No. SC18-190

IN THE

Supreme Court of Florida

ERIC SCOTT BRANCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION AND A HEARING ON HIS PREVIOUSLY UNAVAILABLE CONSTITUTIONAL CLAIM

Stacy Biggart
Florida Bar No. 89388
Kathleen Pafford
Florida Bar No. 99527
Assistant Capital Collateral
Regional Counsel – North
Office of the Capital Collateral
Regional Counsel – North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Stacy.Biggart@ccrc-north.org
Kathleen.Pafford@ccrc-north.org

Billy H. Nolas
Florida Bar No. 806821
Chief, Capital Habeas Unit
Kimberly Sharkey
Florida Bar No. 505978
Attorney, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
billy_nolas@fd.org
kimberly_sharkey@fd.org

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITES..... ii

APPLICATION FOR STAY OF EXECUTION 1

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING 2

STATEMENT OF THE CASE AND FACTS.....2

SUMMARY OF ARGUMENT 8

STANDARD OF REVIEW 11

ARGUMENT.....12

CONCLUSION.....

CERTIFICATE OF SERVICE .....

CERTIFICATE OF FONT .....

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002).....*passim*
Barwick v. State, 88 So. 3d 85 (Fla. 2011).....59
Branch v. Sec'y, 638 F.3d 1353 (11th Cir. 2011).....3
Branch v. State, 685 So. 2d 1250 (Fla. 1996).....3
Branch v. State, 952 So. 2d 470 (Fla. 2006).....3
Branch v. State, SC15-1869.....3
Branch v. Florida, SC17-1509.....3
Kentucky v. Bredhold, Fayette Circ. Ct. No. 14-CR-161 (Aug. 1, 2017).....54
Carroll v. State, 114 So. 3d 883 (Fla. 2013).....*passim*
Clark v. State, 995 So. 2d 1112 (Fla. 2d DCA 2008).....57
Coker v. Georgia, 433 U.S. 584 (1977).....27, 29
Correll v. State, 184 So. 3d 478 (Fla. 2015).....7
Danforth v. Minnesota, 522 U.S. 264 (2015).....15
Davis v. State, 142 So. 3d 867 (Fla. 2014).....59
Duncan v. State, No. 2D16-2625, 2017 WL 1422648.....57
Edelstein v. Roskin, 356 So. 2d 38, 39 (Fla. DCA 1978).....47
England v. State, 940 So. 2d 389 (Fla. 2006).....60
Enmund v. Florida, 458 U.S. 782 (1982).....*passim*
Falcon v. State, 162 So. 3d 954 (Fla. 2015).....17
Furman v. Georgia, 408 U.S. 238 (1972).....26, 68
Gall v. United States, 552 U.S. 38 (2007).....61
Gardner v. Florida, 430 U.S. 349 (1977).....45, 46
Glossip v. Gross, 135 S. Ct. 2726 (2015).....75
Goldberg v. Kelly, 397 U.S. 254, 266-72 (1970).....46
Graham v. Florida, 560 U.S. 48 (2010).....*passim*
Grannis v. Ordean, 234 U.S. 385 (1914).....46
Gregg v. Georgia, 428 U.S. 153 (1976).....27, 68
Green v. State, 975 So. 2d 1090 (Fla. 2008).....11
Hall v. Florida, 134 S. Ct. 1986 (2014).....*passim*
Hildwin v. State, 951 So. 2d 784 (Fla. 2006).....58
Hill v. State, 921 So. 2d 579 (Fla. 2006).....60
Huff v. State, 622 So. 2d 982 (Fla. 1993).....4
Hurst v. State, 202 So. 3d 40 (Fla. 2016).....16, 17
In re Amendments to Florida Rules of Criminal Procedure-Capital Postconvicton Pub. Records Prod., 683 So. 2d 475 (Fla. 1996).....75
In re Medley, 134 U.S. 160 (1890).....68, 72
In re Murchison, 349 U.S. 133, 138 (1955).....46

Johnson v. Bredesen, 558 U.S. 1067 (2009).....67
Johnson v. Stephens, 617 Fed. Appx. 293 (5th Cir. 2015).....60
Johnston v. State, 27 So. 3d 11 (Fla. 2010).....60
Jones v. State, 709 So. 2d 512 (Fla. 1998).....13, 14, 43
Kennedy v. Louisiana, 554 U.S. 407 (2008).....*passim*
Krawczuk v. State, 92 So. 3d 195, 202 (Fla. 2012).....47
Lackey v. Texas, 514 U.S. 1045 (1995).....68
Lebron v. State, 135 So. 3d 1040 (Fla. 2014).....62
Lockett v. Ohio, 438 U.S. 586 (1978).....28
Lowe v. State, 2 So. 3d 21 (Fla. 2008).....60
Marcelin v. Denny's Restaurant, 648 So. 2d 834 (Fla. 4th DCA 1995).....46, 47
Martin v. Hunter's Lessee, 14 U.S. 304 (1816).....14, 15
Martin v. Wilkes, 490 U.S. 755 (1989).....74
McCoy v. State, 132 So. 3d 756 (Fla. 2013).....60
Melton v. State, 949 So. 2d 994 (Fla. 2006).....60
Miller v. Alabama, 567 U.S. 460 (2012).....17, 36
Moore v. Texas, 137 S. Ct. 1039 (2017).....*passim*
Morton v. State, 995 So. 2d 233 (Fla. 2008).....61
Murphy v. State, 24 So. 3d 1220 (Fla. 2d DCA 2009).....57
Panetti v. Quarterman, 551 U.S. 930 (2007).....67
Penry v. Lynaugh, 492 U.S. 302 (1989).....27
Porter v. State, 400 So. 2d 5, 7 (Fla. 1981).....46
Preston v. State, 970 So. 2d 789 (Fla. 2007).....58
Roper v. Simmons, 543 U.S. 551 (2005).....*passim*
Rose v. State, 985 So. 2d 500 (Fla. 2008).....11
Sims v. State, 753 So. 2d 66 (Fla. 2000).....*passim*
Snook v. Firestone Tire & Rubber Co., 485 So.2d 496 (Fla. DCA 1986).....47
Stanford v. Kentucky, 429 U.S. 361 (1989).....27, 30
State v. Sireci, 502 So. 2d 1221 (Fla. 1987).....57
Swafford v. State, 679 So. 2d 736, 740-41 (Fla. 1996).....43
Thompson v. Oklahoma, 487 U.S. 815 (1988).....33
Tomkins v. State, 994 So. 2d 1072 (Fla. 2008).....13, 67
Trop v. Dulles, 356 U.S. 86 (1958).....*passim*
Ventura v. State, 2 So. 3d 194 (Fla. 2009).....11
Weems v. United States, 217 U.S. 349 (1910).....35
Wright v. Florida, 138 S. Ct. 360 (2017).....64
Wyatt v. State, 71 So. 3d 86 (Fla. 2011).....58
Zamarippa v. State, 100 So. 3d 746 (Fla. 2d DCA 2012).....57

Statutes and Constitutional Provisions

Chapter 119, Florida Statutes....72
Section 925.11, Florida Statutes....3
Article I, Section 17, Florida Constitution....14, 15
Article VI, United States Constitution....14

Rules

Fla. R. App. P. 9.100....
Fla. R. App. P. 9.320....2
Fla. R. Crim. P. 3.851(d)(2)....*passim*
Fla. R. Crim. P. 3.851(e)(2)....*passim*
Fla. R. Crim. P. 3.852(h)....72
Fla. R. Crim. P. 3.853....3

Other Authorities

American Bar Association's House of Delegates Resolution (Feb. 5, 2018) . *passim*
Facts about the Death Penalty, Death Penalty Information Center (2018)....37

Barasso-Catanzaro, C.; Eslinger, P., *Neurobiological Bases of Executive Function and Social-Emotional Development: Typical and Atypical Brain Changes*, Interdisciplinary J. of Applied Family Studies (February 2016)....52

Bonnie, R., et al., Inst. of Med. & Nat'l Res. Council, *Investing in the Health and Well-Being of Young Adults* (2015)....52
Cohen, Alexandra O. et.al, *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 Psych. Sci. 4, at 549 (May 2016)....51

Hayasaki, E., *This is Your Brain on Poor*, Newsweek (Sept. 2, 2016)....53, 54
Kennedy, M., *Heavy Teenage Drinking Linked to Abnormal Brain Development*,

Reuters Health Medical News (Dec. 2, 2016)....53

Rawles, L., *Ban Death Penalty for Those 21 or Younger, ABA House Says*, ABA Journal (Feb. 5, 2018)....1

Rudolph, M., *At Risk of Being Risky: The Relationship between 'Brain Age' under Emotional States and Risk Preference*, Dev. Cognitive Neurosci. 24:93-106 (2017)....33, 34, 62

Scott, Elizabeth S., Bonnie, Richard J., & Steinberg, Laurence, *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641 (Nov. 2016).....*passim*

Vandiver, B., *Trial Delayed, Death Penalty under Review*, University of Kentucky, Kentucky Kernel (Oct. 20, 2017).....38

APPLICATION FOR STAY OF EXECUTION

Eric Branch's execution is scheduled for 6:00 p.m. on February 22, 2018. This is an appeal of the First Judicial Circuit in and for Escambia County's final order denying his Application for Stay of Execution and Successive Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend.

We urge that the Court stay this execution to consider the new scientific consensus demonstrating the execution of Eric Branch would violate the Eighth Amendment, and to direct that a hearing be conducted to meaningfully address this Eighth Amendment claim. The evidence upon which Appellant relies could not be ascertained by due diligence, as it was unavailable in prior proceedings. *See* Fla. R. Crim. P. 3.851(d)(2). As the evidence has only now become available, its presentation in this "successive" proceeding does not constitute an abuse of process. *See* Fla. R. Crim. P. 3.851(e)(2).

The new scientific consensus about brain development as it relates to someone like Appellant, who was twenty-one years old at the time of the offense, is so significant that just three days ago the American Bar Association's House of Delegates passed a resolution calling on American jurisdictions that still have capital punishment to prohibit its imposition against those who were twenty-one years of age or younger at the time of the offense. *See* Rawles, L., *Ban Death Penalty for*

Those 21 or Younger, ABA House Says, ABA Journal (Feb. 5, 2018). A stay of execution to allow for untruncated consideration and a hearing is appropriate.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

Appellant filed a motion for oral argument yesterday, renewed hereby, explaining that oral argument is appropriate because this appeal presents an important issue of first impression: whether a hearing should be conducted on the new consensus in the scientific community that people twenty-one-years-old and younger are comparable to juveniles under eighteen for the purpose of prohibiting their execution under the Eighth Amendment's prohibition against cruel and unusual punishment. Appellant respectfully renews his request for oral argument pursuant to Fla. R. App. P. 9.320.

STATEMENT OF THE CASE[1]

I. Trial and Appeals

Appellant was convicted of first degree murder, sexual battery, and auto theft on March 10, 1994. The jury recommended death by a vote of 10-2. The trial court

[1] References to the record on appeal from the under-warrant postconviction proceeding are made with the letters "SPCR" followed by the page number(s). References to the record on appeal from Appellant's initial postconviction proceeding are made with the letters "PCR" followed by the page number(s). References to the record on appeal from the original trial are made with the letters "TR" followed by the page number(s). Appellant is referred to as "Appellant" or "Mr. Branch," and Appellee is referred to as "Appellee" or the "State."

sentenced Appellant to death, and this Court affirmed on direct appeal. *Branch v. State*, 685 So. 2d 1250 (Fla. 1996).

Appellant filed a Rule 3.850 motion on May 7, 1998, and amended motions on April 1, 2003, and October 10, 2003. The Circuit Court denied relief. On appeal, this Court affirmed and also denied his petition for writ of habeas corpus. *Branch v. State*, 952 So. 2d 470 (Fla. 2006). On March 28, 2007, Appellant filed a federal habeas petition in the Northern District of Florida. The petition was denied, and the Eleventh Circuit affirmed. *Branch v. Sec'y*, 638 F. 3d 1353 (2011).

On April 17, 2014, and July 30, 2015, Appellant filed motions under Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes (2015), for postconviction DNA testing. The motions were denied on July 2, 2015, and August 17, 2015. This Court affirmed on August 8, 2016. *Branch v. State*, No. SC15-1869.

In June 2016, Appellant filed a successive Rule 3.851 motion with an amendment on April 3, 2017, seeking relief in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). The trial court denied the motion. This Court affirmed on January 22, 2018, three days after Governor Rick Scott signed Appellant's death warrant. *Branch v. Florida*, SC17-1509 (Jan. 22, 2018). On February 6, 2018, this Court denied Appellant's motion for a stay pending certiorari review in the United States Supreme Court.

II. Death Warrant Litigation

On January 29, 2018, Appellant filed an application for stay of execution and 3.851 motion, raising two claims for relief. (SPCR. 237-310). He presented a detailed proffer showing that his death sentence should be precluded by the Eighth Amendment because of the emerging scientific consensus on the effects of brain development that continues into the mid-twenties and renders people in their early-twenties, such as Appellant, cognitively indistinguishable from juveniles under the age of eighteen and especially where, as here, other factors further delayed brain development. Appellant also presented a second claim that the needless suffering and uncertainty he has experienced during his time on death row—exacerbated by prolonged stretches of time when he was without meaningful counsel—violates the Eighth Amendment's prohibition against cruel and unusual punishment. (SPCR. 303). The State's response argued that relief should be denied because Appellant had not asserted he was intellectually disabled or under eighteen at the time of the offense, and that the second claim did not necessitate relief. (SPCR. 1101-02)

A. The *Huff* Hearing

At the January 30, 2018, hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993), the *State did not dispute Appellant's proffer*. (SPCR. 1093). The proffer included undisputed evidence concerning Appellant's traumatic life history and, crucially, a new scientific consensus detailed in the reports of Dr. Faye Sultan and

Dr. James Garbarino that "[t]here is a new mental health professional consensus" regarding the consequences of "brain development [that] continues into the 20's." (SPCR. 1094 (Dr. Sultan)). This new scientific consensus "was not available during the previous proceedings in the case of Eric Branch." (SPCR. 334). The "science of brain development had not progressed to the point where [Mr. Branch's] problems could be recognized for what they were: developmental brain immaturity." (SPCR. 344 (Dr. Garbarino)). And prior counsel Doug Knox confirmed that the proffer of a new scientific consensus on brain development "was not available previously and that [he] would have raised it had it been available." (SPCR. 1095).

Regarding Claim 2, Appellant explained that the claim was not ripe for review until the Governor issued Appellant's death warrant. (SPCR. 1099).

The State sought a summary denial on the basis of a "conformity clause" argument.[2] (SPCR 1099-1100). The State did not contest Appellant's actual proffer but asserted that *Roper* claims are "limited to minors." (SPCR. 1101-02).

As to Claim 2, the State argued that Appellant's twenty-four years on death row were not cruel and unusual punishment. (SPCR. 1104-05). The State argued this claim as a "quantitative" years on death row claim and did not address Appellant's qualitative argument about his decades-long fight for legal representation.

---

[2] The conformity clause of the Florida Constitution is discussed later in this brief.

Appellant's counsel then pressed the point that "expert opinions from qualified experts" that were "not contradicted by the State," highlight there is a new scientific consensus. (SPCR. 1107). Appellant also countered the State's "conformity clause" argument, pointing out that United States Supreme Court precedent holds that courts should not ignore a scientific consensus when evaluating an Eighth Amendment claim and citing to *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), as authority. (SPCR. 1107-08). Appellant urged that conformity with that established Eighth Amendment law is appropriate. (SPCR. 1096-97).

The Circuit Court acknowledged that "the State does not seem to be contradicting" Appellant's proffer of a new scientific consensus, but it was hesitant. (SPCR. 1101-11). Appellant explained at length that the recent developments in the research on adolescent brains were not previously available. (SPCR. 1112-17). Counsel stated, "The science, as Dr. Sultan and Dr. Garbarino explained, is available today. And the reality of it is, as a presiding judge, you don't have a contradictory presentation from the parties on the science itself." (SPCR. 1116).

The Circuit Court concluded by indicating that, because it had the unrefuted expert reports and lay witness affidavits, an evidentiary hearing was unnecessary for the court to prepare an order. (SPCR. 1123).

B. The Order

The court denied the application for stay of execution and motion to vacate judgment and sentence on February 1, 2018. (SPCR. 1123-38). It did not directly address Appellant's previously unavailable scientific consensus argument but, citing to *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015), wrote "[t]his court must construe the prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court," and it "declines to propose a modification of the bright line of *Roper* based on psychological evidence." (SPCR. 1135).

Then, without permitting a hearing and notwithstanding the unrebutted nature of Appellant's proffer, the court relied on its own belief about the new science and wrote, "[t]he emerging science . . . does not qualify as newly discovered evidence." *Id*. The court cited cases that did not involve the new scientific consensus about brain development . (SPCR. 1136). The court stated its belief that Appellant "could have brought this claim in the years prior to the signing of his death warrant." *Id.* But the court did not provide Appellant the opportunity to explain why the earlier studies were inapplicable to Appellant's claim, to rebut the court's inaccurate belief about the science, or to establish that the science was not previously available and that Appellant has presented a valid claim. Ironically, just four days *after* the court's ruling, the American Bar Association issued a resolution further highlighting that the court was wrong in its belief that the science was not new.

The court denied Claim 2 based on previous rulings rejecting claims addressing the length of time a prisoner was on death row. (SPCR. 1136). The court did not mention the qualitative aspect of the evidence Appellant presented on this claim.

The court denied all of Appellant's public records requests relating to the execution process and execution drugs used in Florida. This aspect of the court's ruling is discussed in Argument 3.

SUMMARY OF ARGUMENT

ARGUMENT I: This appeal involves an important issue of first impression. Appellant has presented a new consensus in the scientific community, founded on expert evaluations that the State did not rebut below and other unrebutted supporting evidence, establishing that people in their late teens and early twenties are comparable to juveniles for the purpose of barring their execution under the Eighth Amendment's prohibition against cruel and unusual punishments. Appellant also presented the applicable United States Supreme Court precedent, known to this Court, establishing that a reviewing court may not ignore the relevant scientific consensus when evaluating an Eighth Amendment issue in a capital case. Accordingly, Appellant, who was twenty-one years old at the time of the offense, sought a hearing to present evidence that he is ineligible for the death penalty because of his specific, limited brain development. Highlighting that this consensus

was not available in prior proceedings, just three days ago the American Bar Association's House of Delegates passed a resolution calling on all jurisdictions that still use capital punishment to prohibit its imposition against people twenty-one years of age or younger.

Appellant's claim *does not* depend on the research used to support the United States Supreme Court's holding in *Roper*. That research addressed people under age 18. Instead, Appellant has presented evidence, including reports from respected mental health practitioners, of a newly-emerged scientific consensus regarding the the effect of limited brain development on people twenty-one and younger, such as Appellant. It shows now what could not be shown previously: that because brain development is not complete until the mid-twenties, there are pronounced effects on the behavior of people in their late teens and early twenties. In fact, even as of 2016, brain development research had been so focused on adolescents under eighteen that most studies were not even looking at adolescents older than eighteen; instead, people over eighteen were often lumped in with other adults as old as fifty. This new scientific consensus is especially applicable here because Appellant suffered years of childhood trauma and has a significant history of adolescent substance abuse, two major factors that delay brain development even more. The proffer was not contested by the State in the Circuit Court. Nevertheless, the Circuit Court did not proceed to a hearing.

A central question Appellant now presents to this Court is whether the Eighth Amendment understanding of United States Supreme Court decisions such as *Hall v. Florida* and *Moore v. Texas* will be followed in this case. This Eighth Amendment precedent counsels that the consensus of the science community should not be ignored when a court determines whether a defendant is ineligible for a death sentence. This Eighth Amendment law was overlooked by the Circuit Court, but it demonstrates that this Court would be acting in "conformity" with the Eighth Amendment by permitting a hearing at which Mr. Branch may present proof that the science is new and that it prohibits the death penalty here.

The Circuit Court committed an additional error in its treatment of Mr. Branch's claim. It relied on its own undisclosed belief about the prior availability of brain development research without giving Mr. Branch the opportunity to rebut that belief. It is highly likely that the court conflated the older science about pre-eighteen brain development with the new, more particularized science on how the delayed maturation process affects people through their early twenties. The Circuit Court then declined to hold an evidentiary hearing, depriving Mr. Branch the opportunity to present evidence of the new scientific consensus and its application here, and so also deprived Mr. Branch of the opportunity to rebut the Circuit Court's inaccurate belief about the new science. A stay and a hearing are appropriate.

ARGUMENT II: Appellant spent a majority of this time on death row making desperate attempts to obtain counsel to assist with his case. The fear and suffering he underwent violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Circuit Court erred in believing this claim, which is based on Appellant's unique circumstances, is foreclosed by prior rulings.

ARGUMENT III: The trial court should have granted Appellant's limited requests for the expiration dates of the drugs that will be used to execute him and the autopsy report for Patrick Hannon.

STANDARD OF REVIEW

When the trial court denies postconviction relief without an evidentiary hearing, this Court accepts Appellant's allegations as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, the Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision regarding whether to grant an evidentiary hearing depends upon the actual material before the court, not the court's innate belief about the evidence, and the ruling as to whether a hearing is appropriate is subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM, BASED UPON A NEW SCIENTIFIC CONSENSUS, THAT DUE TO APPELLANT'S LIMITED BRAIN DEVELOPMENT WHEN HE COMMITTED THE CRIME AT AGE 21, HIS EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS

This claim should be addressed after a proper hearing. Contrary to the Circuit Court's belief, the science upon which the claim is based did not exist earlier. The claim therefore "could not have been ascertained by the exercise of due diligence" and is not procedurally barred. *See* Fla. R. Crim. P. 3.851(d)(2)(A). Since the scientific consensus upon which the claim is founded is new, submitting the claim in this "successive" posture case is not an "abuse of process." *See* Fla. R. Crim. P. 3.851(e)(2).

The State did not contest Appellant's evidentiary proffer. However, the Circuit Court relied upon its own preconceived beliefs about the science supporting Appellant's claim, but did not give Appellant the chance to present evidence countering those beliefs. The Circuit Court's core misapprehension—i.e., that the new science supporting Appellant's claims is not new—brings us to this appeal.

Appellant was twenty-one years old at the time of the offense. While the United States Supreme Court has prohibited capital punishment for juveniles under the age of eighteen in *Roper v. Simmons*, 543 U.S. 551 (2005), the evolving standards of decency *today* counsel that extended adolescents—young people in their late

teens and early twenties—also do not have the requisite culpability to be sentenced to death. Today's newly developed science in the area of adolescent brain development shows that extended adolescents are more comparable to their younger counterparts than they are to people with matured adult brains. While practically all twenty-one year olds bear these characteristics, Mr. Branch had even more profound cognitive delays due to his traumatic childhood and history of adolescent alcohol and substance abuse.

The fact that the scientific consensus has only now become available was confirmed last Monday, February 5, 2018, by the American Bar Association, whose House of Delegates issued a resolution calling on jurisdictions that have capital punishment to prohibit its imposition in cases of people aged twenty-one and younger *because of the new science*.

"In reviewing a trial court's summary denial of postconviction relief, this Court must accept the [appellant]'s allegations as true to the extent they are not conclusively refuted by the record." *Tomkins v. State*, 994 So. 2d 1072 (Fla. 2008). Mr. Branch's allegations are not refuted by the record. In fact, the only substantial, competent evidence before the Circuit Court was the uncontested factual proffer submitted by Mr. Branch. That evidence was not contradicted by the State, as the Circuit Court itself acknowledged at the hearing. (SPCR. 1110). This Court should remand for a hearing in light of Mr. Branch's uncontested proffer. *Cf. Jones v. State*,

709 So. 2d 512, 533 (Fla. 1998) ("[T]he record contains no competent substantial evidence to support its summary dismissal of the testimony. The trial court's order denying relief thus is defective.").

A. This Court has the authority to grant this constitutional relief under the "conformity clause" of Article I, Section 17, of the Florida Constitution

The Circuit Court viewed its authority to assess Mr. Branch's claim under the United States Constitution as curtailed. (SPCR. 1135) ("This Court must construe the prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court. . . . In light of the decision in *Roper*, this Court declines to propose a modification of the bright line of *Roper* based on psychological evidence."). The Circuit Court's perspective was off the mark.

First, Florida courts have the authority to interpret and apply the United States Constitution. For two centuries, this has been a bedrock principle of the American judicial system.

> [I]t is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. . . . From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment.

Martin v. Hunter's Lessee, 14 U.S. 304, 34-41 (1816) (citing U.S. Const. art. VI). The Federal Constitution "would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue" if state courts lacked jurisdiction to interpret the federal constitution. *Id.* at 342.

> [T]he constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend.

Id. See also Danforth v. Minnesota, 552 U.S. 264, 280 (2008) (indicating that states may expand constitutional protections "as long as they do not infringe on federal constitutional guarantees").

Second, the "conformity clause" of the Florida Constitution provides: "The prohibition against cruel or unusual punishment . . . shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided by the Eighth Amendment to the United States Constitution." Fla. Const. art. 1, sec. 17. In this context, the Circuit Court should have, and this Court now should, rule in conformity with the United States Supreme Court's Eighth Amendment decisions. Those decisions teach that the consensus of the scientific community should inform a court's determination of whether an individual sentenced to death should not be subjected to capital punishment. This Court is well aware of those scientific-consensus decisions, as one directly affected Florida's previous limited understanding of the scientific consensus in cases of intellectual disability. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *see also Moore v. Texas*, 137 S. Ct. 1039 (2017) (addressing the significance of a

scientific consensus to the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (highlighting that scientific consensus about pre-eighteen brain development informed the Court's Eighth Amendment decision).

While the United States Supreme Court has not yet addressed the question whether *Roper*'s prohibition on the execution of juveniles who were under age eighteen at the time of the offense should be expanded to include individuals, like Mr. Branch, who were twenty-one years old or younger at the time of the offense, "conformity with decisions of the United States Supreme Court" means that this Court should consider the new science. And while *Roper* sets the minimum standards, or constitutional "floor," this Court has long recognized its authority to provide defendants greater-than-minimum protections in conformity with Eighth Amendment precedent.

Most recently, the Court reaffirmed that it could grant "greater" relief under the Eighth Amendment, where the United States Supreme Court had not directly addressed the issue at hand. In *Hurst v. State*, 202 So. 3d 40, 59-60 (Fla. 2016), the Court held that, despite the United States Supreme Court's decision to address only the Sixth Amendment implications of Florida's prior capital sentencing scheme, this Court was empowered to rule that the scheme violated the Eighth Amendment and

accordingly to grant more expansive relief.[3] *Id.* at 50; *see also id.* at 74 (Pariente, J., concurring) (explaining that, because the United States Supreme Court had not addressed the relevant Eighth Amendment question, the Florida Supreme Court could properly consider and decide the matter itself). So too here, the United States Supreme Court has not ruled on the new scientific consensus regarding brain development in young people such as Appellant. The evidence did not exist when *Roper* was decided thirteen years ago and, therefore, was not presented to, or rejected by, the United States Supreme Court in *Roper*. This Court should act "in conformity with" the United States Supreme Court's rulings and allow a hearing in light of the new scientific consensus.

Roper v. Simmons, 543 U.S. 551 (2005), prohibited imposition of the death penalty on juveniles under eighteen. This was because the science available at that time distinguished juveniles under eighteen from adults in three key ways relevant to criminal justice policy: (1) a lack of maturity and lesser sense of responsibility, leading to increased risk-taking; (2) susceptibility to negative influences, including peer pressure; and (3) the transient nature of juveniles' personality traits. *Id.* at 569-70.

---

[3] This Court also provided "greater" protection in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (holding the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), retroactive before the United States Supreme Court so held).

Mr. Branch's claim *does not* depend on the research used to support the United States Supreme Court's holding in *Roper*. That research addressed people under age 18. Instead, Mr. Branch presented evidence, including reports from respected mental health practitioners, of a newly-emerged scientific consensus regarding the brain development of young people in their late teens and early twenties. The new scientific consensus establishes the effect of limited brain development on people twenty-one and younger, such as Appellant. It shows now what could not be shown previously: that because brain development is not complete until the mid-twenties, there are pronounced effects on the behavior of people in their late teens and early twenties. This new consensus applies to twenty-one-year-old Eric Branch. And it is especially applicable here because Mr. Branch suffered years of childhood trauma and has a history of adolescent substance abuse, two major factors that delay brain development even more. The proffer was not contested by the State in the Circuit Court.

Part of the reason the scientific consensus was not previously available is that, until recently, researchers understood "[y]oung adults between the ages of eighteen and twenty-one [to] constitute a less well-defined category that has only recently received even informal acknowledgement." *See* Scott, Elizabeth S., Bonnie, Richard J., & Steinberg, Laurence, *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 643 (Nov.

2016). While the beginnings of the idea previously existed that "psychological and neurobiological development that characterizes adolescence continues into the midtwenties, [] the research [had] not yet produced a robust understanding of maturation in young adults age eighteen to twenty-one." *Id.* at 653. Brain development research had been so focused on adolescents under eighteen that most studies were not systematically looking at adolescents older than eighteen; instead, they were often lumped in with other adults as old as fifty. *Id.* at 651. Thus, even as of 2016, "the developmental research suggesting that young adults are not fully mature [was] in an early stage." *Id.* at 643. It is only recently that science turned its attention to older adolescents and provided a newly-formed consensus that many of the same traits possessed by juveniles under eighteen—traits that make them ineligible for the death penalty—also apply to older adolescents in their late teens and early twenties.

Accordingly, the "conformity clause" question Mr. Branch presents to this Court is whether this Court should conform to United States Supreme Court Eighth Amendment decisions holding that the consensus of the scientific community should not be ignored in cases assessing whether a defendant is ineligible for a death sentence.

In accord (or conformity) with the United States Supreme Court Eighth Amendment jurisprudence, this Court may allow a hearing on the new science and

its effect on the question of whether the Eighth Amendment also protects from execution young people like Mr. Branch who were the cognitive equivalent of juveniles at the time of their offense.

B. To support his claim, Appellant presented the Circuit Court with a factual proffer based on lay witness declarations about his life history and expert opinions on the new scientific consensus about adolescent brain development, none of which was disputed by the State

Mr. Branch submitted a detailed factual proffer that included reports from Dr. Faye E. Sultan and Dr. James E. Garbarino as well as declarations from family members, friends, and former attorneys.[4] None of this evidence was contested by the State.

1. The undisputed life history proffer

Eric Branch's undisputed proffer established that he was born to teenaged parents who did not know how to care for themselves, let alone their children, and neglected their young sons. The home where Eric spent his childhood was deplorable and chaotic. Eric and his brother were terribly neglected. Eric's father, Neal Branch, beat his wife, even when she was pregnant, and beat the children, including slamming Eric down into concrete when he was still a toddler. Eric suffered

[4] For Mr. Branch's full life history as submitted to the court below, with citations to the relevant affidavits, see Appellant's R. 3.851 motion (SPCR. 237-310) and accompanying expert reports. (SPCR. 319-48).

extensive abuse and trauma. Eric's mother later left her sons with Neal's parents, but the boys ultimately were sent back to live with their abusive father.

Eric's mother remarried. Eric was able to move back in with her. However, his new stepfather used hard labor as discipline. Eric had difficulty adjusting. He could not control his emotions and allowed them to overwhelm him, much like a younger child. He threw tantrums, and would kick, scream, punch walls, and break things, even when he was far too old to be doing so. Starting in seventh grade, Eric self-medicated with alcohol, drinking whenever he got the chance.

Desperate for some kind of attention, Eric started getting increasingly reckless and getting into trouble. Eventually, Eric's stepfather tired of having him around and took Eric back to live with his abusive father. Eric's mother and brother said nothing, which Eric saw as an act of abandonment.

By the time Eric was a teenager, he felt rejected by his family. He continued to drink heavily, daily if possible. He had no emotional support and became even more desperate for attention and acceptance from his peers. Eric was immature and reckless. He played "chicken" while driving cars and started breaking into buildings. He drove a motorcycle at 150, and even 185, miles per hour. He did not always make it through his exploits unscathed. At the age of sixteen, he was riding on the back of his uncle's motorcycle when he fell off and hit his head. Eric was unconscious for several minutes.

As a teenager, Eric continued to suffer extraordinary violence from his father, Neal. On one occasion, Neal beat Eric and pulled out a clump of his hair. He also broke a lamp over Eric's head.

Eric's immaturity also extended into his teenage years. He acted like a small child when things did not go his way. He would get upset easily and could not accept perceived losses. He had difficulty controlling his emotions in other ways too. He would laugh at inappropriate times. He was referred for therapy at Southern Hills Counseling Center where the clinician noted he "appear[ed] immature and resistant to assuming responsibility."

Eric ended up in prison in Indiana. Small for his age, he was gang raped by a group of men. Ultimately, he left Indiana for Panama City Beach where his cousin was attending college. When Eric arrived in Florida, he was an immature, child-like boy who struggled to grasp reality and was plagued by a drinking problem. At trial, he did not appreciate how much trouble he was in. People who observed him could tell that he did not understand the gravity of the situation.

2. The undisputed expert opinions

In support of his claim, Mr. Branch submitted reports from two knowledgeable experts: Dr. Faye Sultan and Dr. James Garbarino. (SPCR. 319-40; 342-48). Dr. Sultan explained that there is a "new mental health professional consensus that brain development continues into the twenties." (SPCR. 335). Dr.

Garbarino also noted, "our science now recognizes that the cut-off of 18 years is arbitrary, and not in accord with the current understanding of the scientific community." (SPCR. 342).

> *Today it is established in the medical and scientific literature that brain development does not reach "full maturity" until approximately the period of mid-twenties.* Synaptic pruning, the process by which brain synapses are selectively "pruned" or eliminated continues until this time, allowing for more efficient later brain functioning. The myelination process – the development of the substance which provides insulation for the nerve fibers – continues as well. This allows a mature individual to effectively transmit signals, promoting healthy brain functioning and allowing more complex functions. *This process continues until well into the individual's twenties. Also continuing until approximately mid-twenties is the increasing connectivity between regions of the brain.*

(SPCR. 339) (emphasis added). The new science teaches that development of "the pre-frontal cortex area of the brain" continues "until at least the mid-twenties." (SPCR. 287). This is the region of the brain where "executive functions are developed," meaning that executive functioning skills—the skills necessary to "assess risk, think ahead, set goals, and plan ahead" and "[c]omplex planning, the ability to focus on one thing while ignoring distractions, decision-making, impulse control, logical thinking, risk management, organized thinking"—are not fully developed until a person's mid-twenties." *Id.*

Dr. Sultan indicated, "[T]his new mental health professional consensus was not available during previous proceedings in the case of Eric Branch." (SPCR. 334). Similarly, Dr. Garbarino indicated, "the new professional mental health consensus

about the developing human brain in the case of a twenty-one-year-old, such as Eric Branch, was not available to the experts who assessed this case in the past." And former counsel S. Douglas Knox stated in his affidavit:

> Had this new scientific understanding in the mental health professions been available to me during the time I represented Eric, I certainly would have used it. I would have litigated . . . that he should not be executed due to the lack of moral culpability related to his immature level of functioning.

(SPCR. 1129).

Further, in regard to Mr. Branch specifically, his brain development was also delayed by the abuse and neglect he suffered, the instability of his home life, and his substance abuse.

> Eric Branch was exposed to chronic trauma within his home and within his community. Traumas, and the resulting fear produced by such situations, are now understood to undermine the development of a child's brain. The brain adjusts to patterned-repetitive experiences that are understood through the senses. Trauma impacts brain areas like the amygdala (involved in emotion management) and the hippocampus (involved in memory and memory consolidation).

Id. Dr. Sultan concluded—based on her assessment of Mr. Branch and on the new scientific information—that "Mr. Branch, at age 21, still had an 'underdeveloped brain.'" (SPCR. 335).

> In order to cope with his unmet emotional needs, Eric Branch turned to alcohol binging and substance abuse.

* * * *

> Medical research has demonstrated that adolescent substance abusers show abnormalities on multiple measures of brain functioning which is linked to changes in cognitive ability, decision-making, and the regulation of emotions. Abnormalities have been seen in brain structure volume, white matter quality, and activation to cognitive tasks.

(SPCR. 338-39). "Deficits in executive functioning, specifically in the areas of abstract reasoning ability and problem-solving ability have also been linked directly to adolescent substance abuse." Because of this, "[t]he normal maturational process of the brain is disrupted by the introduction of alcohol and other substances." (SPCR. 339). *See also* (SPCR. 346) ("While such consumption by a traumatized person like Mr. Branch has a self-medicative component, its significance . . . is that such a history additionally impairs brain development for adolescents and individuals in their early 20's.").

At the time of the offense, Mr. Branch was a youth who had suffered a lifetime of trauma (including abuse, neglect, and rape) and years of adolescent substance abuse. Today's science teaches us that the specific effects of his limited brain development at twenty-one years old put him in the same category as those under eighteen. This science was not available when the Court decided *Roper*. From an Eighth Amendment perspective, the now available science teaches that his brain development was not complete, and this distinguishes him from adults in the three key ways *Roper* identified as relevant to criminal justice policy: (1) a lack of maturity and an undeveloped sense of responsibility, which often results in poor

decision-making and increased risk-taking; (2) greater vulnerability and susceptibility; and (3) transitory personality traits and unfixed character. *Roper*, 543 U.S. at 569-70. As summarized by Dr. Garbarino, "An individual such as Eric Branch should not be considered eligible for imposition of the death penalty, given his age of 21 and developmental history." (SPCR. 345).

The State presented no expert or other evidence to rebut this proffer.

C. The Eighth Amendment prohibits the death penalty against this twenty-one-year-old offender with an undeveloped brain

The Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002); *see also Enmund v. Florida*, 458 U.S. 782, 788 (1982). A punishment's proportionality is determined by the evolving standards of decency, since "the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (citing *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, J., dissenting)). The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).[6]

[6] "[E]volving standards of decency" necessarily evolve, and what may have been acceptable to the courts and society at large historically may not prove

The concern over cruel and unusual punishment is even more significant when a person's life is at stake. In capital cases, "the Court has been particularly sensitive to ensure that every safeguard is observed," because "[t]here is no question that death as a punishment is unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Under the Eighth Amendment, a death sentence "is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Id.* at 183. *See also Kennedy*, 554 U.S. at 441 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

When assessing the proportionality of a death sentence under the Eighth Amendment, "the Court [also] insists upon confining the instances in which the punishment can be imposed." *Id.* at 420. The result has been that the death penalty is only proportionate when used for "'a narrow category of the most serious crimes' and on those whose extreme culpability makes them '*the most deserving of execution*.'" *Id.* (quoting *Roper*, 543 U.S. at 568) (emphasis added); *see also Roper*,

---

acceptable later in time. *Compare Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding constitutional the execution of intellectually disabled people), *with Atkins*, 536 U.S. at 319 (prohibiting the execution of intellectually disabled people); *compare Stanford v. Kentucky*, 492 U.S. 361, (1989) (holding constitutional the execution of offenders under eighteen years), *with Roper*, 436 U.S. at 560 (prohibiting the execution of offenders under eighteen years).

543 U.S. at 568 (recognizing that the death penalty should be reserved for "the worst of the worst").

Since "the imposition of death by public authority is so profoundly different from all other penalties, . . . an individualized decision is essential in capital cases." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Moreover, because of "the resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment," Eighth Amendment jurisdiction requires court to "insist upon confining the instances in which capital punishment may be imposed." *Kennedy*, 554 U.S. at 440.

There are times, then, when a death sentence is unconstitutionally excessive. To evaluate excessive imposition, courts first must look to "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, 543 U.S. at 563. To make this assessment, courts generally consider "the historical development of the punishment at issue, legislative judgments, international opinion, and sentencing decisions juries have made . . . ." *Enmund*, 458 U.S. at 788. After the objective indicia, courts consider proportionality in light of the "standards elaborated by controlling precedents" and an "understanding and interpretation of the Eighth Amendment's text, meaning, and purpose." *Kennedy*, 554 U.S. at 421. This second step is the more dominant factor. *Enmund*, 458 U.S. at 797. Under this test, the United States Supreme Court has found

the death penalty unconstitutionally excessive when used against those who have not committed homicide, *see Kennedy*, 554 U.S. at 421; *Enmund*, 458 U.S. at 801; *Coker*, 433 U.S. at 59; those with intellectual disabilities, *see Atkins*, 536 U.S. at 321; and juveniles under eighteen, *see Roper*, 543 U.S. at 578. Such decisions are made in light of the underlying principles of narrowing the death penalty's use, and making sure that only those viewed as having the highest culpability face execution.

As part of this evolving standards assessment, courts must consider the consensus of the medical community and scientific data in determining where to draw the moral culpability line. For example, in *Hall*, the Court relied heavily on the standards of the scientific community:

> Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Hall, 134 S. Ct. at 1993. In *Hall*, the Court ruled that the brightline test then used by Florida that precluded anyone with an I.Q. score of over seventy from presenting evidence of intellectual disability ignored the medical consensus that an I.Q. score is not dispositive of a person's intellectual capacity. The Court wrote:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's [brightline cutoff] contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The

> States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Id. at 2001. To act in conformity with Eighth Amendment jurisprudence, a court may not ignore the relevant scientific consensus. *Id.*

Evolving standards of decency no longer allow for the imposition of death sentences on people twenty-one years of age and younger. The United States Supreme Court prohibited the death sentence for juveniles under eighteen in *Roper*. That case was an adjustment to the evolving standards of decency, as the Court overruled its 1989 decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), allowing for the imposition of death sentences on sixteen and seventeen-year-olds. The studies available at the time of *Roper* assessed brain development on youths younger than eighteen. Science had not at that time reached a consensus on youths in later adolescence and early twenties.

Today, the effects of brain development in youth twenty-one and under has reached the point of scientific consensus. The medical community has now overwhelmingly determined that adolescents in their late teens and early twenties are more comparable to their younger peers than they are to adults in their late-twenties or older with developed brains. For the same reasons *Roper* extended the categorical bar to all adolescents under eighteen, conformity with Eighth Amendment standards now counsels this Court to apply the constitutional protection

to youths twenty-one and under, and especially for those who, like Mr. Branch, have other factors further delaying their development.

Based on this new medical consensus, on February 5, 2018, the American Bar Association passed a resolution specifically addressing that, under evolving standards of decency, people who were twenty-one and younger at the time of their capital offense should not be executed. The ABA explained:

> "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."

Rawles, L., *Ban Death Penalty for Those 21 or Younger, ABA House Says*, ABA Journal (Feb. 5, 2018).

1. There is now a consensus in the medical community that the brain development that continues through the mid-twenties affects adolescents in their late teens and early twenties in ways similar to the effects on juveniles under eighteen, meaning that adolescents in their late teens and early twenties are no more culpable for their crimes than their younger counterparts

In *Roper*, the Court explained, "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Roper*, 543 U.S. at 572-73. Relying on scientific studies about brain development up to age eighteen, the Court observed: "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the

worst offenders." *Id.* at 569. This understanding included three concepts: (1) "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young;" (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) "that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 569-70 (citation, internal quotations omitted). "These differences render suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 570.

Today's scientific consensus teaches that these same three concepts apply to youth in late adolescence and early twenties. Since the Court's decision in *Roper*, scientific and social-science research has revealed that, like sixteen and seventeen-year-olds, people in their late teens and early twenties do not have fully developed brains, are immature, and are vulnerable to peer pressure and risk-taking behavior. "The age of 18 as a 'bright line' is not in accord with the current findings of research in developmental science. This research reveals that human brain maturation is ordinarily not complete until the mid-20's . . . . This [is a] new understanding . . . ." (SPCR. 343).

In *Roper*, the first category of traits cited by the Supreme Court as grounds for treating juveniles differently than adults includes immaturity, irresponsibility, and

impulsivity. *Roper*, 543 U.S. at 569. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). Dr. Sultan explained:

> The pre-frontal cortex is the area of the brain in which executive functions are developed. This region of the brain makes it possible to assess risk, think ahead, set goals, and plan ahead. Significant development of the pre-frontal region of the brain continues until at least the mid-twenties. Complex planning, the ability to focus on one thing while ignoring distractions, decision-making, impulse control, logical thinking, risk management, organized thinking, and short-term memory are all functions of the pre-frontal cortex.

(SPCR. 339). Similarly, Dr. Garbarino explained:

> Adolescent brains are immature—an immaturity that extends into early adulthood. This includes the frontal lobes which play a crucial role in making good decisions, controlling impulses, focusing attention for planning, and managing emotions. Science now understands that the process of maturation involves three components of brain function: "gray matter" – the outer layer of the brain, "white matter connections" – the brain cells serving as the "wiring" between neurons, and activity in the chemicals or "neurotransmitters" that execute messages within the brain. *All three are compromised in an individual in his early 20's.*

(SPCR. 343) (emphasis added).

Roper recognized that, as a consequence of their immature brains, teens seek risk. Research has shown that "individuals in the young adult period (i.e. ages 18-21)" are at a greater risk to engage in risky behavior than younger adolescents, which indicates "that this period of development is an important transition." Rudolph, M., *At Risk of Being Risky: The Relationship between 'Brain Age' under Emotional*

States and Risk Preference, Dev. Cognitive Neurosci. 24:93-106 at 102 (2017). Current science demonstrates that the prefrontal cortex, crucial to executive functioning—which encompasses a broad array of abilities such as impulse control, risk management, and decision making—continues to develop until "at least the mid-twenties." (SPCR. 339).

The second category of traits cited by the *Roper* court as grounds for treating juveniles differently than adults includes vulnerability and susceptibility. *Roper*, 543 U.S. at 569. "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570. Science now teaches that the vulnerabilities of twenty-one year olds are analogous.

> [T]he hormonal conditions of such youths contribute to impaired brain function (relative to adults) in matters of assessing and taking risks, emotional intensity, and dealing with peers (including social rejection). All of these considerations underlie the current scientific recognition that extended adolescents (people in their early 20's) are a special class.

(SPCR. 344).

The third category of traits cited by the *Roper* court as grounds for treating juveniles differently than adults includes transitory personality and unfixed character. *Roper*, 543 U.S. at 570. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime

committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

Today's scientific consensus is that this reasoning applies with equal force to those in their early twenties.

> Mr. Branch clearly fits the brain development pattern recognized by current science. In his late teens and early 20's he is described as immature, impulsive, often not functional, unable to recognize cause and effect, emotionally labile, acting out, lacking an appropriate understanding of legal proceedings and their consequences, and lacking in self-control. As his history demonstrates, at the time of the offense and trial, his functioning was still that of a child. Later in life and currently, he is thoughtful, mature, considerate of others, and taking steps to assist himself in the legal process.

(SPCR. 345).

"The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall*, 134 S. Ct. at 1992 (quoting *Weems v. United States*, 217 U.S. 349 (1910)). In *Hall*, the Court stated, "It is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of I.Q. scores to determine how the scores relate to the holding of *Atkins*." *Hall*, 134 S. Ct. at 1993. And in *Miller v. Alabama*, the Court discussed that the decisions in *Roper* and *Graham v. Florida*, 560 U.S. 48 (2010), "rested not only on common sense . . . but on science and social science . . .

and 'developments in psychology and brain science.'" *Miller*, 567 U.S. at 471. Similarly, it is appropriate for this Court to consider the new scientific consensus to assess the Eighth Amendment's application to a twenty-one year old, like Appellant.

Today we know there is no meaningful difference between Appellant and a defendant under eighteen. Both have brains that have not yet fully developed. Both are prone to immaturity, recklessness, and impulsivity; are still in the neurological development phase; and have transitory personality traits as they search for a stable, authentic identity.

2. Other objective indicia demonstrate that society as a whole is treating youths aged twenty-one and under differently than adults

In addition to the emerging consensus of the medical and scientific community, state and local governments, juries, and international governments are increasingly treating youths in their late teens and early twenties in ways similar to younger juveniles. And on February 5, 2018, the American Bar Association's House of Delegates adopted a resolution recommending that jurisdictions that still impose the death penalty do not impose it on any offender twenty-one years of age or younger at the time of the offense.

a. An emerging national consensus reflects that individuals in Appellant's age group should not be executed

There is an emerging national legal consensus that older adolescents should be treated more similarly to juveniles under eighteen. In assessing the existence of

national consensus on an issue, the United States Supreme Court has examined laws enacted by the various state legislatures and the decisions of sentencing juries, appellate courts, and governors about whether to execute defendants who belong to a particular category of individuals. *See Roper*, 543 U.S. at 563-65; *see also Atkins*, 536 U.S. at 313-17.

Here, there is a trend supporting the idea that youths aged twenty-one and under should not be subjected to the death penalty. First, they would not be executed for any offense in twenty-three states, the District of Columbia, and the five United States territories, because the death penalty has been abolished in these jurisdictions. *Facts about the Death Penalty*, Death Penalty Information Center (2018). The governors of four states have imposed moratoria on executions: Pennsylvania, Oregon, Washington, and Colorado. In *Hall*, the Court characterized states with moratoria as being on the defendant's "side of the ledger" in the national consensus equation. *Hall*, 134 S. Ct. at 1997.

Second, the Court should consider actual practice in states that allow a punishment but do not actually impose it. *Graham*, 560 U.S. at 67 (citations omitted). Seven states that theoretically authorize the death penalty for extended adolescents over eighteen actually highlight a trend against using eighteen as the cut-

off. [7] These states have not executed young offenders in the last fifteen years: Kansas, New Hampshire, Montana, Wyoming, Utah, Idaho, and Kentucky. Six of these states have not imposed death sentences in cases of youth twenty-one and under in the last twenty years: New Hampshire, Montana, Wyoming, Utah, Idaho, and Kentucky.

Similarly, states have gone beyond the age eighteen cutoff in decreasing the number of executions for those who were younger at the time of their crimes. Even in the remaining states with the death penalty as an authorized punishment for offenders twenty-one years of age and younger, executions occur in a minority of the states. Since 2007, for example, only twelve states have actually executed offenders who were twenty-one or younger at the time of their offenses.[8] Since 2011, that number has dropped to nine states.

b. State and federal laws reflect the consensus that youth in Appellant's age group are categorically less mature and less responsible than older people whose brains have reached full maturity

---

[7] The most recent example is Kentucky where, in two recent cases, a Circuit Court ruled the death penalty unconstitutional for those under twenty-one years of age. *See* Vandiver, B., *Trial Delayed, Death Penalty under Review*, University of Kentucky, Kentucky Kernel (Oct. 20, 2017), http://www.kykernel.com/news/trial-delayed-death-penalty-under-review/article.

[8] These states are Texas, Virginia, Oklahoma, Florida, Delaware, Mississippi, Alabama, Ohio, Georgia, South Carolina, Indiana, and South Dakota.

The United States Supreme Court has considered state statutes imposing minimum age requirements to buttress its conclusion that the death penalty was a prohibited punishment for juvenile offenders. *Roper*, 543 U.S. at 569. In the capital sentencing context, youth is a mitigating factor in almost all death penalty states. Since capital punishment is prohibited for those under eighteen, the youth mitigating factor plainly supports a national consensus that considers defendants in their late teens and early twenties differently than adults.[9]

Three death penalty states have interpreted "onset in the developmental period," for purposes of an intellectual disability assessment in the capital punishment context, as onset prior to age twenty-two: Indiana, Utah, and Maryland.

---

[9] *See* Alabama, Ala. Code § 13A-5-51(7); Arizona, Ariz. Rev. Stat. § 13751(5); Arkansas, Ark. Code. Ann. § 5-4-605(4); California, Cal. Penal Code § 190.3 (i); Colorado, Colo. Rev. Stat. Ann. § 18-1.3.1201(a); Florida, Fla. Stat. Ann. § 921.141 (g); Kansas, Kan. Stat. Ann. § 21-6625(7); Kentucky, Ky. Rev. Stat. Ann. & 532.025(8); Louisiana, La. C.Cr. P. art. 905.5(f); Mississippi, Miss. Code Ann. § 99-19-101(g); Missouri, Mo. Ann. Stat. § 565.032(7); Nebraska, Neb. Rev. Stat. Ann. § 29-2523(d); Nevada, Nev. Rev. Stat. Ann. §200.035(6); New Hampshire, N.H. Rev. Stat. Ann. § 630:5(d); North Carolina, N.C. Gen. Stat. Ann. § 15A-2000(7); Ohio, Ohio Rev. Code Ann. §(4); Pennsylvania, 42 Pa. Stat. § 9711(4); South Carolina, S.C. Code Ann. § 16-3-20(7); Tennessee, Tenn. Code Ann. § 39-13-204(7); Utah, Utah Code Ann. § 76-3-207(e); Virginia, Va. Code Ann. § 19.2-264.4(v); Washington, Wash. Rev. Code Ann. § 10.95.070(7); Wyoming, Wyo. Stat. Ann. § 6-2-102(vii).

Two more states include this factor for defendants who are under the age of eighteen, but as that is now a complete bar to a death sentence, presumably they consider evidence of youth for those over the age of eighteen as well. *See* Indiana, Ind. Code Ann. § 35-50-2-9(6); Montana, Mont. Code Ann. § 46-18-304(g).

Ind. Code § 35-36-9-2 (2017); Utah Code § 77-15a-102; Md. Code, Crim. Law § 2-202 (2010).

Civil commitment statutes addressing "onset in the developmental period" in four non-death penalty states also use age twenty-two as the developmental age for onset purposes: Minnesota, New Mexico, Rhode Island, and Wisconsin. Minn. Stat. § 253B.02; N.M. Stat § 28-16A-6; N.M. Stat § 43-1-3; R.I. Gen. Laws § 40.1-1-8.1; Wis. Stat. § 51.01(5)(a), § 51.62(1).

In the criminal justice system more generally, there are many examples of courts and legislatures recognizing that people in their early to mid-twenties are not full-fledged adults. For example, Nebraska, California, Idaho, and New York all offer Young Adult Court, for youthful offenders aged eighteen to twenty-four or twenty-five, depending on the state. States are increasingly opening young adult correctional facilities to focus more on rehabilitation and building life resources. They have done this in Connecticut (for eighteen to twenty-five year olds), Maine (for eighteen to twenty-six year olds), and New York (with a unit at Rikers Island that specifically houses eighteen to twenty-one year olds).

Outside of the criminal justice system, the federal Affordable Care Act uses age twenty-six as the cut off age for youths covered by a parent's health insurance plan, and rental car companies impose extra "young driver" fees on renters under age twenty-four.

c. There is little penological purpose for imposition of the death penalty on youth in Appellant's age group

Death sentences imposed on extended adolescents like Appellant have little or no penological purpose. They do not meet any of the three principal rationales of punishment: "rehabilitation, deterrence, and retribution." *Kennedy*, 554 U.S. at 420. "Rehabilitation, it is evident, is not an applicable rationale for the death penalty." *Hall*, 134 S. Ct. at 1992-93 (citation omitted). As for the rationale of deterrence, "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles." *Roper*, 543 U.S. at 571. "The same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* And "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Today we know that this same understanding about deterrence and retribution must apply to a youth such as Appellant.

Youth aged twenty-one and younger have the same impulsivity as youths eighteen and under. They act rashly, without reflection and full consideration of the consequences of their actions. They do not grow out of this behavior until their brains have fully formed. Science now shows that like sixteen and seventeen year olds, they

lack the self-regulation and executive functioning to appreciate the death penalty as a deterrent.

This is especially true here, where Mr. Branch also suffered delays to his brain development because of his childhood trauma and adolescent substance abuse. Given the findings of the medical community and its most recent consensus on brain development in older adolescents, the Court should afford Mr. Branch the opportunity to present evidence that he is constitutionally ineligible for execution.

D. The Circuit Court erred in its treatment of Appellant's claim

1. The court erred in failing to hold an evidentiary hearing where it still had questions about the undisputed evidence

During the January 30, 2018, *Huff* hearing, the Circuit Court said, "I ask the first [question] in—with some trepidation because it is, as you say, an issue that the State does not seem to be contradicting. I'm not sure that I understand this recent consensus." (SPCR. 1110-11). Appellant's counsel noted:

> Now, we have known for a long time that abusing children is a bad thing, and we've known for a long time that kids drinking and doing illegal substances is a bad thing for kids. What is now available and crystallized is that national consensus, that the two experts have proffered to the Court, that there are specific effects on the brain, that there are specific brain chemical and brain synaptic activity that applies to someone who's 19, 20, 21, 22, and the experts have provided that in their reports.

(SPCR. 1113-14). The undisputed expert reports also addressed the court's question:

> The mental health professions, including psychology, psychiatry, the neurocognitive disciplines, and related social science disciplines, have

> expanded their research and professional understanding of human brain functions. . . . [T]he professional consensus today is that there are distinct aspects to human brain development such that adolescent brain formation continues into the period of one's 20's.

(SPCR. 334 (Dr. Sultan)).

> The age of 18 as a 'bright line' is not in accord with the current findings of research in developmental science. . . . This new understanding is especially significant to a case such as the case of Eric Branch, who was 21 at the time of the offense, demonstrably impulsive and immature, and suffered an abusive developmental history.

(SPCR. 343 (Dr. Garbarino)). *None of this was disputed by the State*.

The Circuit Court, if unwilling to accept Appellant's proffer based on the pleadings, should have held a hearing in light of the proffer and expert opinions that the medical community has come to a consensus on human brain development that was not available at earlier stages of this case. Instead, the Circuit Court complained that, given the warrant, it did not have time to go into all of this, stating, "I don't have, you know, three months to let people get ready for hearings on this consensus . . . and both sides prepare for whether there really is a consensus and how it ought to be applied. I'm asked to do this on the fly." (SPCR. 1112).

Expediency is no justification for the court's actions. The need for full and fair evidentiary resolution is especially acute in a capital case. *See Swafford v. State*, 679 So. 2d 736, 740-41 (Fla. 1996) (Harding, J., concurring in decision granting stay and remanding for a hearing, stating that "[w]hile finality is important in all legal proceedings, its importance must be tempered by the finality of the death penalty");

see also Jones v. State, 678 So. 2d 309, 310 (Fla. 1996) (staying execution and remanding for an evidentiary hearing to determine whether some of the evidence proffered was not previously available).

And the court had already scheduled tentative hearing dates for February 1 and 2, 2018, (SPCR. 155), so any hesitancy of the Circuit Court could have been addressed at a hearing.

2. The Circuit Court erred in relying on its own undisclosed beliefs rather than the undisputed factual proffer

Rather than holding a hearing, the Circuit Court erroneously relied on undisclosed information that Appellant did not have an opportunity to confront or explain over the undisputed factual proffer. The Circuit Court's actions deprived Mr. Branch of due process and a full, fair, and reliable hearing in a proceeding where a human life is at stake.

The competent, substantial evidence in this record all supports Appellant's claim. Mr. Branch submitted reports from two qualified mental health experts who spoke to a "new mental health professional consensus" regarding the brain development of a twenty-one year old like Mr. Branch and explained that evidence of the "new professional mental health consensus" was not available previously. (SPCR. 334-35); (SPCR. 342). The State did not challenge the factual proffer and did not contest the findings of Drs. Sultan and Garbarino. The Circuit Court acknowledged that the State did not contradict Mr. Branch's factual proffer. (SPCR.

1110). However, the court did not embrace the unchallenged proffer because of a belief the court obtained outside of the proceedings at hand.

When a court relies on information that is unknown to the defendant and the defendant has no opportunity to question that information, "[t]he risk that some of the information . . . may be erroneous, or may be misinterpreted, by the . . . judge, is manifest." *Gardner v. Florida*, 430 U.S. 349, 359 (1977). Here, the court swept aside the uncontested reports of Drs. Sultan and Garbarino, ruling that "[t]he emerging science alleged and referenced by Defendant explains information already known and does not qualify as newly discovered evidence." (SPCR. 1135). To reach that conclusion, the court must have relied upon some personal belief about the science, although the court did not elaborate in its order. But the court did not allow a hearing at which Mr. Branch could address or contest that belief.

It appears the court conflated previously known information about brain development in eighteen year olds and information that substance abuse is bad for the human brain with the new scientific findings about the specific brain development of young people in their late teens and early twenties. Had the court allowed a hearing, its misunderstandings could have been addressed.

The Circuit Court's actions erroneously deprived Mr. Branch of an opportunity to confront the evidence upon which the court relied. As the United States Supreme Court has explained:

> [T]he judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred . . . and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.

In re Murchison, 349 U.S. 133, 138 (1955). *Cf. Goldberg v. Kelly*, 397 U.S. 254, 266-72 (1970) (holding that procedural due process requires timely and adequate notice, the opportunity to confront adverse witnesses, and the opportunity to present evidence in rebuttal); *Grannis v. Ordean*, 234 U.S. 385 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). And as explained in *Gardner*, "[D]ebate between adversaries is often essential to the truth-seeking function of trials [and] requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Gardner*, 430 U.S. at 360.

If a court intends to "use any information not presented in open court as a factual basis" for a ruling, the court must "afford the defendant an opportunity to rebut it." *Porter v. State*, 400 So. 2d 5, 7 (Fla. 1981). *See also Marcelin v. Denny's Rest.*, 648 So. 2d 834, 835 (Fla. DCA 1995) (reversing where the judge's opinion relied on personal out-of-court observations of a party);

> There is no doubt that in evaluating the evidence, the [judge] should confine its considerations to the facts in evidence as weighed and interpreted in the light of common knowledge. [Judges] must not act on special or independent facts which were not received in evidence.

Edelstein v. Roskin, 356 So. 2d 38, 39 (Fla. DCA 1978) (holding that judges "must not act on special or independent facts which were not received in evidence"); *Snook v. Firestone Tire & Rubber Co.*, 485 So.2d 496 (Fla. DCA 1986) ("In reaching a verdict, [the fact-finder] must not act on special or independent facts which were not received in evidence."); *Krawczuk v. State*, 92 So. 3d 195, 202 (Fla. 2012) (explaining that judges are "strongly discourage[d]" from researching factual matters before them as "[t]here is no reason apparent" for a judge to rely upon the results of personal research "outside of open court").

Mr. Branch was not allowed a hearing to address, with evidence, the belief about relevant science on which the Circuit Court relied. He was denied the chance to test the accuracy, reliability, and applicability of the undisclosed information apparently considered by the Circuit Court. "[F]acts independent of the evidentiary record should not have been considered" by the trial court, and "remand for a new merits hearing is necessary." *Marcelin*, 648 So. 2d at 835.

3. Had Mr. Branch been afforded an opportunity to rebut the Circuit Court's undisclosed belief, he would have presented evidence that the medical community has only recently come to a relevant consensus on brain development, including the effect of the still-forming brain on those in their late teens and early twenties

Contrary to the Circuit Court's untested belief, a consensus by the medical community on certain topics in adolescent brain development, including the effect of the still-forming brain on those in their late teens and early twenties, and the effect

of childhood trauma and substance abuse on adolescent brain development, has only recently formed.

In *Roper*, the United States Supreme Court relied heavily on neuroscience research on adolescent brain development to find that juveniles under eighteen differ from adults in three ways. *Roper*, 543 U.S. at 569. While the Court relied on several neuroscience studies, its conclusions were based extensively on the works of Laurence Steinberg and Elizabeth S. Scott. In November 2016, Steinberg and Scott, along with another author, published an article on recent findings regarding the brain development of what they termed "young adults," those aged eighteen to twenty-one. *See* Scott, E., Bonnie, R., & Steinberg, L., *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (Nov. 2016).

The article explained that since the time of *Roper*, "developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority. Recently, researchers have found that eighteen- to twenty-one-year old adults are more like younger adolescents than older adults in their impulsivity under conditions of emotional arousal." *Id.*

While it may have been known when the Supreme Court decided *Roper* that brain development continued into the twenties, the *consequences* of that delayed

development were still unknown until recently. In their 2016 article, Scott and Steinberg stated, "[U]ntil recently, no compelling scientific argument existed for treating young adults differently than their older counterparts." *Id.* at 643. Rather, "[y]oung adults between the ages of eighteen and twenty-one constitute a less well-defined category that has only recently received even informal acknowledgement." *Id.* at 644. Thus, even as of 2016, the "*developmental research suggesting that young adults are not fully mature [was] in an early stage*." *Id.* at 643 (emphasis added). While it had been "clear that the psychological and neurobiological development that characterizes adolescence continues into the midtwenties, [] the research *[had] not yet produced a robust understanding of maturation in young adults age eighteen to twenty-one*." *Id.* at 653 (emphasis added).

The focus of the earlier science was on juveniles *under* eighteen. As Steinberg and Scott explained, the prior studies, including those relied upon by the Supreme Court in *Roper*, compared the group then viewed as adolescents—those under eighteen—to adults. There were "very few studies [that] systematically examined age differences in brain development among individuals older than eighteen." *Id.* at 651. Most of those studies compared adolescents to "'adult[s],' with the latter group composed of people who may be as young as nineteen or as old as fifty." *Id.* When the adult group covered "data from such a wide age range, it [was] impossible to draw specific inferences about potential differences between young adults and their

older counterparts." *Id.* As a result, young adults like Appellant were lumped in with older adults and believed to be more mature than their under-eighteen counterparts.

This is evidenced by the medical data used in *Graham v. Florida*, 560 U.S. 48 (2010), the case that prohibited life imprisonment without the possibility of parole for juveniles under eighteen who were convicted of non-homicide offenses. *Id.* at 82. In an amicus brief for the State of Florida, the Criminal Justice Legal Foundation pointed out that crime rates actually spike around age eighteen and then only decrease gradually until the mid-twenties, when crime rates more noticeably taper off. *See* Brief for the Criminal Justice Legal Foundation as Amicus Curiae, at 15-17, *Graham v. Florida*, 560 U.S. 48 (2010). So while it may have been common knowledge as of 2010 that older adolescents in their late teens and early twenties were still engaging in risky and at times illegal behavior at higher rates than older adults, *there was no explanation for why*.

The reason for this also aligns with Scott, Bonner, and Steinberg's 2016 article addressing the research on young adults. The Center for Constitutional Jurisprudence, in another amicus brief for the State of Florida in *Graham*, pointed out that the science explaining brain development relied upon by the American Medical Association and the American Academy of Child and Adolescent Psychiatry was "developing" and that it "could not yet provide a reliable basis" for fully understanding adolescent brain development. *See* Brief for The Center for

Constitutional Jurisprudence as Amicus Curiae, at 2, *Graham v. Florida*, 560 U.S. 48 (2010); *see also Young Adulthood*, at 648 (explaining that in the past there had been too few studies on young adult brain development, and so the "extant research [was] suggestive but inconclusive").

After *Graham*, the scientific community began to engage in more targeted research to answer the questions about the effects of incomplete brain development on young people in their early twenties and late teens. Scott and Steinberg, to start filling in the holes of what happens in an older adolescent's still-developing brain, joined a team of researchers to examine decision-making in eighteen to twenty year olds. The early research began to show impairment in that age range (eighteen to twenty-one) when under both brief and prolonged negative emotional situations. *See* Cohen, Alexandra O. et.al, *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 Psych. Sci. 4, at 549 (May 2016). Following that research, the group explained that "extension of this work [examining the brains of juveniles under eighteen] to young adults, who show diminished cognitive control relative to slightly older adults in negative emotional situations, may have implications for legal policy." *Id.* at 560.

Other neuroscientific and psychological studies confirm this recent shift in science's understanding of older adolescent brain development. For example, there has been an "increasing array of typical child and adolescent behavioral processes

that have been examined in relationship to brain maturation and genetic factors." Barasso-Catanzaro, C.; Eslinger, P., *Neurobiological Bases of Executive Function and Social-Emotional Development: Typical and Atypical Brain Changes*, Interdisciplinary J. of Applied Family Studies, at 108 (February 2016). In 2013, the National Academy of Science's Institute of Medicine convened a task force to look into the "health, safety, and well-being of young adults" aged eighteen to twenty-six. *See* Bonnie, R., et al., Inst. of Med. & Nat'l Res. Council, *Investing in the Health and Well-Being of Young Adults*, at xv (2015). By that fall, the Committee formed a group to conduct a study to "address the needs of young adults and guide policy makers and other stakeholders in meeting those needs." *Id.* A key reason for this task force was that young adults "are too rarely treated as a distinct population in policy, program design and research. Instead, they are often grouped with adolescents or, more often, with all adults." *Id.* at 1. As part of that study, the Committee broke down the level of risk-taking among young adults and noted that research as of 2015 was beginning to recognize that "young adults (aged eighteen to twenty-four) experience higher rates of morbidity and mortality than either adolescents or older adults from a wide variety of preventable causes, including automobile crashes, physical assaults, gun violence, sexually transmitted diseases, and substance abuse." *Young Adulthood*, at 645-46. This data makes sense when considering Mr. Branch's life history and some of the activities he engaged in, *see*, *supra*, Argument I(B)(1),

but only now is there an explanation of *why* he was participating in these dangerous activities, seemingly without thought of the consequences.

It is not just brain development in older adolescents that has been clarified since *Roper* and *Graham* but also the effect that childhood trauma and adolescent substance abuse have on this development, namely that it can cause specifically identified delays in brain maturation. It was reported only in December of 2016 that studies began to show that heavy alcohol use in teenagers causes abnormal development of the brain's gray matter. *See* Kennedy, M., *Heavy Teenage Drinking Linked to Abnormal Brain Development*, Reuters Health Medical News (Dec. 2, 2016). As counsel explained at the *Huff* hearing, while it was generally known that alcohol is bad for adolescent brains, it was not known exactly why, and, more importantly, it was not known how that tied to behavior. (SPCR. 1115).

The same is true for recent developments in the science of trauma and brain development. The Center on the Developing Child at Harvard stated that, as of 2016, researchers began to understand the effect of social class on health and learning outcomes but that "neuroscience [was just then linking] environment, behavior, and brain activity." *See* Hayasaki, E., *This is Your Brain on Poor*, Newsweek (Sept. 2, 2016). Mary Helen Immordino-Yang, a neuroscientist at the University of Southern California's Brain and Creativity Lab who has been conducting exactly that research on stressful childhood environments and brain development, explained that, as of

2016, "the scientific revolution is only beginning." *Id.* She said, "We're *starting* to get an appreciation of the richness of the social story—the social stress . . . that is really driving these kinds of effects and shaping brain development and biological development . . . ." *Id.* (emphasis added).

On a more pragmatic level, it is also only recently that the criminal justice system has started taking these recent developments into account. It was only on August 1, 2017, that a court ruled that *Roper* should extend to anyone over the age of eighteen. *See Kentucky v. Bredhold*, Fayette Circ. Ct. No. 14-CR-161 (Aug. 1, 2017). Many of the Young Adult Court (YAC) programs referenced in Mr. Branch's successive 3.851 motion were only recently opened. For example, the California YAC program started in summer 2015;[10] and the New York YAC only started in the spring of 2016.[11]

Young adult correctional facilities and units are even more recent. For example, Connecticut's young adult unit opened in January 2017. Massachusetts's young adult wing is scheduled to open this month, and South Carolina is the next state working to open one.[12]

---

10 http://www.sfsuperiorcourt.org/divisions/collaborative/yac

11 http://www.brooklynda.org/young-adult-bureau/

12 https://www.vera.org/newsroom/press-releases/groundbreaking-young-adult-initiative-to-expand-to-prisons-in-south-carolina

And it was just this week (on February 5, 2018) that the ABA passed a resolution encouraging jurisdictions with the death penalty to ban the execution of individuals who were younger than twenty-two at the time of the offense. *See* Rawles, L., *Ban Death Penalty for Those 21 or Younger, ABA House Says*, ABA Journal (Feb. 5, 2018). Just as it takes time for a consensus to form once new research is discovered, it also takes time for that consensus to reach the criminal justice and legal community.

Finally, the Circuit Court's belief that Mr. Branch waited until he had a warrant to bring this claim is erroneous. As explained in Dr. Sultan's report, she evaluated Mr. Branch on December 14, 2017, more than a month before Governor Scott signed Mr. Branch's warrant. (SPCR. 332). Contact had also been made with several of Mr. Branch's family members and with Dr. Garbarino before the warrant was signed. Undersigned counsel was in the process of developing this claim and had every intent of filing it in the very near future. The warrant merely imposed an official and much tighter schedule than was previously expected. Had Mr. Branch brought this claim in the last "five or six or seven years"—as the Circuit Court implied he should have—there would have been nothing but a few preliminary studies to support some aspects of the claim, and almost no research at all into others. As counsel stated at the *Huff* hearing: "You don't wake up one morning and [] open

your closet and . . . there's a scientific consensus. . . . Scientific consensus takes a while to develop." (SPCR 1116).

If Drs. Steinberg and Scott, the leading authorities on this issue, could not have previously explained what effect an undeveloped brain has on older adolescents in their late teens and early twenties, it is unthinkable that Mr. Branch could have provided such an explanation at earlier stages of this litigation. It is the culmination of inquiry regarding the neurological and behavioral consequences for older adolescents who have not yet reached their mid-twenties, as well as the new information about trauma and adolescent substance abuse and developing brains, that allowed Mr. Branch to raise such a claim at this point in time. Science has only just recently reached a consensus on these issues.

4. The court erred in concluding, without a hearing, that the relevant evidence was not newly-discovered

Given the recent nature of the scientific conclusions upon which Mr. Branch relies, the Circuit Court erred in its belief that this evidence was not newly-discovered. Appellant's claim that his execution would violate the Eighth Amendment due to his cognitive underdevelopment at the time of the crime satisfies the procedural requirements of Fla. R. Crim. P. 3.851(d)(2), (e)(2). This new scientific consensus, discussed by Dr. Sultan (SPCR. 319-40) and Dr. Garbarino (SPCR. 342-48), is a valid basis for this claim to be considered on its merits at a hearing. As prior counsel Douglas Knox also affirmed, this claim could not have

been raised before. (SPCR. 1129) ("This science did not exist at the time I represented Eric or beforehand. . . . Had this new scientific understanding in the mental health professions been available to me during the time I represented Eric, I certainly would have used it.").

Florida courts have long understood, and recently affirmed, that emerging science can constitute newly discovered evidence for purposes of postconviction litigation. *See, e.g.*, *Duncan v. State*, No. 2D16-2625, 2017 WL 1422648, at *2 (Fla. 2d DCA Apr. 21, 2017) ("[W]e disagree with the postconviction court's conclusion that scientific evidence in the form of articles and studies cannot constitute newly discovered evidence."); *Clark v. State*, 995 So. 2d 1112, 1113 (Fla. 2d DCA 2008) (holding that new scientific evidence could be considered newly discovered evidence); *Zamarippa v. State*, 100 So. 3d 746, 747 (Fla. 2d DCA 2012) (reversing and remanding for an evidentiary hearing because a scientific organization's new report . . . could constitute newly discovered evidence); *Murphy v. State*, 24 So. 3d 1220, 1222 (Fla. 2d DCA 2009) (same).

This Court has also held that new scientific evaluations relating to evidence presented in a defendant's prior litigation can qualify as newly-discovered evidence. For example, mental health evaluations conducted years after trial can produce newly-discovered evidence. *See State v. Sireci*, 502 So. 2d 1221 (Fla. 1987). Scientific advances also give rise to "newly discovered evidence claims predicated

upon new testing methods or technologies that did not exist at the time of the trial, but are used to test evidence produced at the original trial." *Wyatt v. State*, 71 So. 3d 86, 100 (Fla. 2011); *see also Preston v. State*, 970 So. 2d 789, 798 (Fla. 2007) (holding new DNA testing of pubic hair constituted newly discovered evidence); *Hildwin v. State*, 951 So. 2d 784, 788-89 (Fla. 2006) (holding new DNA testing of semen and saliva was newly discovered evidence).

To the extent Florida has not yet grappled with the specific question whether the emerging scientific consensus, establishing that individuals in their late teens and early twenties are no more cognitively developed than individuals in their mid-to-late teens, is newly-discovered evidence for purposes of successive postconviction litigation, this Court should allow a hearing so that the issue can be reliably resolved. Given Appellant's evidence regarding the emerging scientific consensus on juvenile brain development and its effect on the propriety of this death sentence, a hearing should be conducted to address whether his execution should be prohibited under the Eighth Amendment.

The State and Circuit Court's reliance on *Carroll v. State*, 114 So. 3d 883, 886-87 (Fla. 2013), was misplaced. This Court found Carroll's *Atkins* claim to be procedurally barred, because *Atkins* was decided in 2002, and Carroll did not raise an *Atkins* claim in the successive postconviction motion he filed in 2003. *Id*. at 886-87. In the instant case, the State contended that Appellant's claim based on the

emerging scientific consensus on juvenile brain development is barred, because *Roper* was decided in March 2005, and Appellant filed his state habeas in this Court in August 2005 without raising a *Roper* claim. (SPCR. 1102). This ignores that Appellant's claim is based on a new scientific consensus that did not exist in 2005.

In fact, none of the cases cited by the State in the Circuit Court addressed the new scientific consensus. For example, the State claimed this Court rejected a similar claim in *Davis v. State*, 142 So. 3d 867, 874-76 (Fla. 2014). *Davis* involved a twenty-five-year-old defendant who generally argued that based on the effects of alcohol and sexual abuse on brain development in children, he was the "functional equivalent of a child" and had "the mind of a juvenile." As counsel for the State acknowledged at the *Huff* hearing, the *Davis* petitioner did not proffer a "case-specific" study to the court. (SPCR. 1118-19). In contrast, Mr. Branch comes to this Court with case-specific studies addressing the effects of the now scientific consensus on his case. More significantly, *Davis* pre-dates the current consensus. In *Davis*, this Court neither spoke about a consensus nor rejected a consensus in the scientific community.

Other than *Davis*, the State cited cases where this Court rejected general arguments citing *Roper* for defendants over the age of eighteen at the time of the offense or younger than eighteen at the time of a crime used as an aggravator, *see Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011) (relying on expert conclusion of brain

damage even though it was not the type of brain damage that "causes . . . behavioral problems"); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (denying *Roper* relief to a defendant who was twenty-three at the time of the offense and did not provide case-specific scientific conclusions or new research); *Melton v. State*, 949 So. 2d 994, 1020 (Fla. 2006) (declining to find that pre-eighteen offenses should not count as aggravators); *England v. State*, 940 So. 2d 389, 406-07 (Fla. 2006) (same); *Lowe v. State*, 2 So. 3d 21, 46 (Fla. 2008) (same), and decisions of this Court rejecting generalized assertions that mental illness, brain damage, and borderline intellectual disability alone should bar an execution. *See McCoy v. State*, 132 So. 3d 756, 775 (Fla. 2013); *Johnston v. State*, 27 So. 3d 11, 27 (Fla. 2010); *Carroll v. State*, 114 So. 3d 883, 887 (Fla. 2013); *Johnson v. Stephens*, 617 Fed. Appx. 293, 303 (5th Cir. 2015). All of these cases are irrelevant here.

In short, the bulk of cases the State cited pre-date *Hall* and thus could not present the same claim as Appellant: that he is entitled to individualized review of his evidence that he is ineligible for the death penalty as demonstrated by the new scientific consensus. Appellant's claim is not a generalized assertion that *Roper* should extend to him; his claim is that, under the Eighth Amendment, this Court should consider the new scientific consensus and allow a hearing where the evidence can be duly considered.

In addition, the Circuit Court listed cases not used by the State to say that Appellant had not presented newly discovered evidence. (SPCR. 1135-36). However, the use of these cases demonstrates that the court fundamentally misunderstood the new science at issue in Appellant's proffer: rather than defeating Appellant's claim, these cases further highlight the court's conflation of what the prior studies showed about brain development and its timing as opposed to what the newer studies show about the effects of delayed brain maturation process.

For example, the Circuit Court wrote, "Studies from 2004 showing the human brain development is not complete until the age of 25 have been cited in previous case law." *Id. Gall* v. United States, 552 U.S. 38, 57-58 (2007), and *Morton v. State*, 995 So. 2d 233, 245 (Fla. 2008)—the cases cited by the Circuit Court—said there was some indication that the brain continues to evolve into the mid-twenties. But as Appellant proffered below and explains in this brief, *the earlier studies referenced in these cases did not address how the maturation process effects youth in their late teens and early twenties*. This new science about the actual maturation process was not available earlier. Leading experts in the field have described the proffered maturation science as new. This is the science now relied upon by the ABA to recommend abolition of capital punishment for youths twenty-one and under.

To the extent that these cases relied on studies delving into the *effects* of a not-yet-developed brain, this research was at the early forefront—just beginning—of the

study of these effects. The beginning of a field of study is not a consensus. So, for example, in *Lebron v. State*, 135 So. 3d 1040 (2014), the court relied on a then recent study explaining that the part of the brain that controls risk-taking is one of the still-developing parts of the brain. The neuroscientific community, once armed with that knowledge, then had to conduct additional studies to determine whether this actually affected impulse control and risk taking in youth up to their mid-twenties. This is exactly what that community did. *See* Scott, E., Bonnie, R., & Steinberg, L., *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (Nov. 2016); Rudolph, M., *At Risk of Being Risky: The Relationship between 'Brain Age' under Emotional States and Risk Preference*, Dev. Cognitive Neurosci. 24:93-106 at 102 (2017). And as with all scientific endeavors, once one study suggested certain results, more research was necessary to confirm the results before a consensus within the mental health community as a whole could be formed.

As discussed throughout this brief, it was only recently that the consensus emerged on the behavioral and decision-making effects lack of brain development in youth in their late teens and early twenties. Had the Circuit Court allowed a hearing, its misperception about the earlier studies could have been addressed and explained. But Mr. Branch was not given the chance to address the court's misperception.

Unlike those cases, Appellant's claim is based on a new scientific consensus regarding the brain development of people in their late teens and early twenties, and includes a case-specific proffer by knowledgeable experts. More importantly, Appellant's claim is based on the mandates of *Hall* and *Moore* to consider the teachings of the medical community just as much as it is based on the principles of *Roper*.

E. Because there is a consensus, the Court should not ignore the medical community's conclusions in considering Mr. Branch's ineligibility for the death penalty

Today there is a consensus in the medical community that (1) the brain does not stop developing until somewhere around the mid-twenties, (2) this late development means that those in their late teens and early twenties still resemble teenagers under eighteen in ways that are relevant to criminal justice policies, and (3) childhood trauma and adolescent substance abuse further delay brain development. The United States Supreme Court has established that in accord with the Eighth Amendment, courts—which are not scientific experts—must rely on the teachings of the medical and scientific community. This is of utmost importance when deciding the constitutionality of a death sentence. *See*, *e.g.*, *Graham*, 560 U.S. at 68 (observing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Roper*, 543 U.S. at 569 (repeatedly citing various neuroscience studies).

The Eighth Amendment mandate to take science into account led to the decision in *Hall v. Florida*, where the Court disapproved jurisprudence that "disregard[ed] established medical practice." *Hall*, 134 S. Ct. at 1995. In the context of intellectual disability, the Court held that it violated the Eighth Amendment to prohibit evidence of intellectual disability once a person scored over 70 on I.Q. testing. The *Hall* court explained:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction *must have a fair opportunity to show that the Constitution prohibits their execution*. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Id. at 2001 (emphasis added). Under this Eighth Amendment jurisprudence, the Court later chastised the Texas Court of Criminal Appeals for "diminish[ing] the force of the medical community's consensus." *Moore v. Texas*, 137 S. Ct. 1039, 1043 (2017). Most recently, the Court ordered a remand in *Wright v. Florida*, 138 S. Ct. 360 (2017), in light of *Moore*, because rejection of the applicable consensus is impermissible.

Here, recent developments in the science of older adolescent brain maturation now demonstrates that there are young people—analogous to people within the 70 to 75 standard error of measurement for intellectual disability—where the bright-line cutoff causes an "unacceptable risk" that death sentences are being imposed

upon those ineligible for such a sentence. *See Hall*, 134 S. Ct. at 1990. Based on the consensus in the medical community that brain development reaches into the mid-twenties, that the lack of development still impacts older adolescents and people in their early twenties in ways relevant to the criminal justice system, and that alcohol and trauma further delay brain development, Mr. Branch can show that he is not eligible for capital punishment. For all intents and purposes, Mr. Branch was not yet an adult at the time of his crime. Because he is "facing that most severe sanction, [he] must have a fair opportunity to show that the Constitution prohibits [his] execution." *Hall*, 134 S. Ct. at 2001. A hearing is appropriate.

ARGUMENT II

APPELLANT'S NEEDLESS SUFFERING AND UNCERTAINTY DURING HIS TIME ON DEATH ROW VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The Circuit Court erroneously denied relief on this claim, asserting that courts have consistently rejected the claim. (SPCR. 1136). First, this claim is specific to Appellant. It is based on the circumstances of Appellant's stay on death row, during which he spent years without competent counsel and years engaging in a painful campaign to locate a lawyer to represent him. This claim—based on Appellant's specific experiences—has never been raised before. It certainly has not been rejected by this Court or the Supreme Court. And it is a claim that becomes ripe for review only after an execution is set, because it seeks to prohibit that execution.

A. Among Appellant's undisputed proffer was evidence of his lengthy incarceration on death row and troubling experiences with Florida's capital punishment defense system[13]

Appellant presented undisputed evidence regarding the extensive suffering he experienced on death row, which was directly caused and exacerbated by a lack of meaningful representation. Since Appellant's arrest, the entire history of his representation is a tragic story of the funding shortfalls of state defender agencies, a failed pilot registry attorney program, conflicts of interest, and legal abandonment by those who were supposed to be his advocates.

After Appellant's conviction became final on May 12, 1997, the case was assigned to the Office of Capital Collateral Regional Counsel for the Northern Region (CCRC-N), where Appellant went without a designated attorney from the date the mandate issued until October 1, 1998. An amended petition for postconviction relief was finally filed in March 2003, right before CCRC-N was defunded. Due to a lack of funding and resources, the first post-conviction counsel withdrew. Michael Reiter, former head of CCRC-N, took over the case as a registry attorney. Appellant wanted to challenge the new registry system, leading to inherent conflict with Mr. Reiter, but Mr. Reiter refused to withdraw. In federal court, Appellant again sought appointment of conflict-free counsel, first in District Court

---

[13] For Mr. Branch's experience on death row as submitted to the court below, *see* Appellant's R. 3.851 motion. (SPCR. 237-310).

and then in the Eleventh Circuit, which finally permitted Mr. Reiter to withdraw after it denied relief. This started a years-long search by Mr. Branch, his cousin, other family, and the ABA to find counsel. By the time the ABA secured pro bono counsel for Appellant, it was too late. His appeals had long since been denied.

B. This claim is not procedurally barred

There is no procedural impediment to Appellant's Eighth Amendment claim that it would be cruel and unusual to execute him after his particularly anguishing twenty-four years of confinement on death row, during which his desperate attempts to obtain meaningful representation went repeatedly unanswered.

Like a claim of incompetency to be executed, *see Panetti v. Quarterman*, 551 U.S. 930 (2007), or a broad claim that it would be cruel and unusual to execute a prisoner who had spent an inordinate amount of years on death row, *see Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Stevens, J., statement respecting the denial of certiorari), Appellant's Eighth Amendment claim did not become ripe until his death warrant was signed and execution became imminent. This claim "is measured at the time of the execution, not years before then." *Tompkins v. Secretary*, 557 F. 3d 1257, 1260 (11th Cir. 2009).

C. Appellant has endured needless suffering and uncertainty during his time on Florida's death row

Appellant has been on death row for twenty-four years, and he has spent most of that time fighting for competent legal representation. His days have been filled

with uncertainty, never knowing when he would finally receive a response from one of the many lawyers, law firms, and legal aid organizations he contacted for legal counsel or whether the governor would sign his death warrant. The United States Supreme Court precedent recognized a predicament such as Appellant's over a hundred years ago: "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). As Justice Brennan noted, "The 'fate of ever-increasing fear and distress' to which the expatriate is subjected, *Trop v. Dulles*, 356 U.S. 86, 102, (1958), can only exist to a great degree for a person confined in prison awaiting death." *Furman v. Georgia*, 408 U.S. 238, 289 (1972).

Although the Supreme Court has held that capital punishment does not violate the Eighth Amendment, the Court also recognized that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

The Circuit Court dismissed Appellant's claim as a garden-variety "*Lackey*" claim—a complaint about the number of years Appellant has spent on death row—without recognizing that Appellant's claim was *actually* about the needless suffering and uncertainty he faced as he begged for proper counsel and navigated the perils of the failed Florida registry program from his 6 x 9 x 9.5 foot cell. *Death Row Fact*

Sheet, www.dc.state.fl.us/oth/deathrow. Rather than speculation about the "ever-increasing fear and distress," *see Trop*, 356 U.S. at 102, Appellant must have felt, the record reflects Appellant's own articulation of that point. Appellant's letters and pleadings (described in detail in the 3.851 motion) serve as a remarkable documentation of his inner fear and pain suffered throughout his time on death row. For example, when the District Court for the Northern District of Florida denied his § 2254 petition, Appellant speculated that he only had seven months to one year of appeals left. He wrote, "Assuming I win nothing than [sic] it's up to the governor. It could be a week. It could be 10 yrs after. But he can sign my warrant at any moment after my appeal expires." (SPCR. 434-68 (Letter Excerpts from Appellant to Leora Nosko-Passmore; his grandmother; his aunt, Connie Branch; and his cousin, Alex Branch (2008 to 2013))).

Appellant panicked even more when the Eleventh Circuit denied relief, causing him to fear that he would imminently end up on the "Ready List"—a list of death row prisoners provided to the governor indicating they have exhausted all appeals and are ready for execution. Appellant explained, "Once I am on the list, staying there 3 months is normal. Remaining there 3 yrs is extraordinary. Meaning I have up to 3 months but less than 3 yrs to make something happen or die." Shortly thereafter, Appellant grew even more fearful when the United States Supreme Court denied his petition for writ of certiorari, again writing, "There is no hope of lasting

3 years on the Ready List for the simple fact they will run out of people on the list long before that and have to kill me." Sure enough, Appellant received notification that he was on the governor's list less than a month later.

The pressure started to weigh on Appellant. He wrote, "Most days I don't even feel like opening my eyes. I am constantly tired, sad, lonely, hungry, and generally miserable . . . ." Appellant ended up filing for certiorari review *pro se*. Almost a year after Appellant's certiorari petition had been denied, he told his cousin, "I feel like somebody has been standing behind me with a gun to my head for a year now."

Appellant described what it felt like to have the men living around him taken away and killed one by one:

> The tough part is that now everyone they are killing has been here with me for 20 years. Its [*sic*] kind of like coming into work and finding every month another person you've worked in the office with for 20 years has been taken out back and killed. Even when it's not you, it's so much stress.

In 2013, Florida passed the Timely Justice Act. It required the governor to issue a warrant within thirty days of clemency denial, and to schedule an execution within 180 days of the warrant. This caused utter panic on Florida's death row, as the prisoners wondered how quickly their executions would be processed and if there might be mass warrants. Appellant described the fearful atmosphere, writing:

> Now, every time the door opens, it falls quiet, everybody wondering if he did it . . . signed all our warrants or is he coming after just one of us today . . . . Anybody who survives this will be driven nuts, watching

> 120 people they know get killed, wondering at each open door – am I next? It's too much.

Exacerbating Appellant's anxiety was that most of his time on the row, he was represented by inadequate conflicted counsel. In over sixty letters to his loved ones, Appellant lamented his lack of appropriate representation all through his state and federal review. He reached out to Florida and national attorneys and organizations. *See, e.g.*, (SPCR at 475-76). He filed numerous *pro se* pleadings, most of which were stricken due to his representation by the court-appointed counsel he wanted removed from the case. He finally got some assistance when he reached out to the American Bar Association's Death Penalty Project in April of 2010. (SPCR. 503-58). However, it took the ABA more than three years to find counsel for Appellant, and by then his appeals were completely exhausted. Ms. Emily Olson-Gault of the ABA wrote, "We recognize that if we had been able to find a law firm sooner – or if Appellant had received consistent, qualified representation from court-appointed counsel throughout the case – his legal situation might be different." *See* (SPCR. 430-32). Ms. Olson-Gault said of Appellant:

> During the years we were looking for pro bono counsel, Appellant stayed in frequent contact with the Project, asking about our efforts and urging us to not give up trying to find counsel for him. He provided me with suggestions for lawyers that I might try to contact and kept me updated on legal developments in his case. . . . He was as diligent and persistent in seeking representation and trying to preserve his claims as any death-sentenced prisoner I have encountered in my many years of working with the Project.

As the Supreme Court once stated about the death penalty, "one of the most horrible feelings to which [the prisoner] can be subjected during that time is the uncertainty during the whole of it." *Medley*, 134 U.S. at 172. Appellant's letters put that uncertainty on full display, along with the fear, paranoia, and tension of those living under a death sentence—but further exacerbated by Appellant's lack of meaningful counsel. Executing Appellant after those twenty-four years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment, not solely because of the length of time he has been on death row but because of the psychological suffering he endured as he wrote letter after letter complaining about his attorney, drafting *pro se* motions that would be ignored by the courts, and launching campaigns from death row to find an attorney anywhere in the United States who would represent him—the whole time fearing that "whenever the Governor wants me to die, I will." This Court should permit a hearing on this claim.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S PUBLIC RECORD REQUESTS MADE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.852(h) AND FLORIDA STATUTES CHAPTER 119, WHICH RESULTED IN A DENIAL OF DUE PROCESS AND PROCEEDINGS THAT WERE NEITHER FULL NOR FAIR.

On January 22, 2018, Appellant sent demands for public records pursuant to Fla. R. Crim. P. 3.852(h) and Florida Statutes Chapter 119 to the Florida Department of Corrections (FDOC), the Florida Department of Law Enforcement (FDLE), and

the Office of the Medical Examiner, District Eight, seeking information in support of a potential Eighth Amendment lethal injection claim. (SPCR. 66-121). Appellant requested the following records from FDLE and DOC:

a. Public records, including logs or record books regarding the purchase, storage, maintenance, use, distribution, disposal, and expiration dates of etomidate, rocuronium bromide, and potassium acetate that show compliance (or non-compliance) with the Federal Controlled Substances Act and Florida Statutes, Chapters 828, 893, and 465 from September 9, 2013 to January 4, 2017.

b. Public records showing the name of the manufacturer and distributor of the lethal injection drugs including package insert information and/or manufacturer's instructions, the date of manufacture, and the shelf life of etomidate, rocuronium bromide, and potassium acetate currently possessed by the DOC.

c. Public records, including the required logs, notes, memoranda, letters, electronic mail, and facsimiles, relating to the executions by lethal injection of Mark Asay, Michael Lambrix, and Patrick Hannon.

(SPCR 67; 95-96).

Appellant asked the Eighth District Medical Examiner's Office for the following records:

a. Copies of documents concerning post mortem examinations performed on Mark Asay, Michael Lambrix, and Patrick Hannon, including but not limited to autopsy narrative reports, notes, diagrams, photographs, and toxicology reports.

(SPCR. 118).

In support of his demands, Appellant attached all the information in his possession regarding the State's current supply of lethal drugs. (SPCR. 74-92; 99-

117). The logs show that the State of Florida does not currently possess unexpired etomidate, and their rocuronium supply expires this month. (SPCR. 75; 83). The Circuit Court denied the requests, reasoning that since the current protocol was upheld as constitutional as applied to another inmate in a separate death warrant proceeding, the matter is firmly settled. (SPCR. 233). This is far from accurate. Appellant cannot be deprived of his rights by prior litigation to which he was not a party. *Martin v. Wilks*, 490 U.S. 755 (1989). He is entitled to make his own factual record. Nor is his claim foreclosed by established law. Further, as will be discussed further below, any other citizen could request these same records and would not have to make any showing of relevance. This is a denial of Appellant's equal protection rights.

Without access to relevant public records, Appellant was prevented from finding out relevant information that would support an Eighth Amendment claim. The records requests made by Appellant are not, as the State suggests, a "fishing expedition," but instead were filed in response to well-founded concerns regarding the constitutionality of his pending execution based on the drug logs that the State voluntarily disclosed previously in an out-of-state court proceeding.

In *Sims v. State*, 753 So. 2d 66 (Fla. 2000), Justice Anstead cautioned that "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing

his constitutional right as a citizen to access to public records that any other citizen could routinely access." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000) (Anstead, J. concurring). Yet, this is exactly what occurred in Appellant's case. Justice Anstead had earlier emphasized that "[t]rial courts must be mindful of our intention that a capital defendant's right of access to public records be recognized under this rule," because "[i]f there is any category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed." *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod.*, 683 So. 2d 475, 477 (Fla. 1996). Furthermore, Justice Anstead acknowledged assurances from the State and its agencies that they will essentially follow an "open file" policy. *Id.* This promise has been not been fulfilled. Instead, these agencies have continuously shielded themselves with a harsh and unconstitutional interpretation of Fla. R. Crim. P. 3.852 to avoid turning over to capital defendants, including Appellant, the information they need to fully plead their lethal injection claims.

The information that was requested was narrowly tailored for a specific reason—to make sure the State possesses unexpired drugs in which to humanely carry out the execution of Appellant. It is undisputed that using expired lethal drugs will subject Appellant to a substantial risk of serious harm in violation of *Glossip v. Gross*, 135 S. Ct. 2726 (2015), and the Eighth Amendment's prohibition against

cruel and unusual punishment. Knowing the expiration dates of the drugs is a basic and fundamental fact, and there is absolutely no rational basis for refusing to disclose this information. None of the cases relied upon by the Circuit Court address the specific issue regarding expired drugs, and thus do not provide any guidance for this Court. Appellant made a simple request below: provide him with proof that the State's drug supply is unexpired. In light of the fact that the current logs suggest the supply *is in fact expired or about to expire*, this is far from an unreasonable request.

The State of Florida claims that it is "proud to lead the nation in providing public access to government meetings and records" because the "[g]overnment must be accountable to the people." *See* http://www.myflsunshine.com/ (last visited February 2, 2018). The State also touts that, "in Florida, transparency is not up to the whim or grace of public officials. Instead, it is an enforceable right." *Id*. However, in practice, in a setting where transparency is needed most, the State is keeping a capital defendant in the dark.

Appellant, a prisoner on Florida's Death Row, is about to be executed without being able to enforce "his constitutional right as a citizen to access to public records that any other citizen could routinely access." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000) (Anstead, J., concurring). The lower court's denial of Appellant's access to public records was an abuse of discretion, which denied Appellant due process under the Fourteenth Amendment of the United States Supreme Constitution and resulted

in proceedings that were neither full nor fair. This Court should order the records disclosed, and remand to the Circuit Court for a full and fair hearing.

CONCLUSION

Appellant prays that the Court grant oral argument, stay this execution, direct that an evidentiary hearing be conducted in the Circuit Court, and ultimately prohibit his execution.

Respectfully submitted,

/s/ Stacy Biggart

Stacy Biggart
Florida Bar No. 89388
Kathleen Pafford
Florida Bar No. 99527
Assistant Capital Collateral
Regional Counsel – North
Office of the Capital Collateral
Regional Counsel – North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Stacy.Biggart@ccrc-north.org
Kathleen.Pafford@ccrc-north.org

/s/ Billy H. Nolas

Billy H. Nolas
Florida Bar No. 806821
Chief, Capital Habeas Unit
Kimberly Sharkey
Florida Bar No. 505978
Attorney, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
billy_nolas@fd.org
kimberly_sharkey@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2018, the foregoing was electronically served via the e-portal to Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF FONT

This is to certify that the foregoing Initial Brief of Appellant has been reproduced in Times New Roman 14-point font, pursuant to Rule 9.100(1), Florida Rules of Appellate Procedure.

Respectfully submitted,

/s/ Billy H. Nolas
Billy H. Nolas