to both the offense and the offender.[73] Thus, to be in furtherance of the goal of retribution, those sentenced to death – the most severe and irrevocable sanction available to the state – should be the most blameworthy defendants who have also committed the worst crimes in our society. As has been extensively discussed above, contemporary neuroscientific research demonstrates that several relevant characteristics typify late adolescents' developmental stage, including: 1) a lack of maturity and an underdeveloped sense of responsibility, 2) increased susceptibility to negative influences, emotional states, and social pressures, and 3) underdeveloped and highly fluid character.[74]

The U.S. Supreme Court's holdings in *Roper* and *Atkins* were based on the findings that society had redrawn the lines for who is the most culpable or "worst of the worst." Similarly, the scientific advancements and legal reforms discussed above support the ABA's determination that there is an evolving moral consensus that late adolescents share a lesser moral culpability with their teenage counterparts. If "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state", then the lesser culpability of those in late adolescence surely cannot justify such a form of retribution.[75]

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[72] *Roper,* 543 U.S. at 553.
[73] *Graham v. Florida,* 560 U.S. 48, 59 (2010) (citing *Weems v. United States,* 217 U.S. 349, 367 (1910)).
[74] *See Commonwealth v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 14-CR-161, *1, 7-8 (Fayette Circuit Court, Aug. 1, 2017) (After expert testimony and briefing based on contemporary science, the court made specific factual findings that individuals in late adolescence are more likely to underestimate risks; more likely to engage in "sensation seeking;" less able to control their impulses; less emotionally developed than intellectually developed; and more influenced by their peers than adults. It then held that, based on those traits and other reasons, those individuals should be exempt from capital puninshment.)
[75] *See Atkins v. Virginia,* 536 U.S. 304, 319 (2002).

Second, there is insufficient evidence to support the proposition that the death penalty is an effective deterrent to capital murder for individuals in late adolescence. In fact, there is no consensus in either the social science or legal communities about whether there is any general deterrent effect of the death penalty.[76] Even with the most generous assumption that the death penalty may have some deterrent effect for adults without any cognitive or mental health disability, it does not necessarily follow that it would similarly deter a juvenile or late adolescent. Scientific findings suggest that late adolescents are, in this respect, more similar to juveniles.[77] As noted earlier, late adolescence is a developmental period marked by risk-taking and sensation-seeking behavior, as well as a diminished capacity to perform rational, long-term cost-benefit analyses. The same cognitive and behavioral capacities that make those in late adolescence less morally culpable for their acts also "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[78]

Finally, both the death penalty and LWOP effectively serve the additional penological goal of incapacitation, as either sentence will prevent that individual from release into general society to commit any future crimes. However, only the death penalty completely rejects the goal of providing some opportunity for redemption or rehabilitation for a young offender. Ninety percent of violent juvenile and late adolescent offenders do not go on to reoffend later in life.[79] Thus, many of these individuals can and will serve their sentences without additional violence, even inside prison, and will surely mature and change as they reach full adulthood. Imposing a death sentence and otherwise giving up on adolescents, precluding their possible rehabilitation or any future positive contributions (even if only made during their years of incarceration), is antithetical to the fundamental principles of our justice system.

Conclusion

In the decades since the ABA adopted its 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

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[76] John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate,* 58 STAN. L. REV. 791, 843 (2005).

[77] James C. Howell et al., *Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What Happens, What Should Happen, and What We Need to Know,* NAT'L INST. OF JUST. STUDY GROUP ON THE TRANSITIONS BETWEEN JUV. DELINQ. AND ADULT CRIME, at Bulletin 5, 24 (2013).

[78] *Atkins,* 536 U.S. at 320.

[79] Kathryn Monahan et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior,* 25 DEV. & PSYCHOPATHOLOGY 1093, 1093-1105 (2013); Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders,* 22 DEV. & PSYCHOPATHOLOGY 453,453-75 (2010).

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 they 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.

Respectfully submitted,

Seth Miller
Chair, Death Penalty Due Process Review Project

Robert Weiner
Chair, Section of Civil Rights and Social Justice

February, 2018

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GENERAL INFORMATION FORM

Submitting Entities: Death Penalty Due Process Review Project, with Co-sponsor: Section of Civil Rights and Social Justice

Submitted By: Seth Miller, Chair, Steering Committee, Death Penalty Due Process Review Project; Robert N. Weiner, Chair, Section of Civil Rights and Social Justice.

1. Summary of Resolution.

This resolution urges each death penalty jurisdiction to not execute or sentence to death anyone who was 21 years old or younger at the time of the offense. Without taking a position supporting or opposing the death penalty, this recommendation fully comports with the ABA's longstanding position that states should administer the death penalty only when performed in accordance with constitutional principles of fairness and proportionality. Because the Eighth Amendment demands that states impose death only as a response to the most serious crimes committed by the most heinous offenders, this resolution calls on jurisdictions to extend existing constitutional protections for capital defendants under the age of 18 to offenders up to and including the age of 21.

2. Approval by Submitting Entity.

Yes. The Steering Committee of the Death Penalty Due Process Review Project approved the Resolution on October 26, 2017 via written vote. The Council of the Section of Civil Rights and Social Justice approved the Recommendation at the Section's Fall Meeting in Washington, D.C on October 27, 2017, and agreed to be a co-sponsor.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has existing policy that pertains to the imposition of capital punishment on young offenders under the age of 18; this new policy, if adopted, would effectively supercede that policy and extend our position to individuals age 21 and under. Specifically, at the 1983 Annual Meeting, the House of Delegates adopted the position "that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committee while under the age of 18."[80]

[80] ABA House of Delegates Recommendation 117A, (adopted Aug. 1983), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/juvenile_offenders_death_penalty0883.authcheckdam.pdf.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation.

N/A. There is no known relevant legislation pending in Congress or in state legislatures. However, several states have passed laws in recent years extending juvenile protections to persons older than 18 years of age, including, for example, allowing youth under 21 to remain under the jurisdiction of the juvenile justice system. Additionally, this is an issue being raised more frequently in capital case litigation.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use this policy to enable the leadership, members and staff of the ABA to engage in active and ongoing policy discussions on this issue, to respond to possible state legislation introduced in 2018 and beyond, and to participate as *amicus curiae*, if a case reaches the U.S. Supreme Court with relevant claims. The sponsors will also use the policy to consult on issues related to the imposition of the death penalty on vulnerable defendants generally, and youthful offenders specifically, when called upon to do so by judges, lawyers, government entities, and bar associations.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

This Resolution has been referred to the following ABA entities that may have an interest in the subject matter:

Center for Human Rights
Center on Children and the Law
Coalition on Racial and Ethnic Justice
Commission on Youth at Risk
Criminal Justice Section
Death Penalty Representation Project
Judicial Division
Law Student Division

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Litigation
Section of International Law
Section of State and Local Government Law
Solo, Small Firm and General Practice Division
Standing Committee on Legal Aid and Indigent Defense
Young Lawyers Division

11. Contact Name and Address Information (prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges each death penalty jurisdiction to not execute or sentence to death anyone who was 21 years old or younger at the time of the offense.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the practice of sentencing to death and executing young persons ages 21 and under. The resolution clarifies that the ABA's long-standing position on capital punishment further necessitates that jurisdictions categorically exempt offenders ages 21 and under from capital punishment due to the lessened moral culpability, immaturity, and capacity for rehabilitation exemplified in late adolescence.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution aims to accomplish this goal by consulting on issues related to young offenders and the death penalty when called upon to do so by judges, lawyers, government entities, and bar associations, by supporting the filing of amicus briefs in cases that present issues of youthfulness and capital punishment, and by conducting and publicizing reports of jurisdictional practices vis-à-vis the imposition of death on late adolescent offenders for public information and use in the media and advocacy communities.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.

AMERICAN PSYCHOLOGICAL ASSOCIATION

APA RESOLUTION on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class

AUGUST 2022

WHEREAS APA is the leading scientific and professional organization representing psychology in the United States; with more than 133,000 researchers, educators, clinicians, consultants, at all stages of their careers, as well as students among its members.

WHEREAS APA is dedicated to fairness, inclusion, diversity, and to the improvement of the human condition overall, as individuals and as a society, through the development and application of the psychological sciences.

WHEREAS APA is aware of the U.S. Supreme Court (SCOTUS) decision in *Roper v. Simmons* (543 U.S. 551, 568 2005) and notes that the APA *amicus curiae* brief submitted in this case was relied upon and cited often and favorably by SCOTUS in arriving at this landmark decision.

WHEREAS in this same Roper decision, SCOTUS reiterated and reinforced that death as a penalty must be limited to those persons who commit a narrow category of the most serious crimes and whose extreme culpability makes them eligible to be sentenced to death, as the most severe of punishments and most extreme application of the authority of the state (*Roper v. Simmons*, 2005).

WHEREAS in deciding *Roper v. Simmons*, SCOTUS held that adolescents involved in the criminal justice system and under 18 years of age are categorically less culpable than the average criminal, and subsequently ruled that application of death as a penalty to persons under 18 at the time of the offense is unconstitutional.

WHEREAS the conclusion of lesser culpability was based upon three primary findings by the *Roper* court: First, juveniles possess a lack of maturity and an underdeveloped sense of responsibility; second, adolescents who are involved in the criminal justice system are more vulnerable/susceptible to negative influences, such as peer pressure and other outside pressures; and third, the character of adolescents is not as fully formed as that of adults.

WHEREAS APA concludes, based on the current state of the psychological and related developmental sciences, that although the principal reason these three primary findings by the *Roper* court are true and accurate is the level of maturity (or immaturity) of major brain systems at age 17, there is no neuroscientific bright line regarding brain development that indicates the brains of 18- to 20-year-olds differ in any substantive way from those of 17-year-olds (e.g., Bigler, 2021; Casey, Simmons, Somerville, & Baskin-Sommers, 2022; Gur, 2021).

WHEREAS assuming the commission of a crime by a member of the late adolescent class that qualifies as a statutorily defined death-eligible offense, the same youthful and immature characteristics that apply to categorically exempt 16- and 17-year-olds are similarly present in 18- to 20- year olds, rendering them less culpable and less susceptible to any deterrent value of the death penalty, thus failing to further the penological goals of retribution and deterrence.

WHEREAS neuroscientific research demonstrates brain development at age 17 has not become static and there is significant, ongoing brain development in the "late adolescent class" (Somerville, 2016). While some research on continued neurobiological development after 17 was published prior to the *Roper* decision, the question of whether members of the late adolescent class (ages 18 to 20) should be eligible for death as a penalty was not before SCOTUS at the time of the *Roper* decision and thus was not considered.

WHEREAS federal law previously officially recognized the "developmental period of childhood and adolescence" as extending past the age of 17 in binding legislation as early as 2000, extending by law the developmental period of childhood and adolescence to encompass the period up to age 22 (PUBLIC LAW 106–402—OCT. 30, 2000 114 STAT. 1683, the Developmental Disabilities Assistance and Bill of Rights Act of 2000).

WHEREAS as of 2013, the *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.; DSM–5; American Psychiatric Association, 2013) eliminated the age-18 cutoff for the expression and diagnosis of some developmental disorders, recognizing that the developmental period extends to age 18 and beyond.

WHEREAS consistent with this recognition of the extended nature of the developmental period, in 2021, the 12th edition of the American Association of Intellectual and Developmental Disabilities (AAIDD) Manual increased the age of onset criterion

for the diagnosis of intellectual disability (a neurodevelopmental disorder) from age 18 to age 22 (AAIDD, 2021).

WHEREAS much more extensive research has been conducted in developmental science in the years since several of these notable policy changes were enacted, and since the *Roper* decision, that significantly adds to the quantity and quality of existing scientific knowledge.

WHEREAS developmental neuroscience, including research on both the structure and function of brain development, establishes that significant maturation of the brain continues through at least age 20 (e.g., Bigler, 2021; Gur, 2021; McCaffrey & Reynolds, 2021; Somerville, 2016), especially in the key brain systems implicated in a person's capacity to evaluate behavioral options, make rational decisions about behavior, meaningfully consider the consequences of acting and not acting in a particular way, and to act deliberately in stressful or highly charged emotional environments, as well as continued development of personality traits (e.g., emotional stability and conscientiousness) and what is popularly known as "character" (e.g., Casey, Simmons, Somerville, & Baskin-Sommers, 2022; Casey, Taylor-Thompson, Rubien-Thomas, Robbins, & Baskin-Sommers, 2020; Harden & Tucker-Drob, 2011; McCaffrey & Reynolds, 2021; Roberts et al., 2006; Steinberg et al., 2018).

WHEREAS these brain regions are often referred to as executive control systems and include (but not exclusively) the prefrontal cortex and its connections throughout the brain. There is significant development of these brain systems that continues beyond the age of 20 (e.g., Somerville, 2016).

WHEREAS in the context of capital cases where death is a potential penalty, which typically involve crimes that have occurred in situations of high emotional arousal, it is especially noteworthy that current developmental science documents that during emotionally arousing situations, this late adolescent class responds more like younger adolescents than like adults (Figner et al., 2009; Cohen et al., 2016; Steinberg et al., 2008; Icenogle et al., 2019) though — like younger adolescents — show cognitive capacity similar to adults when not under pressure or heightened emotional arousal (Figner et al., 2009; Icenogle et al., 2019; Steinberg et al., 2008).

WHEREAS in considering youth who display more extreme behaviors (e.g., callousness, low empathy), there is emerging empirical evidence of change in the developmental course of these traits, even without intervention. Although a small group of youth show persistently high trajectories of extreme behaviors, the majority who initially show extreme behaviors exhibit decreasing patterns during development (Baskin-Sommers et al., 2015; Hawes et al., 2014).

WHEREAS the fact that neurobiological development in key brain systems associated with behavioral and emotional control continue after the age of 18, determining whether the nature of the crimes committed by members of the late adolescent class and the level of culpability that should be ascribed to them truly constitutes the "worst of the worst" is inherently unreliable. Given the continued psychological development of these group members, predictions about their rehabilitation potential and likely future actions are equally unreliable. There is clear evidence of prolonged development far beyond the age of 17 and into the mid-20s, so that the psychological capacity of members of the late adolescent class to exercise a mature sense of responsibility, and to resist outside pressures is still very much in process (Steinberg et al., 2018). The significant structural and functional changes in the brain at this time corroborate these findings (e.g., Somerville, 2016).

WHEREAS it is clear the brains of 18- to 20-year-olds are continuing to develop in key brain systems related to higher-order executive functions and self-control, such as planning ahead, weighing consequences of behavior, and emotional regulation. Their brain development cannot be distinguished reliably from that of 17-year-olds with regard to these key brain systems (Cohen et al., 2016).

WHEREAS numerous lawmakers, governmental officials, and regulators have recognized multiple ages as demarcation points for independent decision-making and access to forms of employment, positions of authority and public trust, independent decision-making for various lifestyle, medical, and recreational events, and there are currently more than 3,000 laws and government regulations restricting the behavior and actions of persons under the age of 21 years in force in the United States (e.g., see review by Meggitt, 2021) that prohibit those under age 21 from engaging in such diverse activities as: legalized purchases of alcoholic beverages, legalized purchases of marijuana, legalized purchases of tobacco products (19 states); obtaining work as a Federal Marshall, FBI agent, or armed Treasury agent; to engage in blasting or the use of explosives, including operating a fireworks display; to obtain a license to carry a concealed handgun; to obtain a credit card without a cosigner; to act as a foster parent; to serve in the State legislature (32 states); to obtain various professional licenses; nine states require all persons under 21 to wear a helmet when riding a motorcycle; as examples among the more than 3,000 such laws. Such legislative and regulatory precedents also make it reasonable to make distinctions related to crime and punishment in the 18- to 20-year-old population; indeed, some states do so now with regard to retaining juvenile jurisdiction, as well as variables such as inmate housing as a function of age and sentencing restrictions and review. As of this writing in July of 2022, this trend is continuing with more states and local jurisdictions increasing the minimum age to purchase tobacco and also firearms from 18 to 21 years. Much of this restrictive legislation and regulations consider the issues of decision-making in highly stressful and extremely arousing circumstances (sometimes referred to as issues of decision-making during hot-versus-cold cognition) but other laws appropriately grant increasing rights to this age group when evaluating the maturity required to make careful/considered choices such as about personal health care,

voting, and other matters that need not to be made, and typically are not made, rashly in emotionally volatile circumstances as are the criminal actions that make such youth currently eligible for death as a penalty.

WHEREAS the Society for Black Neuropsychology, the Hispanic Neuropsychological Society, and the Asian Neuropsychological Association have concluded that racial factors significantly influence criminal justice system decision-making, resulting in disparate conviction rates, wrongful convictions, and levels of punishment (Ghandnoosh, 2015; Gross, Possley, & Stephens, 2017; Mitchell & MacKenzie, 2004; Nellis, 2016; Rucker & Richeson, 2021; Sentencing Project, 2013; Spohn, 2017; Sweeney & Haney, 1992) across common racial groupings in the United States. Racial factors also affect the system of death sentencing in the United States, where Black persons are perceived as more "deathworthy," evaluated more unfavorably by capital jurors, and are more likely to be sentenced to death and to be executed than their White counterparts, especially when their victims were White (Baldus, Woodworth, Zuckerman, & Weiner, 1998; Beckett & Evans, 2016; Eberhardt, et al., 2006; Keil & Vito, 2006; Lyman, Baumgartner, & Pierce, in press-2022; Lynch & Haney, 2011; Phillips & Marceau, 2020), contributing to minorities' overrepresentation on death row. For example, as recently as 2014, the proportion of Black people on death row was more than three times the proportion of Black people in the national population (Ford, 2014); current statistics demonstrating continued over-representation also can be found at the Death Penalty Information Center website, https://deathpenaltyinfo.org/; as well as individual states' websites, such as the Texas Departmental of Criminal Justice website, where, as of July 1 of 2022, 45.7% of all death row inmates were designated as "Black" (http://www.tdcj.texas.gov/death_row/dr_gender_racial_stats.html), while in 2020, only 12.2% of the general population of Texas is designated as Black.

WHEREAS Black youth are punished more harshly than Whites (Morris & Perry, 2016) and significantly more likely to be perceived incorrectly as older and more responsible (Goff, et al., 2014), and therefore more likely to be treated as if they were adults in criminal proceedings in general. In combination, these race-based differences in treatment impact members of the late adolescent class, placing Black youth more at risk of facing and receiving the death penalty compared with their White peers. In fact, a recent analysis shows that non-White (Black, Hispanic, and "Other") members of the late adolescent class (20 years old or younger at the time of their crime) represent approximately two-thirds of persons in that age group who are sentenced to death, as opposed to a little more than half of non-Whites who were 21 years or older who received death sentences. Moreover, since *Roper*, the racial disproportion in the 18-to 20-year-old late adolescent class has increased, with more than three-quarters of the non-White members of the late adolescent class sentenced to death as opposed to 20% of Whites (Baumgartner, 2022), clearly demonstrating the disproportionately biasing effects, as a function of age, of minority racial status on the LAC when death is sought as a penalty.

WHEREAS in addition to the strong biasing effect of gender of the defendant on whether prosecutors seek death as a penalty (e.g., Shatz & Shatz, 2011), victim race and gender also affect who is sentenced to death (e.g., Baumgartner, Grigg, & Mastro, 2015; Baumgartner, Johnson, Wilson, & Whitehead, 2016; Pierce, Radelet, & Sharp, 2017).

WHEREAS psychological science research also indicates that members of the LGBTQ+ community and those with nontraditional sexual orientations are dealt with more harshly in their interactions with the criminal justice system, including harsher sentencing (Movement Advancement Project, 2016; Nadal, 2021).

WHEREAS historically, SCOTUS has emphasized death as a penalty should be reserved for persons whose crimes and culpability represent the "worst of the worst" (*e.g., Roper v. Simmons,* 543 U.S. 551, 568 2005; *Kennedy v. Louisiana,* 554 U.S. 407, 420, 2008; *California v. Brown,* 479 U.S. 538, 541, 1987) and, given its extreme severity and finality, that the penalty of death is qualitatively different from any other sentence (e.g., *Woodson v. North Carolina,* 428 U.S. 280, 305, 1976; *Lockett v. Ohio,* 438 U.S. 586, 604, 1978). SCOTUS has repeatedly acknowledged that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed (*California v. Brown,* 479 U.S. 538, 541, 1987).

WHEREAS a review of the scientific literature as noted above indicates that death as a penalty for the late adolescent class is typically based on unreliable determinations of members' current culpability status and even more unreliable predictions of their future potential.

THEREFORE, BE IT RESOLVED that based upon the rationale of the *Roper* decision and currently available science, APA concludes the same prohibitions that have been applied to application of the penalty of death for persons who commit a serious crime at ages 17 and younger should apply to persons ages 18 through 20. The same scientific and societal reasons as given by the *Roper* court in banning death as a penalty for those under the age of 18 apply to the late adolescent class.

THEREFORE, BE IT RESOLVED that it is clear death as a penalty is not applied equally and fairly among members of the late adolescent class. In addition, extraneous factors such as race, ethnicity, and gender (of both the defendant and the victim) influence the discretionary decisions of prosecutors to seek and their success in obtaining death verdicts for defendants who are members of the late adolescent class. When considered in conjunction with neuroscientific evidence of the degree of continuing development of key brain systems that remains to be accomplished in the late adolescent class, these and other status variables act to create biases and prejudices that lead to a higher probability of error by

triers of fact in death penalty cases. In combination, these factors render the application of the death penalty to members of the late adolescent class inherently more unreliable and morally abhorrent in a developed society that is concerned with equality, generally and specifically, in legal justice for all.

THEREFORE, BE IT RESOLVED that APA calls upon the courts and the state and federal legislative bodies of the United States to ban the application of death as a criminal penalty where the offense is alleged to have been committed by a person under 21 years of age.

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Approved by the APA Council of Representatives, August 2022.

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
SEVENTH DIVISION
CASE NO. 14-CR-161

COMMONWEALTH OF KENTUCKY PLAINTIFF

v.

TRAVIS BREDHOLD DEFENDANT

ORDER DECLARING KENTUCKY'S DEATH PENALTY STATUTE AS UNCONSTITUTIONAL

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

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FINDINGS OF FACT

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

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg in the case of Commonwealth v. Diaz, et al., No. 15-CR-584.[1] Dr. Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."[2] Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.[3]

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

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

CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A. Const. Amend. VIII. This provision is applicable to the states through the Fourteenth Amendment. The protection flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen the consistent reference to "the evolving standards of decency that mark the progress of a maturing

[4] *Id* at 6.
[5] *Id* at 3.
[6] *Id* at 5.

society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the "evolving standards of decency" test are: (1) objective indicia of national consensus, and (2) the Court's own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper v. Simmons*, 543 U.S. 551 (2005).

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

Since *Roper*, six (6) states[7] have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states[8] have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven[9] (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.[10]

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

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

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

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

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

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.[13] Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20).

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to

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[11] *Id.*
[12] *Id.*
[13] Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from https://deathpenaltyinfo.org/documents/FactSheet.pdf.

twenty-one (21. "[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles … as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

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

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

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

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late

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teens.[14] Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.[15]

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.[16] First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.[17] Second, they are more likely to engage in "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).[18] Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because gains in impulse control continue to occur during the early twenties (20s).[19] Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the

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[14] B. J. Casey, et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104-110 (2005).

[15] N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 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 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 Sex 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).

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

[17] 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).

[18] E. Cauffman, et al., *Age Differences in Affective Decision Making as Indexed 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).

[19] L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28-44 (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).

ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.[20] As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.[21] The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.[22] In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).[23]

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,

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[20] 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).

[21] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 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).

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

[23] 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).

evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the "cognitive control system"—is still undergoing significant development well into the mid-twenties (20s).[24] Thus, during middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual's twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.[25]

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

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[24] 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: Neurocognitive Development of Reward and Control Regions*, 51 NEUROIMAGE 345-355 (2010).

[25] 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 1184-1191 (2012).

[26] S-J, Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397-406 (2012); R. Engle, *The Teen Brain*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).

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

may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

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

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.[30] Given adolescents' ongoing development and heightened plasticity, it is difficult to predict future criminality or delinquent behavior from antisocial behavior during the teen years, even among teenagers accused of committing violent crimes.[31] In fact, many

[28] 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).
[29] *Id.*
[30] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).
[31] T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, 3(2) DEV. & PSYCHOPATHOLOGY (2016).

researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.[32]

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

Further, the Supreme Court has declared several times that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568

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[32] 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).
[33] *Roper*, 543 U.S. at 569-70.

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(quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("the death penalty must be reserved for 'the worst of the worst'"). Given Mr. Bredhold's young age and development, it is difficult to see how he and others his age could be classified as "the most deserving of execution."

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

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

So ORDERED this the 1 day of August, 2017.

JUDGE ERNESTO SCORSONE
FAYETTE CIRCUIT COURT

14CR161

CERTIFICATE OF SERVICE

The following is to certify that the foregoing was served this the 1st day of August, 2017, by mailing same first class copy, postage prepaid, to the following:

Lou Anna Red Corn
Commonwealth Attorney
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Lexington, KY 40507

Joanne Lynch
Assistant Public Advocate
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By: MKuhles D.C.

A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT
BY MKuhles DEPUTY

RELATED LINKS

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YAC Implementation Evaluation (/sites/default/files/images/YAC%20Interim%20Report_05252017.pdf?1614884422879)

Young Adult Court Fact Sheet (/sites/default/files/images/YACFactSheet_2018.pdf?1614884422879)

Young Adult Court Eligibility Requirements (/sites/default/files/images/REVISED.DEC2017.%202016CollaborativeCourtEligibilityGuidelines.pdf?1614884422879)

Young Adult Court Participant Handbook (/sites/default/files/images/YAC%20Participant%20HandbookFINALAPRIL2019.pdf?1614884422879)

YOUNG ADULT COURT

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The last two decades have given rise to a body of research establishing that young adults are fundamentally different from both juveniles and older adults in how they process information and make decisions. The prefrontal cortex of the brain — responsible for our cognitive processing and impulse control — does not fully develop until the early to mid-20s. At the same time that young adults are going through this critical developmental phase, many find themselves facing adulthood without supportive family, housing, education, employment and other critical protective factors that can help them navigate this tumultuous period. Our traditional justice system is not designed to address cases involving these individuals, who are qualitatively different in development, skills, and needs from both children and older adults.

Young Adult Court (YAC) in San Francisco was established in summer 2015 for eligible young adults, ages 18-24. The court strives to align opportunities for accountability and transformation with the unique needs and developmental stage of this age group. The case load in the first year will serve approximately 60-80 clients. Partner agencies include the Superior Court, Office of the District Attorney, Office of the Public Defender, the Department of Public Health, Adult Probation Department, Department of Children, Youth and their Families, the San Francisco Police Department and Family Service Agency/Felton. YAC is the first of its kind nationwide.

January 31, 2019 Young Adult Court Graduation- (photo from left to right) Felton Institute Case Manager Ashli Rocha, TAC graduate Alonso, and YAC Judge Bruce E. Chan

Problem-Solving Courts

Court Models

Adult Drug and DUI Courts

Nebraska Adult Drug and DUI Courts utilize a specialized team process that functions within the existing court structure. Adult Drug and DUI Courts are designed to achieve a reduction in recidivism and substance use among high-risk and high-need individuals with substance use disorders. The court's goal is to protect public safety and increase the participant's likelihood of successful rehabilitation by utilizing validated risk and need assessments, early and individualized behavioral health treatment, frequent and random chemical testing, incentives, sanctions, and other rehabilitative and ancillary services. Intense community supervision and interaction with a judge in non-adversarial court hearings verify compliance with treatment and other court ordered terms.

Family Drug Treatment Courts

Family Drug Treatment Courts are a juvenile or family court docket of which selected abuse, neglect, and dependency cases are identified where parental substance abuse is a primary factor. Judges, attorneys, child protection services, and treatment personnel unite with the goal of providing safe, nurturing, and permanent homes for children while simultaneously providing parents the necessary support and services to become drug and alcohol abstinent. Family Drug Treatment Courts aid parents in regaining control of their lives and promote long-term stabilized recovery to enhance the possibility of family reunification within mandatory legal timeframes (Wheeler & Siegerist, 2003).

Juvenile Drug Treatment Courts

A Juvenile Drug Treatment Court is a docket within juvenile courts to which selected delinquency cases, and in some instances, status offenders, are referred for handling by a designated judge. The youth referred to this docket are identified as having problems with alcohol and/or other

drugs. The Juvenile Drug Treatment Court's judge maintains close oversight of each case through regular status hearings with the parties involved. The judge both leads and works as a member of a team that comprises representatives from treatment, juvenile justice, social and mental health services, school and vocational training programs, law enforcement, probation, the prosecution, and the defense. Over the course of a year or more, the team meets frequently (often weekly), determining how best to address the substance abuse and related problems of the youth and his or her family that have brought the youth into contact with the justice system (BJA, 2003).

Mental Health Courts

National research has supported Mental Health Courts as effectively reducing recidivism among participants, improving mental health outcomes, and reducing the length of incarceration for participants. (Mental Health America, 2009). The Nebraska Supreme Court's Problem-Solving Court Committee is presently working on standards for Mental Health Courts.

Reentry Courts

Nebraska Reentry Courts are designed for high-risk and high-need individuals who are reentering society from incarceration on a term Post-Release Supervision. Similar to other problem-solving courts, Reentry Courts operate under a team approach where a judge, prosecutor, defense counsel, coordinator, community supervision officer, law enforcement, treatment provider(s), and other key team members work together to design an individualized program for each participant. The court's goal is to protect public safety and reduce recidivism. Intensive community supervision and interaction with a judge in non-adversarial court hearings verifies compliance with treatment and other court ordered terms.

Veterans Treatment Courts

Nebraska Veterans Treatment Courts are designed to reduce recidivism by fostering a comprehensive and coordinated court response using early intervention, appropriate treatment, intensive supervision, and consistent judicial oversight. Nebraska Veterans Treatment Courts adhere to the Nebraska Veterans Treatment Courts Best Practice Standards. Veterans Treatment Courts operate under a team approach where a judge, prosecutor, defense counsel, coordinator, community supervision officer, law enforcement, treatment provider(s), Veterans Health Administration, and other key team members work together to design an individualized program for each participant. Compliance with treatment and court orders is verified by frequent alcohol/drug testing, close community supervision, and judicial interaction in non-adversarial court review hearings. Veterans Treatment Courts enhance close monitoring of participants using home and field visits.

Veterans Treatment Courts utilize trained volunteer Veteran Mentors to act as role models and provide guidance for veterans. Veteran Mentors help with readjustment issues to assist with reentry into civilian life.

Young Adult Court

Young Adult Court is a judicially supervised program that provides a sentencing alternative, for youthful offenders up to age 25, who have been charged with a felony offense and required to participate in a program of selective assessment and rehabilitative services administered by multidisciplinary agencies. Key aspects of the Young Adult Court are community supervision, substance use treatment, mental health assistance, education, employment and frequent drug testing. The goal of this 18 to 24-month program is to stabilize participant's lives by providing tools for success, thus reducing recidivism.

PRESS RELEASE

New York State
Unified Court System

Hon. Lawrence K. Marks
Chief Administrative Judge

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Date: May 6, 2016

State's First Young Adult Court Launched in Brooklyn

NEW YORK – Chief Administrative Judge Lawrence K. Marks today joined Brooklyn District Attorney Ken Thompson and local court officials to inaugurate Brooklyn's Young Adult Court, the first court part in New York State to handle exclusively misdemeanor defendants ages 16 through 24, offering counseling, treatment and services customized to the unique needs of young adults in an effort to reduce the use of jail, decrease recidivism and enhance public safety. DWI cases, sex crimes and domestic violences are ineligible for adjudication in the new court part.

The Brooklyn District Attorney's newly established Young Adult Bureau, with its comprehensive approach to the prosecution of low-level offenses of adolescents and young adults, will serve to complement the efforts of the new court initiative.

The new program is supported by a grant awarded to the Center for Court Innovation and the Brooklyn District Attorney's Office by the U.S. Department of Justice. The grant acknowledged that young adults account for a disproportionate percentage of criminal arrests nationwide, have the highest propensity for recividism of any other group and face more severe consequences from convictions and incarceration, such as problems securing employment, housing and education.

"This is one more example of the criminal justice system working together to implement an innovative approach to low-level criminal activity. By focusing on young adults charged with low-level offenses, this new court part seeks to identify the underlying problem that led these cases to come into court, and develop an age-appropriate solution to address that underlying problem. Research has shown that young people are more amenable to rehabilitation. Ensuring that these individuals are referred to appropriate services and programs will lower recidivism and help them go on to become productive, law-abiding adults. I applaud District Attorney Ken Thompson for his leadership in establishing a special bureau within his office that complements the new young adult court part and commend the U.S. Department of Justice, the Center for Court Innovation, the local defense bar and our other justice partners for their support of this program," said Chief Administrative Judge Marks.

"Young adults account for a disproportionately large percentage of criminal arrests and have the highest risk of re-offending. Recognizing that, we have created the specialized Brooklyn Young Adult Bureau to offer this population the services they need to help set them on the right path. I would like to thank the U.S. Department of Justice for providing funding, and the Center for Court Innovation, the Office of Court Administration and our other partners for their commitment to making this initiative a reality. Together, I am confident that this new court will be a success and serve as a model for others around the country," said District Attorney Ken Thompson.

Participants in the Young Adult Court will undergo a risk-needs assessment and be matched to age-appropriate treatment and services, including substance abuse, mental health, anger management, GED, vocational and internship programs. Social workers from Brooklyn Justice Initiatives, a project of the Center for Court Innovation, will conduct the assesments, develop treatment recommendations and coordinate services. Participants will be rigorously monitored for compliance with court-mandated treatment and programs. Upon successful fulfillment of the program, participants may have their charges reduced or dismissed.

Hon. Craig S. Walker will preside over the new Young Adult Court part.

# # #

Young Adult Court helps offenders change habits

By RUTH BROWN - *Associated Press - Saturday, February 8, 2014*

IDAHO FALLS, Idaho (AP) - Teyler Sato always thought she was having a good time.

Nearly every day during her junior year of high school, Sato said she was high. She often ditched classes, didn't listen to her mother and admits she lied about things - a lot.

Today, looking back on that time, 20-year-old Sato said Bonneville County's Young Adult Court - also known as YAC - changed her outlook on life.

"They're trying in YAC to get us to prepare ourselves (for the future) and to not be so impulsive," Sato said.

The Idaho Falls woman was sentenced to Young Adult Court in 2012 after she was convicted of possession of drug paraphernalia and consumption of alcohol by a minor.

The specialty court started two years ago in Bonneville and Jefferson counties. It's designed for impulsive 18- to 24-year-olds whose poor decision-making lands them in trouble with the law.

The specialty court is assigned at sentencing. The sentencing judge places them on probation while they complete the program. It is an alternative to jail or prison.

"This population is frustrating," said Jared Bingham, executive director for D7 treatment. "Their impulsivity is the biggest issue. Something comes along that sounds like a great idea and they do it. … They have less to lose."

As a result, young people such as Sato are often unsuccessful in drug court or other specialized courts with more rules and regulations, said Aimee Austin, Bonneville County drug court coordinator.

“Commitment to an 18- or 19-year-old is a lot different than commitment to a 30-year-old. Tolerance is the key,” Austin said. “There’s a lot of stuff (in YAC) that won’t be tolerated in other courts.”

Bingham, who supervises Young Adult Court treatment strategies, said the court uses a structured program to help participants gain perspective on their behavior and maturity.

They work on honesty. They discuss the positive and negative things in their lives. They look at who is responsible for the things that have happened to them, Bingham said. They also look to the future and apply what they’ve learned to help them make better decisions.

Since the program started, 12 young adults have graduated. Another 42 remain in the two-year program. But some graduate earlier than two years depending on how progressive they are.

At any one time, Young Adult Court can accommodate up to 50 participants. Ten spots are available for juveniles, 20 for misdemeanor crimes, 10 for felony crimes and 10 for crimes that occur in Jefferson County.

When Sean Pope, 21, started Young Adult Court, he didn’t have a high school diploma, a driver’s license or a job. He had sold most of the little he did own to buy drugs, including six of his cherished guitars.

When Pope graduated, however, the Idaho Falls man had received his GED, qualified for a driver's license and was able to buy a car and one of his pawned guitars. He also had a job, as well as the skills he needed to make better decisions about his life.

"I didn't understand a lot of the impact of the things I was doing and the impact that it would have on my life and my family's life before YAC," he said.

One difference between drug court and YAC is reporting about drug use. If a client talks to his or her counselor about drug use, the counselor does not relay that information to the probation officer - something that's required in other specialty courts.

"It's nice to have someone to talk to that you're not gonna worry about 'Am I gonna be in trouble for this?' So you can work through what happened so it doesn't happen again," Sato said. "Rather than thinking, 'I don't want to tell them because I'll go to jail if I tell them.' "

Bingham said that was a goal when they started the Young Adult Court model.

"I've been doing drug courts 10 years and what's surprising is that I didn't think they'd open up," he said. "But (the clients) did, and when we know what's really going on we're able to deal with those problems."

Juvenile Probation Officer Sharon Portela said the biggest change she sees in her clients is the way they mature.

As clients proceed through Young Adult Court, Portela said she expects negative drug tests early in the process. But rarely does that happen as the clients apply what they've learned, becoming more mature and responsible for their actions in the process.

Both Sato and Pope admitted to backsliding while working their way through the program. It was during specialty court that Sato finished her high school diploma, got a job and stopped using drugs.

"People who fight it say 'It was a waste of time,' but if you let it work then it will," Sato said. "It will widen so many different aspects of your life."

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Information from: Post Register, https://www.postregister.com