IN THE SUPREME COURT OF FLORIDA

Case No. SC18-860

Lower Tribunal Case No. 361996-CF-001362

KEVIN FOSTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR LEE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

SCOTT GAVIN
Assistant CCRC
Florida Bar No. 0058651

CAPITAL COLLATERAL
REGIONAL COUNSEL – SOUTH
1 E. Broward Blvd., Ste. 444
Fort Lauderdale, FL 33301
(954) 713-1284
COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Foster's third successive motion for post-conviction relief.[1] The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court

"T"—trial transcripts on direct appeal to this Court

"Supp. R." -- supplemental record on direct appeal to this Court;

"PCR-1" –record on the 3.851 appeal to this Court.

"Supp. PC-R." – supplemental record on the 3.851 appeal to this Court.

"PCR-2" –record on the second successive 3.851 appeal to this Court

"PCR-3" –- record on the third successive 3.851 appeal to this Court

[1] Both the State and the circuit court characterized Mr. Foster's successive Rule 3.851 as a "Fourth Successive" in the circuit court below. However, Mr. Foster maintains that based on the procedural history of his case, where the circuit court struck Mr. Foster's third successive motion without prejudice to re-file, it is in fact still his Third Successive Motion for Postconviction Relief. For purposes of clarity with citations to the record on appeal, Mr. Foster will reference the record on appeal in this appeal of the denial of postconviction relief as "PCR-3."

REQUEST FOR ORAL ARGUMENT

Mr. Foster has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Foster, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

On May 21, 1996, a Lee County grand jury indicted Mr. Foster along with his co-defendants. Mr. Foster entered a plea of not guilty. (R. 9). Before trial, the three primary co-defendants entered into plea agreements and each testified against him.[2] The State offered Mr. Foster a life sentence in exchange for a guilty plea. He declined and proceeded to trial. (R. 9-10).

Trial began on March 3, 1998. On March 11, 1998, the jury returned a verdict of guilty on the charge of first-degree murder (R. 1059). The penalty phase took place on April 9, 1998. The jury voted for death by a 9-3 vote (R. 1239).

A *Spencer* hearing[3] was held on May 28, 1998 and thereafter, the trial court sentenced Mr. Foster to death. (R. 1475-1486). The trial court found two aggravating factors: (1) the capital felony was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody, and (2) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Fla. Stat. § 921.141(5)(e) and (i) (1997) (R. 1477-1479). The trial court rejected all 23 of the mitigators presented by the Defense as statutory mitigators, though only one was statutory (Foster was

[2] Derek Shields and Christopher Black pled to life without parole. Peter Magnotti received a 32-year sentence. Two other lesser involved co-defendants, Christopher Burnett and Tom Torrone, received probation.

[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

18 at the time of the crime). Fla. Stat. § 921.141(6)(h)(1997).(R. 1484). The judgment and sentence were filed on July 7, 1998. (R. 1503-06).

Mr. Foster timely appealed to the Florida Supreme Court. (R. 1489-90). On September 7, 2000 this Court denied relief. (R. 1489-90) *Foster v. State*, 778 So. 2d 906 (Fla. 2000) (corrected opinion). Rehearing was denied on January 22, 2001 and the mandate issued on February 26, 2001. Thereafter, on April 22, 2001 Mr. Foster's conviction and sentence became final upon expiration of the time in which to file a Petition for Writ of Certiorari with the United States Supreme Court. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987).

Mr. Foster timely filed his initial Rule 3.850 Motion for Postconviction Relief on September 27, 2001. (PCR-1. 57-123). An Amended Motion for Post-conviction relief was filed on May 21, 2010. (PCR-1. 1022-1320). The postconviction court summarily denied all claims except Mr. Foster's claim alleging ineffective assistance of counsel at the penalty phase. (PCR-1. 1477-78).

An evidentiary hearing was held on April 26-29, 2011. Postconviction counsel presented a wealth of evidence related to both Mr. Foster's social history and family background as well his mental health in support of his claim of ineffective assistance of counsel. Following the evidentiary hearing Mr. Foster's post-conviction claims were denied on July 5, 2011. (PCR-1. 3674-4004). Rehearing was denied on July 22, 2011. (PCR-1. 4005-4205).

Mr. Foster appealed to the Florida Supreme Court on August 25, 2011. (PCR-1. 4363-64). On October 17, 2013, the Florida Supreme Court affirmed the circuit court's denial of postconviction relief. *Foster v. State*, 132 So. 3d 40 (Fla. 2013). Rehearing was denied on January 31, 2014. The mandate issued on February 17, 2014.

Mr. Foster filed his Petition for a Writ of Habeas Corpus Relief in the Middle District of the United States District Court, Florida on October 16, 2014. Thereafter, on February 16, 2016 Mr. Foster filed a motion to stay the proceedings in federal district court in light of the United States Supreme Court opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). (DE 46). Two days later on February 18, 2016, Mr. Foster filed a successive Rule 3.851 motion with the Circuit Court based upon *Hurst v. Florida*. (PCR-2. 142-170). Mr. Foster's motion to stay remained pending in the Middle District Court until August 22, 2016 when it was granted. (DE 49).[4] Mr. Foster's Petition for a Writ of Habeas Corpus remains pending before the District Court.

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4 Mr. Foster's habeas proceedings remained stayed in the Middle District Court until June 1, 2017 when the stay was lifted and the District Court issued an Order to Show Cause directing both parties to address whether a continued stay would be appropriate. (DE 58). Following filing of responses to the show cause order, on July 27, 2017 the District Court issued another Order staying the proceedings. (DE 61). That stay remained pending until June 5, 2018 when the District Court once again lifted the stay. (DE 70). Thereafter, on June 8, 2018 Mr. Foster filed a motion to reinstate the stay (DE 72), and on June 25, 2018 the District Court issued an Order directing the State to respond by July 16, 2018. (DE

The Circuit Court held a case management conference on Mr. Foster's Rule 3.851 successive motion on April 4, 2016. Following that hearing, the Circuit Court denied Mr. Foster's motion, finding it "premature and insufficient," but without prejudice to Mr. Foster to file another motion "after the Florida Supreme Court decision in *Hurst* issues." (PCR-2. 216-17). Mr. Foster re-filed the motion for postconviction relief on January 12, 2017. (PCR-2. 218-275). The Circuit Court then held a case management conference on March 14, 2017 and denied relief on April 21, 2017. (PCR-2. 350-365). Mr. Foster timely appealed to the Florida Supreme Court on June 15, 2017. (PCR-2. 390-91).

On September 25, 2017 the Florida Supreme Court issued an order to show cause directing Mr. Foster to submit briefing addressing the application of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) to his case and argument as to why it should not control the outcome of his appeal. Mr. Foster then submitted his initial brief to the Court on October 16, 2017 and a reply brief on November 6, 2017. On January 29, 2018 the Florida Supreme Court denied Mr. Foster's appeal. On January 29, 2018 this Court denied relief. *Foster v. State*, 235 So. 3d 294 (Fla. 2018).

On February 2, 2018 Mr. Foster filed a third successive Rule 3.851 motion for postconviction relief in the Twentieth Judicial Circuit, in and for Lee County,

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73).

Florida. Three days later, on February 5, 2018, the State filed a motion to strike Mr. Foster's successive Rule 3.851 motion for exceeding the page limitations required under the rule. On February 15, 2018 the Circuit Court entered an order denying Mr. Foster's motion to exceed page limits and granting the State's motion to strike Mr. Foster's successive motion for postconviction relief but without prejudice to refile a successive motion within the page limit, if he can do so in good faith. (PCR-3. 77-79).

Thereafter, Mr. Foster re-filed his successive motion for postconviction relief along with an accompanying memorandum of law and attachments on March 23, 2018. (PCR-3. 80-110; 111-393). The State filed its Motion to Strike And/Or Response to Defendant's Fourth Successive Motion To Vacate Judgement Of Conviction And Death Sentence on April 11, 2018. (PCR-3. 394-448). On May 1, 2018 the Circuit Court summarily denied relief without holding a case management conference. (PCR-3. 477-485). Mr. Foster timely filed a Notice of Appeal to this Court on May 29, 2018. (PCR-3. 486-87).

This Initial Brief timely follows.

STANDARD OF REVIEW

"[Fla. R. Crim. P.] 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no

relief.'" *See Tompkins v. State*, 994 So. 2d 1072, 1080-91 (Fla. 2008). A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court and therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to *de novo* review. *Id*.; *see also, e.g., Rose v. State*, 985 So.2d 500, 505 (Fla.2008). In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *Id*.; *see also Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006). A reviewing court will affirm the lower court's summary denial if the motion, files, and record conclusively demonstrate that the movant is entitled to no relief. *See generally* Fla. R. Crim. P. 3.851(f)(5)(B); *see also Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009).

Mr. Foster's claims involved in this appeal contain constitutional issues involving questions of law and fact. Both claims which were denied without any evidentiary development are reviewed by this Court under its *de novo* standard. As to any factual allegations contained in both of Mr. Foster's claims, those factual allegations claims must be accepted as true for purposes of this appeal in order to determine whether Mr. Foster is entitled to evidentiary development to provide opportunity to present evidence in support of those factual allegations. *See Gaskin*

v. State, 737 So. 2d 509 (Fla. 1999); *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

SUMMARY OF ARGUMENT

ARGUMENT I: The circuit court erred in summarily denying Mr. Foster's claim for postconviction relief that his sentence of death is unconstitutional in light of the Florida State Legislature's enactment of Chapter 2017-1, revising Florida's capital sentencing scheme. Mr. Foster's motion sufficiently alleged that his sentence of death violates the Eighth and Fourteenth Amendments to the United States Constitution where the enactment of Chapter 2017-1 created a substantive due process right to a life sentence absent a unanimous jury recommendation beyond a reasonable doubt of all of the elements of capital first degree murder. In basing its summary denial of relief on the finding Mr. Foster's claim was untimely and procedurally barred, the circuit court relied upon erroneous determinations of law.

ARGUMENT II: The circuit court erred in summarily denying Mr. Foster's claim for postconviction relief that his sentence of death violates the Eighth Amendment's prohibition against cruel and unusual punishment where he was 18 years old at the time of the crime and there now exists a national consensus against the imposition of death sentences on defendants who were under 21 years old at the time of the crime. As a matter of law, the circuit court erred in finding that Mr. Foster's claim was untimely because "new research studies do not constitute newly

discovered evidence." Further, the circuit court also erred in finding Mr. Foster's claim was procedurally barred as a matter of law because he did not raise it in the "first or second postconviction motions" and "failed to show good cause for raising this claim now."

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. FOSTER'S CLAIM THAT HIS SENTENCE OF DEATH WAS UNCSONSTITUIONAL IN LIGHT OF CHAPTER 2017-1 FLORIDA LAWS AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUION

A. Introduction

In summarily denying relief the circuit court found that Mr. Foster's claim was untimely under Fla. R. crim. P. 3.851(e)(2) for failing to state a new or different ground for relief. (PCR-3. 482-83). Further, the circuit court found that the enactment of Chapter 2017-1 was a codification of this Court's holding in *Hurst v. State* and as such, was not entitled to retroactive application to Mr. Foster. (*Id*.). Given that finding, the circuit court found the claim procedurally barred. (*Id*.). In doing so, the circuit court noted that Mr. Foster had "failed to provide a reason why this claim was not raised in the first successive motion, and failed to show good cause for raising this claim now." (*Id*.). Mr. Foster will address each of these contentions below.

B. *Hurst v. State* and Chapter 2017-1, Fla. Law.

This Court's decision in *Hurst v. State* held:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, ***all these findings necessary for the jury to essentially convict a defendant of capital murder***-thus allowing imposition of the death penalty-***are also elements that must be found unanimously by the jury***.

202 So. 3d 40, 53-54 (Fla. 2016) (emphasis added). This Court's opinion in *Hurst v. State* construed Fla. Stat. § 921.141 and found that the statute defined the **elements** of capital murder and required that those elements must be necessary to "**essentially convict**" a defendant of **capital first degree murder**. Significantly, this Court acknowledged that the elements of capital first degree murder were longstanding and appeared in the statute. *Id*. at 53 ("As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, 'The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances.'" *Id*. at 313 (quoting § 921.141(3), Fla. Stat. 1985)).").[5]

On March 13, 2017, Chapter 2017-1, Laws of Florida was enacted. The revision to Fla. Stat. § 921.141, through enactment of Chapter 2017-1, codified this

[5] That finding was critical, as it established that the requirement of proof beyond a reasonable doubt of all elements of capital first degree murder had been in existence since, at minimum, as far back as 1991, i.e. the date of the decision in *Parker v. Dugger*.

Court's holding in *Hurst v. State* and confirmed the requirement that a defendant would not be eligible for a death sentence unless the State carried its burden of establishing each element of capital first degree murder beyond a reasonable doubt and each of those elements was found unanimously by a jury. Under the revised § 921.141, before a jury can return a death recommendation it must first: 1) identify each aggravating factor that it has unanimously found proven beyond a reasonable doubt; 2) find beyond a reasonable doubt that the aggravators found to exist are sufficient to justify a sentence of death; and 3) unanimously find beyond a reasonable doubt that the aggravators outweigh the mitigators. *See* § 921.141(2)(b). Having made these findings, the jury must then unanimously decide whether to reject mercy in favor of imposing a sentence of death. Only if the jury returns a unanimous death verdict, can a judge under the revised § 921.141 impose a death sentence.

Under the revised § 921.141, the statutory maximum sentence that can be imposed on a first degree murder conviction is one of life imprisonment. For a death sentence to be permissible, the defendant must be convicted of the next higher degree of murder, i.e. capital first degree murder. The revised § 921.141 provides for proof of the **elements** necessary to raise a conviction of first degree murder up to capital first degree murder to be presented at a "penalty phase" proceeding. But, a unanimous jury's finding that the State has proven the necessary

elements beyond a reasonable doubt is functionally **a verdict finding the defendant guilty of the greater offense of capital first degree murder**.

C. Due Process Clause and the substantive right to a life sentence

The United States Supreme Court held in *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013) that the identification of the facts or elements necessary to increase authorized punishment is a matter of substantive law. ("Defining facts that increase a mandatory statutory minimum to be **part of the substantive offense** enables the defendant to predict the legally applicable penalty from the face of the indictment."). (emphasis added). Court decisions identifying **the elements of a statutorily defined criminal offense constitutes substantive law** that date back to the enactment of the statute. *See Bousley v. United States*, 523 U.S. 614, 625 (1998).[6] Furthermore, "[a] judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added).

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6 (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, *cf. Teague v. Lane*, 489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. **It merely explained what § 924(c) had meant ever since the statute was enacted**. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).") *Bousley v. United States*, 523 U.S. 614, 625 (1998). (emphasis added).

In *Fiore v. White*, 531 U.S. 225, 226 (2001) the United States Supreme Court addressed the import of the Due Process Clause in the context of the substantive law defining a criminal offense. The Court noted, "We granted certiorari in part to decide when, or whether the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." But before resolving the matter, the Supreme Court inquired of the Pennsylvania Supreme Court the basis for one of the determinations regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted.[7] The Court wanted to discern whether the decision construing the criminal statute was a new interpretation or whether it was a straightforward reading of the statute. *Fiore*, 531 U.S. at 226. The Pennsylvania Supreme Court replied to the Court that that its ruling "merely clarified the plain language of the statute." *Id*. at 228, meaning that the ruling by the Pennsylvania Supreme Court dated back to the statute's enactment.

[7] Fiore had been convicted of operating a hazardous waste facility without a permit. Despite having a permit, the State argued that Fiore had deviated so dramatically from the permit's terms that he had violated the statute. 531 U.S. at 227. Following his conviction under the State's theory, the Pennsylvania Supreme Court held in another case that deviation from a permit's terms did not result in a person not having an actual permit. Thus, those individuals who deviated from a permit's terms did not violate the statute. *Id*. at 227. On appeal, the Appeals Court determined that the rule announced by the Pennsylvania Supreme Court in the other case, i.e. *Commonwealth v. Scarpone*, 535 Pa. 273, 279, 634 A.2d 1109, 1112 (1993) announced a new rule of law and was therefore inapplicable to Fiore's already final conviction. *Id.* at 227.

Based on that response, the United States Supreme Court held that the Due Process Clause had been violated and collateral relief was warranted. *Id*. at 228-29 (This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violated due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt."). Because Fiore had not been found guilty of one of the essential elements of the statutory offense, his conviction was constitutionally invalid.

This Court's ruling in *Hurst v. State*, similar to *Fiore*, was a plain reading of the language of Florida's capital sentencing statute. This Court's reading of that language concluded that "just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder--thus allowing imposition of the death penalty--are also elements that must be found unanimously by the jury." *Hurst v. State*, 202 So. 3d at 53-54. This Court's reading of the language of the statute made clear that the elements arise from the statute itself and had been present since its enactment.[8]

[8] That the elements of capital first degree murder had been present in the statute since its enactment was further buttressed by this Court's holding in *Victorino v. State*, 241 So. 3d 48, 50 (Fla. 2018). In *Victorino*, this Court rejected an ex post facto challenge to the defendant's sentence of death where he argued that under the new statute, any relief granted in postconviction which resulted in a resentencing rather than an imposition of a sentence of life would violate the ex post facto clause where it would require proof of elements that were not in

Just as in *Fiore*, the decision in *Hurst v. State* did not create a new rule; it merely identified and explained the substantive law set forth in the previously enacted version of Fla. Stat. 921.141. The enactment of Chapter 2017-1 and the subsequent revision of Fla. Stat. § 921.141 only served to further substantiate the integral inclusion of the elements of capital first degree murder in Florida's capital sentencing scheme. As such, just as in *Fiore*, the same result must occur here in Mr. Foster's case. Absent a jury determination of each element of capital first degree murder beyond a reasonable doubt, there cannot be a constitutionally valid determination of Mr. Foster's guilt and/or sentence.

Florida substantive law identifies the elements that are necessary to be convicted of the higher offense of capital first degree murder, as opposed to first degree murder. To be convicted of capital first degree murder those elements must be found in addition to the elements of first degree murder. A conviction of capital first degree murder without a unanimous jury's finding that the State proved those additional elements beyond a reasonable doubt, violates the Due Process Clause. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (due process of law and the

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existence at the time of the crime for which he was convicted. *Victorino*, 241 So. 2d at 50. This Court denied his claim, holding instead that the elements of capital murder applicable to the homicide in his case, which had occurred 12 years before *Hurst v. State* and 13 years before enactment of Chapter 2017-1, were longstanding and neither altered the definition of criminal conduct nor increased the penalty by which the crime of first-degree murder is punishable. *Id.* at 50.

right to an impartial jury indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."); citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) ("**[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged**"). *Apprendi* noted the historical basis for the due process right found its origins in laws dating back to 1798 and *In re Winship*. *Id.* at 478. The Supreme Court in *Apprendi* likewise noted the companion right to have the jury verdict based on proof beyond a reasonable doubt. *Id*. The Supreme Court observed that the "reasonable doubt" standard demanded by due process protects against erroneous convictions and government overreach and to "**reduce the risk of imposing such deprivations erroneously**." *Id*. at 484 (emphasis added). Without a constitutional conviction of capital first degree murder, any death sentence imposed is illegal because it is in excess of the statutory maximum for a conviction of first degree murder.

The Supreme Court's holding in *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013), noted: "*Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are

elements of the crime." The identifying of the facts necessary to increase the authorized punishment is a matter of substantive law. *Id*. at 2161 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment."). In essence, the Court's reasoning amounted to the acknowledgment that due process demands fair warning be given.

Thus, as *Alleyne* held, the facts necessary to increase the authorized punishment to include death are elements of a new or separate offense. This means, subsequently, that the facts that are identified in the revised § 921.141 as necessary to authorize death are elements of a criminal offense and as such, must be proven beyond a reasonable doubt to a unanimous jury. Under the revised § 921.141, first degree murder plus the additional elements set forth in the statute constitute a new offense, i.e. capital first degree murder. This new offense constitutes a higher degree of murder for which death is authorized and therefore due process requires all of its elements to be proven beyond a reasonable doubt. The jury verdict, however it is labeled in the statute, is functionally a determination of the defendant's guilt of that criminal offense-capital first degree murder.

Given this constitutional framework, under the governing substantive law at the time of the homicide at issue in Mr. Foster's case, he was not convicted of capital first degree murder. The elements as set forth in *Hurst v. State,* and

confirmed in Chapter 2017-1, were not found to have been proven beyond a reasonable doubt by a unanimous jury. Nor was the jury even instructed on the requirement to find each element of the greater offense of capital first degree murder beyond a reasonable doubt. Because he was not afforded his right to a jury determination convicting him of every element of the offense of capital first degree murder beyond a reasonable doubt under the law as it existed at the time of his crime, Mr. Foster's death sentence violates due process and must be vacated as it is in excess of the statutory maximum for a conviction of first degree murder.

Jury instructions recently provided to defendants at capital trials establishes that even for crimes which have been committed prior to its enactment, Section 921.141 as revised by Chapter 2017-1, is treated as controlling.[9] The jury instructions in those cases demonstrate that in recent capital trials Chapter 2017-1 and the revision of § 921.141 is the governing substantive criminal law. Moreover, the court files in cases in which death sentences have been vacated and new

[9] For example, in the case of Kendrick Silver in June 2017, the jury instructions promulgated as a result of the revision of § 921.141 and the enactment of Chapter 2017-1 were read to the jury. As part of those instructions the jury was instructed that it was required to unanimously find that the State had proven all of the requisite elements of capital murder beyond a reasonable doubt before returning a death recommendation. In essence, the penalty phase at Mr. Silver's trial served as determination of whether he was guilty of first degree capital murder, which is murder plus the four elements the jury is required to find unanimously under revised § 921.141. The jury's subsequent life recommendation was essentially an acquittal of the higher degree of murder which precluded the judge from imposing a sentence of death.

"penalty phases" ordered show that § 941.121 as revised is being viewed by the State as controlling in homicides dating as far back as 1978.[10]

In other cases in which new "penalty phases" have been ordered the ongoing proceedings show that § 921.141 as revised is being accepted as controlling as to homicides committed in 1980's and 1990's. The State, in a number of such cases, have filed or given notice of its intention to seek the death penalty. The notice of intent to seek the death penalty is new. It must include a list of the aggravating factors that the prosecution intends to prove beyond a reasonable doubt. *See* § 921.141(1), which references § 775.082, which was first revised to include the filing of a notice to seek the death penalty when Chapter 2016-13, Laws of Florida was enacted on March 7, 2016.[11] Treating the revised § 921.141 as governing capital prosecutions arising from murders committed before the revisions were enacted, shows that the prosecutors involved do not see the retrospective application of the revised statute as violating the Ex Post Facto Clause. Those prosecutors are treating the elements of capital first degree murder set forth in § 921.141 as revised as defining the criminal offense of capital first degree murder at

[10] See, e.g. *White v. State*, 415 So. 2d 719 (Fla. 1982), *cert denied*, 459 U.S. 1155 (1982) (crime committed in 1978).

[11] *See* e.g., *State v. Card*, 1981-518-CFMA (Bay County) (crime committed in 1981); *State v. Parker*, 43-1982-CF-000352-C (Indian River County) (crime committed in 1984)

the time of homicides as far back as 1981 and 1984 such as those at issue in *Card* and *Parker*.

If the elements of capital first degree murder were applicable to homicides committed in 1978, 1981 and 1984, the same substantive law was also applicable to the 1998 homicide for which Mr. Foster was convicted of first degree murder. The Due Process Clause required those elements to have been proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363 (1970). Based upon *Winship*, the US Supreme Court held in *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), that a failure to instruct a jury on the "beyond a reasonable doubt" standard was profound or structural error. However, Mr. Foster's jury was not instructed on the need to find the aggravators sufficient beyond a reasonable doubt, nor was it instructed that it had to find the aggravators outweighed the mitigators beyond a reasonable doubt.

D. Analysis

Under the constitutional framework discussed above, the circuit court's denial of Mr. Foster's successive motion for postconviction relief cannot withstand scrutiny. First, the circuit court's finding that Mr. Foster's motion was untimely failed to grasp the purpose and meaning behind the enactment of Chapter 2017-1. Chapter 2017-1 was promulgated in response to this Court's holding in *Hurst v. State*, 202 So. 3d 40 (2016). Its enactment was meant to serve as codification of

this Court's findings in *Hurst*, and its statutory construction was based upon this Court's holding in that case. While, as noted above, this Court held in *Hurst v. State* that it did not re-define the elements of capital first degree murder, the enactment of Chapter 2017-1 on March 13, 2017 served as a touchstone upon which to raise a claim for relief based upon the denial of the right to a jury finding, beyond a reasonable doubt, on all elements of capital first degree murder. As such, the date of the enactment of Chapter 2017-1 served as a legitimate basis upon which Mr. Foster could have relied to have raised his claim for relief. As Mr. Foster argued in his successive Rule 3.851 to the circuit court below, raising such a claim in a previous motion for postconviction relief prior to the enactment of the new statute would have been impossible as Chapter 2017-1 did not yet exist at the time of any of his previous motions.

Second, the circuit court's finding that Mr. Foster's claim was procedurally barred because the *Hurst* rulings do not apply retroactively to Mr. Foster is simply wrong. The circuit court's finding fails to acknowledge that this Court's holding in *Hurst v. State* identified the elements of capital first degree murder. *Hurst*, 202 So. 3d at 53-54. As such, its ruling was substantive in nature. *See Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013) (the identification of the facts or elements necessary to increase authorized punishment is a matter of substantive law). Further, this Court's decision in *Hurst* made clear that the elements of capital first

degree murder were longstanding and have been present for as far back as *Parker v. Dugger*, 498 U.S. 308 (1991). Because this Court's holding in *Hurst v. State* was a plain reading of the language of Florida's capital sentencing statute, it did not create a new rule. Rather instead, it merely identified the substantive law set forth in the previously enacted version of Fla. Stat. 921.141. And if the enactment of Chapter 2017-1 was merely a codification of this Court's holding in *Hurst v. State*, the enactment of Chapter 2017-1 and the subsequent revision of Fla. Stat. § 921.141 only served to further substantiate the integral inclusion of the elements of capital first degree murder in Florida's capital sentencing scheme.

Under such a framework, retroactivity is not an issue. This Court's holding in *Hurst v. State* was substantive in nature, and the subsequent codification of that holding in Chapter 2017-1 only further served to substantiate Mr. Foster's substantive right to proof beyond a reasonable doubt of all elements of capital first degree murder. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 724 (2016) (substantive rules must be given retroactive effect regardless of when the defendant's conviction became final). Thus, the substantive right to a presumptive life sentence absent a jury finding on all elements of capital first degree murder was a protected liberty interest entitled to protection under due process and not subject to retroactivity. To the extent that the circuit court below denied relief based upon retroactivity grounds, that finding was in error.

E. Conclusion

Mr. Foster's conviction and sentence are not valid as he was never convicted under Florida law of the offense of capital first degree murder. The failure to instruct the jury on the need to find all of the elements of a criminal offense beyond a reasonable doubt violates the Due Process Clause. Because, just like in *Fiore*, this Court held in *Hurst v. State* that the elements of capital first degree murder were not added but had been part of the statute since its enactment in 1972. *Hurst*, 202 So. 3d at 53-54. As such, the Due Process Clause is implicated and governs. Mr. Foster is entitled to relief.

ARGUMENT II

MR. FOSTER'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER EVOLVING STANDARDS OF DECENCY WHERE MR. FOSTER WAS 18 AT THE TIME OF THE CRIME

A. Introduction

Kevin Don Foster was 18-year's old at the time of the crime in this case. As was argued in Mr. Foster's first postconviction appeal to this Court, the evidence of Mr. Foster's social history and mental health background developed in postconviction substantiated a wealth of statutory and non-statutory mitigation that was never presented to his jury. *See Foster v. State*, 132 So. 3d 40 (Fla. 2013). Mr.

Foster's background was one replete with a history of family mental illness, alcoholism, and domestic abuse and a childhood mired in strife and infused with a never ending stream of chaos, upheaval, neglect, and abandonment. Along with the mitigation in Mr. Foster's social history and family background, there was substantial evidence presented in postconviction establishing mental health mitigation that Mr. Foster suffered from neurodevelopmental issues and frontal lobe deficits which impacted his behavior and decision-making.

While this mitigation evidence was previously presented in postconviction and ultimately rejected by this Court, *Foster*, 132 So. 3d at 60-61, it was not considered in light of the now emergent consensus within the scientific community regarding the development of the adolescent brain and cognitive functioning. Mr. Foster in particular suffered from pronounced deficits as a result of his traumatic upbringing and frontal lobe impairments. Specifically, this Court has not had the opportunity to consider that emergent consensus, both jurisprudentially and scientifically, together with the mitigation evidence related to Mr. Foster's social history and mental health background, particularly his pronounced neurological deficits and frontal lobe impairment which resulted from his difficult birth and traumatic upbringing. When considered together, Mr. Foster's extensive mitigation, along with his age at the time of the crime, establish that his sentence of

death violates the Eighth Amendment prohibition against cruel and unusual punishment.

Contrary to the circuit court's finding below, this claim is not untimely and procedurally barred. *See* Fla. R. Crim. P. 3.851 (d)(2)(A). (PCR-3. 483-84). The scientific consensus upon which this claim is based is new, and therefore could not have been previously presented by Mr. Foster. The new scientific research upon which Mr. Foster relies constitutes newly discovered evidence which supports a valid basis for raising a claim for relief under Fla. R. Crim. Pro. 3.851(d)(2), (e)(2). While the circuit court determined that new research studies do not constitute newly discovered evidence, that finding was in error. (PCR-3. 483). Scientific evidence in the form of medical studies, reports, and articles can be considered newly discovered evidence. *See Clark v. State*, 995 So. 2d 1112, 1113 (Fla. 2d DCA 2008).[12.] Evidence as to the general consensus now existing throughout the scientific community regarding the cognitive development of the adolescent brain in youths aged 18-21 constitutes newly discovered evidence based upon new scientific information and data that was not part of any previously existing compilation. *See Henry v. State*, 125 So. 3d 745, 750–51 (Fla. 2013) (leaving open the possibility that scientific articles based on new data and scientific information

12 *See also Smith v. State*, 23 So. 3d 1277, 1278 (Fla. 2d DCA 2010); *Zamarippa v. State*, 100 So. 3d 746, 747 (Fla. 2d DCA 2012); *Murphy v. State*, 24 So. 3d 1220, 1222, (Fla. 2d DCA 2009)

as opposed to a compilation of "previously existing" data may constitute newly discovered evidence).

Scientific advances can give rise to newly discovered evidence claims predicated upon new advancements in testing methods or technologies that did not exist at the time of trial, but were later used to test evidence introduced at the original trial. *See Hildwin v. State*, 951 So. 2d 784, 788-89 (Fla. 2006). The flaws inherent in the science used to assess cognitive development and its impact on an 18-21-year-old defendant's decision-making processes were not fully developed and/or acknowledged at the time of Mr. Foster's trial or during his evidentiary hearing in postconviction. *See Wyatt v. State*, 71 So. 3d 86, 100 (Fla. 2011). Mr. Foster's claim here is premised upon the recognition of the general consensus within the scientific community regarding the development of the adolescent brain and the manner in which that consensus has influenced and shaped courts' determination as to the applicability of the death sentence to defendants under 21 years old under the Eighth Amendment's 'evolving standards of decency.' Mr. Foster's evidence regarding the emerging science of adolescent brain development, considered along with all of the evidence introduced in his case, both at trial and in postconviction, establishes that the Eighth Amendment prohibits the application of the death penalty in his case. *See Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014)

(explaining the impact of newly discovered evidence must be evaluated in combination with the totality of the evidence introduced in the case).

Evolving standards of decency *today* counsel that adolescents aged 18-21 years old do not possess the requisite culpability to be sentenced to death. Newly developed science in the field of adolescent brain development establishes that emerging adolescents—those who are in their late teens and early twenties—are more comparable to juveniles than adults who possess fully developed brains. In Mr. Foster's case this was particularly so, given his age of 18 at the time of the crime and his extensive mitigation background.

B. Authority to grant relief under Article I, Section 17, of the Florida Constitution

While this issue has not been addressed as of yet by the United States Supreme Court, that does not foreclose this Court's consideration of the issue or its authority to grant relief in Mr. Foster's case. In denying relief below, the circuit court believed that it was bound by this Court's decision in *Branch v. State*, 236 So. 3d 981 (Fla. 2018) and therefore prohibited from extending the holding in *Roper v. Simmons*, 543 U.S. 551 (2005) to Mr. Foster. (PCR-3. 484). Based upon that finding, the circuit court determined that Mr. Foster's claim was meritless. (Id.). Those findings, however, fail to acknowledge the authority provided to Florida courts to interpret and apply the United States Constitution and its duty to construe the prohibition against cruel and unusual punishment in conformity with

decisions of the United States Supreme Court. It likewise also fails to acknowledge the individualized sentencing determination to which Mr. Foster is entitled and how the particular facts of Mr. Foster's mental health and background warrant that he be ineligible for the death penalty under the Eighth Amendment.

Florida courts have the authority to interpret and apply the United States Constitution. The *Roper* decision essentially serves to set the constitutional 'floor' while still permitting lower courts the authority to provide additional safeguards in conformity with the Eighth Amendment. *See Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (holding that states may expand constitutional protections so long as "they do not infringe on federal constitutional guarantees); *see also Kansas v. Carr*, 136 S. Ct. 633 (2016) (The federal constitution guarantees only a minimum slate of protections; States can and do provide individual rights above the constitutional floor). Thus, while *Roper* sets the minimum standards, this Court has long recognized its authority to provide greater protection to defendants in conformity with the Eighth Amendment precedent.

This much is evident from this Court's decisions in both *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Falcon v. State*, 162 So. 3d 954 (Fla. 2015). In both of those cases, this Court addressed the constitutional claims before it and granted greater protections under the Eighth Amendment, despite the fact that the United States Supreme Court had not, as of yet, extended application of the Amendment

as expansively. Therefore, while *Roper* and its holding regarding what constitutes 'evolving standards of decency' is important to Mr. Foster's Eighth Amendment claim, it is not the full extent of his arguments, nor the end-point of the Eighth Amendment inquiry before this Court.

Additionally, the Court's capacity to interpret and expand upon United States Supreme Court precedent is buttressed by the Florida Constitution's "conformity clause" which provides that the prohibition against cruel and unusual punishment shall be construed in conformity with decisions of the United States Supreme Court *See* Fla. Const. Art. I, sec. 17. In Mr. Foster's case that means that this Court should rule in conformity with recent United States Supreme Court Eighth Amendment decisions holding that the consensus of the scientific community should inform the court's determination of the Eighth Amendment's 'evolving standards of decency' and who is eligible for the death penalty. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *see also Moore v. Texas*, 137 S. Ct. 1039 (2017). Thus, while *Roper* may have set the constitutional "floor" and minimum standards under the Eighth Amendment, the ever changing nature of the evolving standards of decency under the Eighth Amendment, and this Court's obligation to interpret that case law under the Florida Constitution's conformity clause and its authority to provide defendants greater protection in conformity with the Eighth Amendment precedent, provide grounds for this Court to grant Mr. Foster relief.

While a claim similar to the one now being presented by Mr. Foster was addressed by this Court in *Branch v. State*, 236 So. 3d 981 (Fla. 2018) and rejected, this Court's decision in *Branch* case does not preclude relief in Mr. Foster' case. Most notably, in *Branch*, this Court's finding that his claim was procedurally barred was based on the fact that the trial court had previously rejected the age as a mitigator at Branch's penalty phase and Branch had failed to raise a claim on direct appeal challenging the trial court's ruling. *Branch*, 236 So. 3d at 986. Unlike Mr. Branch, however, while Mr. Foster's age of 18 was rejected by the trial court as a statutory mitigator, on direct appeal Mr. Foster did in fact raise the issue and was denied by this Court. *See Foster v. State*, 778 So. 2d 906, 920-21 (Fla. 2000) In doing so this Court relied upon the finding that Mr. Foster had produced no evidence of any "emotional or mental irregularities, chronic or otherwise…" *Id*. That finding, however, is no longer valid when considered in light of the newly emergent consensus within the scientific community regarding the maturation of the adolescent brain and the effects it has on adolescents' mental and emotional functioning. This is particularly relevant in Mr. Foster's case where there exists a wealth of mitigation establishing that Mr. Foster suffers from neurological developmental issues and frontal lobe impairment which impairs his decision making and self-control.

Last, and by no means less significant, the factual record and mitigation background of Mr. Foster's case is different from Mr. Branch's. Mr. Foster was just 18 at the time of the crime, whereas Mr. Branch was 21. Additionally, Mr. Foster presented a wealth of evidence in postconviction that established not only a highly traumatic and chaotic social history, but also a history of neurological impairments, developmental delays, and frontal lobe impairment. All of which manifested itself on the night of the crime in precisely the type of immature, reckless, and impulsive behavior which Eighth Amendment jurisprudence from the United States Supreme Court has repeatedly recognized militates against classifying such individuals amongst the worst of the worst offenders or as morally responsible as that of an adult. *Roper*, 543 U.S. at 569-570. Although Mr. Foster was 18, the circumstances of his background, mental health, and the emerging science regarding adolescent brain development, necessitate that he was the functional equivalent of a juvenile at the time of the crime.

C. Eighth Amendment jurisprudence establishes that imposition of a death sentence to defendants aged 18-21 constitutes cruel and unusual punishment under evolving standards of decency

Both the United States and Florida Constitutions prohibit the infliction of cruel and unusual punishment. U.S. Const. Amend. 8, 14; Fla. Const. Art 1, § 17; *see also, Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). This fundamental right flows from the basic "precept of justice that punishment for crime should be

graduated and proportioned to (the) offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Id*. at 560. Indeed, "barbaric punishments" are unconstitutional under all circumstances, as are punishments that are without penological justification. *Graham v. Florida*, 560 U.S. 48 (2010).

"The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." *Roper*, 543 U.S. at 560. To determine which punishments are so disproportionate as to be cruel and unusual, courts must consider "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101, 78 S. Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion); *Roper*, 543 U.S. at 561. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972)) (Burger, C.J., dissenting)). "The Eighth Amendment 'is not fastened to the obsolete but may

acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (quoting *Weems v. United States*, *supra*). That is, "evolving standards of decency" necessarily evolve, and what may have been acceptable to the courts and society, at large, historically may not prove acceptable later in time.[13]

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). "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568. (citations omitted). The death penalty is categorically barred for certain groups of offenders if a national consensus develops against executing the particular group and if capital punishment fails to

[13] For examples of society's 'evolving standards of decency', compare *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed .2d 256 (1989), holding constitutional the execution of intellectually disabled people, with *Atkins v. Virginia*, *supra*, prohibiting the execution of intellectually disabled people. Another example of the evolution of the law is the progress from *Stanford v. Kentucky*, 492 U.S. 361, (1989), holding constitutional the execution of offenders under 18 years, to *Roper v. Simmons*, *supra*, prohibiting the execution of offenders under 18 years.

serve the purposes of punishment, namely retribution or deterrence. Under the Eighth Amendment, where neither retribution nor punishment is served, a death sentence is excessive and grossly out of proportion to the crime. *See Kennedy*, 554 U.S. at 441 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

In evaluating whether a death sentence is unconstitutionally excessive, courts generally consider "the historical development of the punishment at issue, legislative judgments, international opinion, and sentencing decisions juries have made…" *Enmund v. Florida*, 458 U.S. 782, 788 (1982). Along with the objective indicia, courts also 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. It has been under this portion of the test that the United States Supreme Court has previously found the death penalty unconstitutional in specific scenarios: for those who are intellectually disabled; *Atkins*, 536 U.S. at 321; for those who have not committed homicide, *Kennedy*, 554 U.S. at 421; and for juveniles under 18 at the time of the crime, *Roper*, 543 U.S. at 578.

It is within the context of the ever evolving standards of what constitutes cruel and unusual punishment under the Eighth Amendment that Mr. Foster files this claim. Mr. Foster's claim is focused upon what the 'evolving standards of decency' under the Eighth Amendment mean today, not what they were. As such,

while *Roper* and its progeny are instructive, those cases are not, and cannot, be the endpoint of any analysis under the Eighth Amendment. For, as the United States Supreme Court has noted, what constitutes the 'evolving standards of decency' is not fastened to the obsolete, but acquires meaning as public opinion becomes enlightened by humane justice. *Hall*, 134 S. Ct. at 1992.

Mr. Foster's claim does not merely rely upon the research that supported the decision in *Roper*. It cannot, as that research addressed the 18 and under age group. Rather, Mr. Foster's claim is premised upon the research and now emerging consensus within the scientific community dealing with development of the adolescent brain in individuals between the ages of 18-21 years old. It relies upon research and conclusions that until now, while believed to be accurate, had not been previously fully developed or shown. Specifically, the conclusion that the maturation of the adolescent brain is not complete until the late twenties and how that later development affects and impacts the decision-making and behaviors of adolescents in the late teens to mid-twenties during that period of development. This emergent scientific consensus is particularly relevant in Mr. Foster's case, where additional evidence exists that establishes a history of childhood abuse and trauma, as well as evidence of frontal lobe impairment and neurological developmental issues throughout his life.

D. Imposition of the Death Penalty Upon Individuals Under 21 Years Of Age Fails to Serve Any Penological Purpose and Is Unconstitutionally Excessive

The imposition of capital punishment upon individuals under 21 years of age is unconstitutional as it is excessive and has little or no penological purpose. "[P]unishment is justified under one or more of three principal rationales: 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). "(C)apital punishment 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." *Kennedy*, 554 U.S. at 441 (emphasis added); *accord Gregg v. Georgia*, 428 U.S. 153 (1976) (noting that the death penalty should serve these "two principal social purposes"). These are bedrock principles of the Constitution's promise to forbid the infliction of cruel and unusual punishment by government. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1061 (C.D. Cal. 2014).

"Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. As the *Roper* Court observed, there are three general differences between juveniles under 18 and adults that demonstrates that juvenile offenders cannot, with any reliability, be classified

amongst the worst of the worst offenders. *Roper*, 543 U.S. at 569-570. The *Roper* Court concluded that "(t)hese differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).[14]

Review of the recent sociological and neuroscientific research and consideration of the state and federal laws that impose restrictions on people under 21 years of age, require the courts to conclude that youthful offenders under age 21 have the same vulnerabilities as juvenile offenders under age 18 such that they are not the "worst of the worst." Consequently, execution does not achieve the constitutionally accepted reasons for capital punishment—retribution and deterrence. Deterrence as a rationale for punishment necessarily requires a group to reflect upon the consequences of its actions. Late adolescents suffer from the same impulsivity as younger teenagers: They act rashly, without reflection and full consideration of the consequences of their actions. They do not grow out of this

[14] The Supreme Court continued this line of thinking in *Miller v. Alabama*, 567 U.S. 460 (2012) when it held that states may not impose mandatory life-without-parole sentences on juvenile offenders, even for murder. 132 S. Ct. at 2464-65 (citations omitted). Life without parole was not categorically prohibited for juvenile offenders, but mandatory life without parole was unconstitutional as to children. *Id*. at 2468.

behavior until their mid-twenties. The fact that the death penalty is a punishment is unlikely to deter murderous behavior. Put simply, capital punishment is only lawful if the offender's "consciousness (is) materially more 'depraved' than that of any person guilty of murder." *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). The characteristics of youthful offenders so affect their individual responsibility and moral guilt that it categorically precludes such a finding. Thus, their execution is categorically unconstitutional

E. Consensus within the Scientific Community

Research within the scientific community establishes a consensus that cognitive development and brain functioning in adolescents under 21 years old is less developed than adults and in ways similar to that of juveniles, thus meaning they are not more culpable for their crimes than those under 18 years old. As part of its evolving standards assessment, courts must consider the consensus of the medical community and scientific data in determining where to draw the moral culpability line. The United States Supreme Court has repeatedly looked to scientific research to inform its constitutional analysis of evolving standards of decency. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 471 (2012) ("Our decisions rested not only on common sense-on what 'any parent knows'-but on science and social science as well.") (quoting *Roper*, 543 U.S. at 569).

In *Hall v. Florida*, the Court relied heavily on the scientific community to determine that Florida's system for the assessment of intellectually disabled defendants was not in accord with the general consensus. *Hall*, 134, S. Ct. at 1993. In doing so, the Court determined that Florida's brightline IQ score cut-off that precluded defendants with scores above 70 from presenting any additional evidence of their intellectual disability contradicted the consensus within the medical community that IQ scores were not the dispositive factor in reaching a determination of a person's intellectual capacity. The *Hall* decision, and the subsequent decision in *Moore v. Texas,* 137 S. Ct. 1039 (2017), reaffirming the holding in *Hall,* stand for the proposition that in order to act in conformity with Eighth Amendment jurisprudence courts may not ignore relevant scientific consensus. *Id*. at 2001.

In deciding *Roper*, the United States Supreme Court relied heavily on neuroscientific research dealing with the development of the adolescent brain. Since *Roper,* research into the development of the adolescent brain has established evidence supporting a general consensus within the scientific community regarding the diminished capacity of juveniles to regulate and modulate behavior and engage in risk-adverse decision-making. These studies establish that the characteristics cited to in *Roper,* and then later relied upon in *Graham* and *Miller,* that distinguish juveniles and typify diminished culpability, are still developing in individuals up to

and beyond 21 years old. These developments in the scientific and medical field have influenced legislators and courts who have increasingly acknowledged in the nation's laws and judicial decisions that the characteristics of youth relied upon in *Roper* and its progeny extend to the age of 21. For the same reasons the *Roper* court extended the categorical bar against imposition of the death penalty to those under 18, conformity with the Eighth Amendment and 'evolving standards of decency' now requires this Court to apply the same constitutional protection to adolescents under 21 years of age like Mr. Foster.

"The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. Research conducted since the time of *Roper* has shown that the same characteristics relied upon in *Roper*-youth, immaturity, susceptibility to peer pressure-persist well into a person's twenties. Today, there is a well-established professional consensus within the scientific community based on neuroscientific evidence that establishes that "adolescent brains are not fully developed, which often leads to erratic behaviors and thought processes in that age group." *In re Stanford*, 537 U.S. 968 (2002).

Specifically, in November 2016 Laurence Steinberg, Elizabeth Scott, and Richard Bonnie, published an article detailing the recent findings within the scientific community regarding the maturation of the adolescent brain and those they classified as "young adults" aged 18-21 years old. *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). Their research showed that since of *Roper*, researchers have found that "adolescents eighteen-to twenty-one-years-old are more like younger adolescents than older adults in their impulsivity under conditions of emotional arousal." *Id*. Given this proclivity for engaging in such impulsive and risky behavior, their research questioned whether "the possibility that much risky behavior, including involvement in criminal activity, is a product of psychological and social immaturity and raises the question of whether the presumption of reduced culpability and greater potential for reform should be applied to young adult offenders as well as juveniles." *Id.*

As a consequence of their immature brains, teens seek out risk. Research now shows that individuals in the young adult period, i.e. 18-21, are at a greater risk to engage in risky behavior than younger adolescents, indicating "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). Rates of risk-taking are high among 18-21 year olds, even for some of those who may be classified as adults. L. Steinberg, "A Social Neuroscience Perspective on Adolescent Risk-Taking," Dev. Rev. Vol. 28(1), Mar. 2008, at pp. 78-106 (Mar. 2008). The rate of

risk taking among 18-21 year olds is exceedingly much higher than that of young adults 25 years or older. The current science now demonstrates that the prefrontal cortex which is critical to executive functioning and encompasses areas such as impulse control, risk management, and decision making, continues to develop until at least the mid-twenties.[15]

The reasoning behind these risk-taking tendencies arises from a mismatch in the differing rates at which the areas of the brain mature. The networks in the brain's limbic system, which drives emotions, develops faster with the onset of puberty than does the networks in the prefrontal cortex, which controls judgement and impulse. J. Giedd, "The Amazing Teen Brain," Scientific American (June 2008), at pp. 33-37. Science now confirms that the prefrontal cortex continues to change prominently until well into a person's 20's. *Id*.

[15] Risk-taking increases between childhood and adolescence as a result of the onset of puberty and changes to the brain's socio-emotional system. *Steinberg at 13*. These changes lead to increased reward-seeking, especially in the presence of peers. *Id*. This tendency for risk-taking declines, however, between adolescence and adulthood because of changes and maturation of the brain's cognitive control system. *Id*. at 1. These changes improve an individual's capacity for self-regulation. However, because these changes occur gradually over the course of adolescence, and on different timetables, the increased tendencies for reward seeking which occurs earlier in adolescence than the increase in self-regulation, which typically does not occur until mid-twenties, makes mid-adolescence a period of high vulnerability for risky and reckless behavior. *Id.* at 1. This phenomenon explains teenagers' high tendencies to engage in reckless behavior such as unprotected sex, excessive drinking, and drug abuse. *Id*.

Thus, while it may have been known at the time of *Roper* that brain development was still continuing up and until the mid-twenties, it was not until the emergence of the recently developed research that there was an explanation of the consequences of that delayed development to help explain the behavior of adolescents aged 18-21 years old. "Until recently, no compelling scientific argument existed for treating young adults differently than their older counterparts." Scott, E., Bonnie, R., & Steinberg at 643. While it was evident that "the psychological and neurobiological development that characterizes adolescence continues into the mid-twenties, [] the research [had] not yet produced a robust understanding of maturation in young adults age eighteen to twenty-one." Id. at 653.

The focus of the earlier science was on juveniles *under* eighteen. 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 the older counterparts." *Id.*

The United States Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), prohibiting life imprisonment without the possibility of parole for juveniles under eighteen who were convicted of non-homicide offenses, further bears this out. Arguments against prohibiting life imprisonment without parole for juveniles under eighteen relied, in part, upon research by the American Medical Association focusing upon the developing science within the field of adolescent brain development and the understanding that it was a field that was still developing and could not yet provide a basis for fully understanding 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").

Following *Graham*, the scientific community conducted more extensive and targeted research to answer the questions about the effects of incomplete brain development on adolescents in their early twenties and late teens. Scientists began focusing on the maturation of the older adolescent brain. Their research showed impairment during the ages of 18-21 under certain circumstances such as negative emotional situations, peer pressure, or

prolonged trauma. *See e.g.,* 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). That research indicated that the examination of adolescent brains aged 18-21 indicating diminished cognitive control in comparison to older adults when confronted with negative emotional situations may have implications for legal policy. *Id.* at 560. Thus *Graham* not only clarified the scientific research of brain development from the time of *Roper*, but also the impact that the effects of things like childhood trauma and abuse can have on the developmental delay in brain maturation.

Subsequently, research within the scientific community now shows that, as with juveniles, there are broad differences between youthful offenders aged 18-20 and those 21 years and over. First, youths under 21 years old are more prone to impulsive risk-taking behavior than individuals 21 and older, in part attributable to a "mismatch" between the limbic system and the development of the prefrontal cortex. Cf. *Roper*, 543 U.S. at 569. Second, this age group remains vulnerable to peer pressure. Cf. *Roper*, 543 U.S. at 569. Third, their character is still not fully formed: Once their brains are fully mature as biological "adults," risk-taking tends to decline; they are better able to withstand the pressures of peers; and they have the power to fully reflect upon the consequences of their actions. Cf. *Roper*, 543 U.S. at 569. In short, as with juveniles, the character of offenders ages 18, 19, and

20 is not fixed; they still have the capacity "to attain a mature understanding of (their) own humanity." *Roper*, 543 U.S. at 571-72. The considerations mentioned in *Roper v. Simmons* apply with equal force to defendants under 21 years of age.

While "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood[,]" *Roper*, 543 U.S. at 574, science now accepts that there is a period of adolescence that exists between the stages of childhood and adulthood which was considered and relied upon by the Court in *Roper*. While legally an adult during this period of time, adolescents in this category, on average, still possess many, if not all, the relevant psychological deficiencies which required protection in *Roper*. The scientific community has confirmed that individuals who are 18 years old do not have fully developed brains and continue to be vulnerable to peer pressure and risk-taking behavior just like their peers who are younger than 18 years old. Because young adults under 21 years of age are as a class not fully mature, they should not be considered among the worst of the worst offenders for purposes of the death penalty. As such, because Mr. Foster was just over the age of 18 at the time of the crime, specifically 18 years, 10 months, 14 days old, and well under the age of 21, he should not be subjected to the death penalty.

F. Other Objective Indicia

1. ABA Resolution

That this emerging consensus in the scientific community has gained recognition and validity within both the scientific community and the legal community gains further support from the February 5, 2018 resolution passed by the American Bar Association calling on all jurisdictions to prohibit imposition of the death penalty on defendants under 21 years of age at the time of their crimes. *See* American Bar Association's House of Delegates Resolution (Feb. 5, 2018). Subsequent to passing the resolution, the ABA explained its reasoning:

> "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). (PCR-3. 166-67). The ABA's resolution is premised upon the recognition within both the legal and scientific communities regarding the development and maturation of the adolescent brain. The ABA's recognition further supports not only that there is indeed a now national consensus within both the legal and scientific community, but also that the science that is being relied upon to formulate that consensus is in fact just that, newly emerging and not previously available.

2. Sentencing and Appellate Courts

Significantly, there is a growing national consensus in sentencing and appellate courts that a sentence of death constitutes cruel and unusual punishment under the Eighth Amendment for defendants under 21 years of age at the time of the offense. Most recently, in *Bredhold v. Kentucky*, Case No. 14-CR-161 (August 1, 2017) the circuit court held that the imposition of the death sentence to a juvenile who was 18 years old at the time of the crime constituted cruel and unusual punishment under the Eighth Amendment and 'evolving standards of decency.' Specifically, the court in *Bredhold* found that there was a "very clear national consensus trending towards restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age." (PCR-3. 268).

The court further determined that Bredhold, who was 18 years and 5 months old at the time of the crime, fit into the group "experiencing the 'maturational imbalance,' during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses.'" (PCR-3. 274). Ultimately, the court held that "[g]iven the national trend toward restricting the use of the death penalty for young offenders, and given the recent studies by the scientific community, the death penalty would be an unconstitutionally

disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age." (PCR-3. 275).

This acknowledgement that a defendant's youth is a significant factor in determining the applicability of the death sentence, was also reiterated just recently by this Court. In *Ellerbee v. Florida*, this Court noted that Ellerbee's "age of twenty-one at the time of the murder" was "significant" when evaluating the appropriateness of his sentence. *See Ellerbee v. Florida*, 232 So. 3d 909 (Fla. 2017). In granting relief this Court noted:

> Dr. Garbarino also found Ellerbee's age of twenty-one at the time of the murder to be significant. He acknowledged the "legal bright line" of eighteen being the age of adulthood, but opined that such a bright line is at odds with developmental psychology. He explained that a person's brain does not fully develop emotional regulation, executive function, and decision making until he reaches his late twenties. He added, "And that's for a normal population who hasn't had traumatic abuse at childhood." He opined that while Ellerbee was legally an adult, he was not "a fully functioning adult" developmentally.
>
> According to Dr. Garbarino, Ellerbee's abusive childhood would have further impaired his intellectual and emotional development."

Id. at 929-30.

The holdings in *Bredhold* and *Ellerbee* establish that throughout the country there has continued to be a consistent trend in the acknowledgement by courts, including this one, that youthful offenders and the characteristics of youth, i.e.

immaturity, vulnerability to peer pressure, lack of developed executive functioning, make the imposition of the death penalty to those offenders who were under 21 at the time of the crime unconstitutional under the Eighth Amendment and 'evolving standards of decency.' Mr. Foster deserves to be afforded the same consideration as part of an individualized sentencing determination in which the characteristics of his youth, i.e. immaturity, recklessness, vulnerability to peer pressure and his environmental influences, along with consideration of his overall mental functioning and brain impairment are considered in determining his culpability and the appropriate sentence under 'evolving standards of decency.'

3. Federal and State Legislative and Statutory Enactments

Review of the legislative enactments by various state legislatures also establishes a national consensus against applying the death penalty to those under 21 years of age. Throughout the various states and territories of the United States offenders under 21 years of age at the time of their crime(s) would not face execution in 23 states, five U.S. territories, and the District of Columbia. Currently, 19 States[16] and the District of Columbia have abolished the death penalty as to all crimes. In addition to those states that have abolished the death penalty, four states

[16] The States that have abolished the death penalty (along with the dates of abolition) include Alaska (1957), Connecticut (2012), Delaware (2016) Hawaii (1957), Illinois (2011), Iowa (1965), Maine (1887), Maryland (2013), Massachusetts (1984), Michigan (1846), Minnesota (1911), New Jersey (2007), New Mexico (2009), New York (2007), North Dakota (1973), Rhode Island (1984), Vermont (1964), West Virginia (1965), and Wisconsin (1853).

have imposed moratoria on executions.[17] These moratoria states are considered to be on the defendant's "side of the ledger" in the national consensus equation. *Hall v. Florida*, 134 S. Ct. at 1997.

4. Statistical Data and Sentencing Practices

Statistical data and actual sentencing practices further supports a national consensus against imposing the death penalty on a defendant under 21 years old. Over the past decade there has been a marked decline in the imposition of new death sentences. *See* Death Penalty Information Center (DPIC), *Death Sentences in the United States from 1977 By State and By Year*.[18] Of those states that theoretically authorize the death penalty for offenders under 21, seven have a *de facto* prohibition on the execution of such defendants.[19] In those remaining states which the death penalty remains a possible sentence for offenders under 21 at the time of their crimes, only a small handful of states actually carry out executions. During the last ten years only 12 states have actually carried out executions of offenders under 21 years old at the time of their offense.[20] Since 2011, that number

[17] Pennsylvania, Oregon, Washington, and Colorado.

[18] Available at https://deathpenaltyinfo.org/death-sentences/united-states-1977-present.

[19] Kansas, New Hampshire, Montana, Wyoming, Utah, Idaho, and Kentucky

[20] Texas, Virginia, Oklahoma, Florida, Delaware, Mississippi, Alabama, Ohio, Georgia, South Carolina, Indiana, and South Dakota. (PCR-3. 290-356; accord PCR-3. 257-381).

has dropped to nine States.[21] Of the 29 States that have had executions since 2000, 14 States did not execute anyone under 21 years of age, and four of those States have since repealed the death penalty or imposed a moratorium on executions.[22] Specifically, with respect to Florida, since 2000 Florida has executed 52 people, three of whom were under 21 years at the time of their offenses. Florida currently has 347 people on its death row[23], and 48 were under 21 at the time of their offense.

Over the last 20 years offenders under 21 years of age at the time of the offense have not been sent to death row, or if sent to death row, they have not remained there following appeal. Review of the relevant data, conducted in 2016, concluded that executions of emerging adults-those under 21 at the time of their crime-are exceedingly rare.[24] While no State has enacted legislation raising the minimum age for death-eligibility above 18, this is most likely attributable to the fact that states have chosen to simply either abandon the death penalty altogether

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[21] *See (*PCR-3 290-356; accord PCR-3 373).

[22] *See* (PCR-3. 257-381).

[23] Data current as of July 11, 2018 per Florida Department of Corrections website: www.dc.state.fl.us/offendersearch/deathrowroster.aspx

[24] *See* Brian Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels's A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. CHANGE 147, 152 (2016) (footnotes omitted); *see also* Andrew Michaels, *A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. CHANGE 139 (2016) (PCR-3. 383-389).

or at minimum, the imposition of it on those under 21 years of age at the time of their crime. Considered with those states that have outlawed the death penalty altogether, the total then rises to 30 states which have banned outright, or in practice, the imposition of death sentences for offenders under 21 years of age who commit capital offenses. Now, given the current state of the law there is evidence of an identifiable emergent consensus against execution of individuals under 21 years of age.

5. Societal Consensus of Juvenile Status for Adolescents Under 21

Along with existing scientific consensus, there is also a societal consensus about those under 21. Society agrees that young adults have neither attained the requisite level of maturity nor an adequate appreciation for the consequences of their actions sufficient to participate in activities which society deems necessary to engage in activities requiring those characteristics. When setting the cutoff at 18 in *Roper*, the Court acknowledged that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18," however, "a line must be drawn." *Roper*, 543 U.S. at 574. The Court in *Roper* noted that the line was drawn at 18 because that is the point where society draws the line for many purposes between childhood and adulthood." *Id*. Yet, society draws the line higher to age 21 for a significant number of activities.

The Court noted in *Miller v. Alabama* that the decisions in *Roper* and *Graham* relied upon the significant gaps between juveniles and adults, including that juveniles possess a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569)). Society has accepted that these gaps which exist at 18, still exist at age 21 with respect to particular behaviors involving high risk situations such as drinking and gambling, such that as a society individuals who are over 18 but under 21 are still excluded from engaging in them.

Over the last decade legislation has consistently extended the age of adulthood to 21 years or older. Various state and federal laws impose a minimum age of 21 years to engage in certain activities and extend the age of "minority" to 21 years for numerous others.[25] Most recently, during the 2018 session the Florida

[25] For example: state laws enacted raising the age for purchase of tobacco, *see, e.g.*, N.Y.C. Administrative Codes § 17-706 (2014);; Haw. Rev. Stat. § 712-1258 (2015); Cal. Penal Code § 308 (2016) and Cal. Bus. & Prof. Code § 22963 (2016); Cleveland, Ohio, Code of Ordinances § 607.15 (2016); Chi., Ill., Code of Ordinances § 4-64-190 (2017), Kansas City, Mo., Code of Ordinances § 50-253 (2017); St. Louis County, Mo., Code Of Ordinances § 602.367 (2017).; state laws regarding the consumption and purchase of alcohol; state laws regarding the consumption and purchase of marijuana; state and federal laws regarding the purchase and possession of firearms, *See* 18 U.S.C. § 922(b)(1), (c)(1); 27 C.F.R. § 478.99(b) and (PCR-3. 391-393); federal and state laws for remaining in foster care *See* Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) Sec. 201 (continuing federal support for children in foster care after 18) Sec. 202 (requiring child welfare agencies to help youths 18-21 to plan for

Legislature passed, and the Governor signed, a law raising the minimum age to purchase any firearm from 18 to 21.[26] Implicit in the law's passage is the acknowledgement that possessing a firearm is inherently dangerous and should be limited to those mature enough to possess one responsibly.

Other age-based limitations related to professional licensing and work-related activities also reflect an acknowledgement of 21 years old as a requirement for full entry into adulthood.[27] These various areas of legislation, both state and

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their transition from the foster care system).; *see also* Cal. Fostering Connections to Success Act, Assembly Bill ("AB") 12 (2010) (extending foster care benefits up to age 21 years); Ind. Collaborative Care Program (extending foster care benefits till 20 years and extend voluntary services until 21 years) Minn. Stat. § 260C.451, subdivision 1 (extending foster care benefits to 21 years); Va. Code §63.2-905.1 (extending independent living services to former foster kids); state laws creating special courts for those young adults aged 18-21; (2) the Credit Card Act of 2009 banning credit cards for people under the age of 21 unless they have a co-signer aged 21 years or older, or show proof that they have the means to repay the debt. *see, e.g.*, 15 U.S.C. § 1637(c)(8); 15 U.S.C. § 1637(p); (3) adoption of youthful offender laws providing special protections to individuals aged 18-21, *see, e.g.*, Federal Juvenile Delinquency Act 18 U.S.C. § 5301 (2014); *see also* Mich. Comp. Laws Ann. § 762.11 (2015); (4) enactment of heightened age requirements on prospective adoptive parents, *see, e.g.*, Colo. Rev. Stat. §§ 19-5-202, 14-1-101 (21 years); Del. Code Tit. 13 §§ 903, 951 (21 years); Ga. Code § 19-8-3 (25 years or married); Okla. Stat. Tit. 10 § 7503-1.1 (21 years); and (5) states that have legalized gambling and casinos restricting entrance to individuals aged 21 years or older, *see* Colo Rev. Stat. § 12-47.1-809 (1991), Del. Code Tit. 29 § 4810 (1974); Ind. Code § 4-33-9-12 (1993); Iowa Code § 99B.43 (2015); La Rev. Stat. § 14:90.5 (2004); Miss. Code §75-76-155 (1990); Mo. Rev. Stat. §313.817 (1991); Nev. Rev. Stat. § 463.350 (1955); N.J. Stat. § 5:12-119 (1977); S.D. Codified Laws § 42-7B-35 (1989).

[26] *See* Chapter No. 2018-3 found at http://laws.flrules.org/2018/3, which amends *Fla. Stat.* §790.065.

[27] For example, federal law requires a driver to be at least 21 years of age to

federal, reflect an acknowledgment that heightened age requirements apply to activities for which a lack of responsibility may have significant consequences for adolescents who behave impulsively, without reflection, and without a greater sense of, or capacity for, responsible action (e.g., consuming alcohol/marijuana, foster parenting, and obtaining credit cards, possessing a handgun). Likewise, federal and state laws extend protections that might otherwise only apply to juveniles (*see, e.g.*, foster care benefits, free public education) because legislatures recognize the vulnerability of these individuals and the need for society to protect this class of young people.

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drive a commercial vehicle interstate, transport passengers intrastate, or transport hazardous materials intrastate. *See, e.g.*, 49 C.F.R. §§ 391.11(b)(1), 390.3(f), 391.2. Additionally, both federal and state laws impose age restrictions of 21 years and above to be employed as a law enforcement officer or federal agent. *See* 13 AAC § 85.010 (basic standards for police officers); (23 years is minimum age to become an agent of the Federal Bureau of Investigation);[27] (21 years is minimum age to become a special agent with the Drug Enforcement Agency)[27]; Alaska Stat. § 18.65.240 (police standards counsel sets minimum requirements). Twenty-one (21) years is also the minimum age to engage in the licensed practice of law in states such as Arizona, Delaware, Illinois, Indiana, Mississippi, New York, Ohio, Rhode Island, South Carolina, and Utah. *See, e.g.*, Ariz. R. Ct. § 43(b)(1)(A); Del. S.Ct. R. 52; Ill. S.Ct. R. 71(a); Ind. R. Admis. B. & Disc. Att'y R. 12(2); Miss. R. Gov'g Admis. B. IV § 5.A; N.Y. R. Ct. § 520.2(a)(1); Ohio Gov. B. Rule I(A); R.I. S.Ct. Art. II Rule 1(b); S.C. App.Ct.R. 402(c)(1); Utah R. Jud. Admin. 14-703(a)(1). Finally, the federal and various state constitutions impose categorical age-of-candidacy requirements for public office. For example, the minimum age to run for the U.S. House of Representatives is 25 years, U.S. Const. Art. I § 2 cl. 2, while 27 states impose a minimum age-of-candidacy of 21 years for the lower legislative house, and six states have even higher age restrictions.

G. The death penalty must be excluded as punishment in Mr. Foster's case under the Eighth Amendment's 'evolving standards of decency'

Following Mr. Foster's convictions and sentencing in 1998 there has been consistent and steady momentum within Eighth Amendment jurisprudence dealing with application of the death penalty to juveniles and adolescents classified as "emerging adults" and under 21 years of age. At the time of the crime Mr. Foster, whose date of birth is June 16, 1977, was 18 years old.[28] Given his age at the time of the crime, in conjunction with the evidence presented at both trial and in postconviction, the application of a sentence of death to Mr. Foster violates the Eighth Amendment under 'evolving standards of decency.'

The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, *supra*, 487 U.S. at 835 (plurality opinion)). In reaching that decision the *Roper* court relied upon several characteristics which were intrinsically tied to adolescence and adolescent

[28] Mr. Foster was 18 yrs, 10 months, 14 days old at the time of the crime. His co-defendant Chris Black was 18 years, 13 days old. Peter Magnotti was 17 years, 8 months, 22 days old. Derek Shields was 18 years, 8 days old. The co-defendants' ages are significant because contrary to what the State argued at trial, Mr. Foster was not the dominant force or motivating factor behind the crime due to his advanced age or superior maturity as compared to his co-defendants. This fact rings even more true when taken into consideration with evidence presented in postconviction establishing Mr. Foster's developmental issues both neurologically and cognitively, along with the impact of his traumatic and chaotic childhood on his development.

emerging adults during the developmental period which the scientific community now recognizes as part of the maturation of the adolescent brain. Indeed, all of the characteristics that compelled the *Roper* court to recognize a ban against imposition of the death penalty to juvenile offenders under 18 years of age were possessed by Mr. Foster and present on the night of the crime: immaturity, vulnerability to peer pressure and negative influences, impulsivity, lack of control over his environment, and still yet formed character and/or personality traits. *Roper*, 543 U.S. at 569-70. Such evidence is critically important to an individualized sentencing determination and were relevant to the jury's assessment of Mr. Foster's moral culpability. *See Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982). However, despite its relevance, that mitigation evidence was either rejected by the Florida state courts or used against Mr. Foster to rebut evidence of the age of 18 statutory mitigator and/or support aggravation.

1. Record at trial

The facts of the night of the crime are highly indicative of the concerns which have underscored the United States Supreme Court's jurisprudence in Eighth Amendment cases and the diminished culpability of adolescents under 'evolving standards of decency.' Rather than serve as mitigating, the State relied upon the facts of Mr. Foster's crime and his age to overwhelm the sentencer's ability to properly consider the weight of youth and its attendant issues. However,

contrary to the State's arguments and the Florida state court's findings, the facts from the night of the crime not only supported the age of 18 mitigator but were reflective of precisely the behaviors to which the United States Supreme Court has repeatedly noted supported diminished culpability under the Eighth Amendment.

As numerous witnesses testified at trial, the circumstances on the night of the crime occurred as result of a peer-influenced group decision and an irrational whim to attempt to avoid trouble after some members of the group had been apprehended by the victim while in the act of vandalizing the local high school. (R. 1281). This decision was the result of group think and peer pressure amongst teenage boys, none of them older than 18 years old. While they were in the process of vandalizing the school, two members of the group, Christopher Black and Thomas Torrone, had been caught by the victim and had been informed that they would be reported in the morning to the school resource officer. After the victim left the school the boys then regrouped. Rather than de-escalate the situation, one of the group's members, Christopher Black, demanded that they act in order to stop the victim from reporting them in the morning. Black wanted to follow Schwebes immediately. (R. 1099-1100). Others persuaded him from doing so. It was then that Black stated that Schwebes had to die because he knew too much. (R. 1098; 1251-52; 1287-88). Despite being scared and unsure of the escalating course of

events, no one raised any arguments or indicated that they thought it was a bad idea. (R. 1325-26).

Initially, the group didn't even have an actual plan as to what to do. They didn't even know where Schwebes lived or how to find him. They hatched an ad-hoc plan, pulling the victim's number and address from the phone book, calling his number and listening to his voicemail before hanging up, and then going to Mr. Foster's house and retrieving a gun and several other items. (R. 1099-1100; 1289-90; 1293-94; 1329-30). It was not until later that they finally decided that making it look like a robbery would be a good disguise. (R. 1509). During this time period, only one member of the group, Peter Magnotti, expressed any uncertainty that their improvised plan was not a good idea. (R. 1105-06). None of the teenage boys commented that it was possibly over-reactionary. The group of four teenage boys then decided to travel to the victim's house in one of the group member's car, Derek Shields, which at the time was loud and without a muffler. (R. 1107-08; 1471-72; 1502-03). No one stopped to think whether choosing such a car was a wise move given the need for anonymity.

Their plan as to what they were going to do once they arrived at the residence was disorganized and chaotic. They were not even able to locate the victim's house upon first trying. (R. 1500-01). After locating the victim's house and committing the crime, the group then fled in the muffler-less car, which made

such a loud commotion that nearby neighbors were able to easily recall hearing it as they left the scene. (R. 1002-04; 1008-09).

These record facts all support that Mr. Foster's actions that night, along with those of the other adolescent boys in the group, were a direct result of the youths' inability to put the brakes on impulsive sensation seeking behavior and resist the influence of their peers. None of the members involved, including Mr. Foster, were able to engage in long-term thinking, or employ logical reasoning and exercise self-control to consider the risks and rewards of alternative courses of action. The group's actions were prototypical examples of the impulsive, risk-seeking behavior which are emblematic of immature youths with underdeveloped neurological and cognitive functioning and when placed in situations which arouse fear, anxiety, and stress. From the inability to de-escalate the affair, the failure to speak up or overcome peer pressure, to the failure to engage in rational long-term thinking giving full consideration of the consequences of their actions, the actions of Mr. Foster and the other group members that night were all indicative of the precise forms of behavior which the Court in *Roper* recognized militated against holding juvenile's behavior as morally culpable as that of an adult. *Roper*, 543 U.S. at 569-70.

Despite the presence of these facts, the State employed a strategy during penalty phase that sought to utilize Mr. Foster's youth against him in aggravation.

Mr. Foster's defense counsel presented 25 witnesses during penalty phase, none of them providing anything more than topical anecdotes as to his "good guy" character. His jury was presented with nothing regarding his age at the time of the crime and the lack of maturity he exhibited as an 18-year-old male. The defense failed to even present evidence in order to establish that Mr. Foster was 18 at the time of the crime. After the close of evidence, the defense had to scramble to find something in the testimony that supported that factor. They finally referred to testimony from a neighbor friend in the penalty phase that established how old Mr. Foster would have been. Even then, no evidence showed the significance of Mr. Foster's young age in relation to his behavior at the time of the crime.

The State then capitalized on defense counsel's failure to present anything substantial at penalty phase to support the age of 18 mitigator. At the close of penalty phase the State urged the jury to sentence Mr. Foster to death because of the absence of any mitigating evidence. (PCR-1. 2056-57).[29] The jury ultimately

[29] The prosecutor told the jury:

> This was a choice made by a young man who had every advantage . . . [t]his evidence is the farthest thing from mitigation, the farthest thing. The defendant's claim today to mitigating factors is simply another attempt to escape accountability. . . To play on our sympathies and divert you from following the law. This is what I say when an attempt is made to play on your sympathies and divert you from following the law. How dare they? How dare they?

returned a vote of 9-3, sentencing Mr. Foster to death.[30] The trial court rejected all 23 of the mitigators as statutory mitigators, though only one was statutory (Foster was 18 at the time of the crime). Fla. Stat. 921.141(6)(h) (1997); (R. 1484). The judge specifically rejected the age of 18 mitigator because trial counsel had done nothing to show any evidence of immaturity on Mr. Foster's part. This, despite the fact that there was ample evidence to the contrary. The judge slammed the defense mitigation case in his order, mocking the statutory mitigator of age 18, and writing a scathing portrayal of Mr. Foster's 'good kid' mitigation (R. 1484). Rather than serve as mitigating, both the State and the Florida courts relied upon the facts of the crime and Mr. Foster's age to serve as aggravation. It did so despite the fact that such characteristics were relevant and constitutionally required to be considered for purposes of providing an individualized sentencing determination. *Eddings*, 455 U.S. at 116.

2. Postconviction Evidentiary hearing

In addition to his age of 18 at the time of the crime, Mr. Foster also presented substantial evidence in postconviction that established he suffered issues

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(R. 2057-58).

[30] The trial court subsequently found two aggravating factors: (1) the capital felony was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody, and (2) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Fla. Stat. § 921.141(5)(e) and (i) (1997).

with frontal lobe damage to his brain, possible brain damage, and neurodevelopmental issues associated with both his difficult birth and his chaotic and traumatic childhood. This evidence established that at the time of the crime Mr. Foster suffered from neurological, psychological, and physiological issues which exacerbated his mental health and stunted his development. This evidence, while previously considered by this court in postconviction, must be re-evaluated in conjunction with the general consensus which now exists within the scientific community regarding the development of the adolescent brain and 'evolving standards of decency' under the Eighth Amendment.

Evidence presented in postconviction established that Mr. Foster experienced significant trauma in his early childhood years which had a profound impact on his development. Medical records established Kevin was born through an emergency C-section, suffered perinatal asphyxia and respiratory distress syndrome, and had to be resuscitated twice. (PCR-1. 2453; 2510; 3000-3315). Following birth, he encountered chronic health issues. He was developmentally slower than other children his age and abnormal. (PCR-1. 2464, 2467). One family member, Irene Bates, thought Kevin was autistic. (PCR-1. 2467).

Mr. Foster's home life which could, at best, be described as highly tumultuous and chaotic also directly contributed to these delays. It was devoid of any stability or nurturing. There was extensive physical and mental abuse. Ruby,

Mr. Foster's mother, was abusive and neglectful. (PCR-1. 2470). Extended family members believed she was an unfit mother. (PCR-1. 2407). She was erratic, fluctuating between being absent and being overly nurturing at other times. (PCR-1. 2470). She was often hyperactive and impulsive and engaged in a revolving door of marriages to four different men throughout Mr. Foster's childhood. many of whom were physically abusive to Ruby, Mr. Foster and Kelly, his sister. (PCR-1. 2414; 2462-63; 2180-81; 2199; 2463). One such husband, Brian Burns, even broke Ruby's nose on one occasion. (PCR-1. 2180-81). At times, Ruby would leave Mr. Foster and his sister alone for extended periods of time while she went out on the road dating other men. (PCR-1. 2460).

The chaos and turmoil affected Mr. Foster. Family members noticed he was developmentally delayed. (PCR-1. 2470). He walked later than other children. (*Id*.). He had an asymmetrical and crooked face. (Id.). He lacked expression and never initiated any physical or emotional connection with others. (PCR-1. 2470-71). Family members noted that the chaotic family environment left both Mr. Foster and his sister depressed. (PCR-1. 2466). His sister, Kelly, walked around with a limp, dragging one leg. (PCR-1. 2467). Doctors could not explain any physical reason why and blamed it on the chaotic family environment. (Id.).

In addition to developmental delays, Mr. Foster was also hyper and accident prone. (PCR-1. 2210; 2213). He was clumsy and fell often. (PCR-1. 2212). He was

constantly getting hurt and having accidents, often requiring him to receive stitches. (PCR-1. 2211; 2318). On several separate occasions he had incidents of closed-wound head injuries. (PCR-1. 2211; 2315, 2318). When Kevin was 5 or 6, Kelly accidentally hit him in the head with a baseball bat causing a concussion (PCR-1. 2211). Another time, in Texas, Kevin was playing on a mud scrapper when he fell back and hit his head on a rock and the bottom of his skull opened (PCR-1. 2211).

Eventually, at around the time Kevin was 15-16 years old the family moved yet again, this time back to Florida. Ruby was at this point living with Husband #3, Brian Burns, despite still being married to Husband #4, John Foster. (PCR-1. 2202-03). In the months that followed, Kevin's life became even more more chaotic and he began spiraling out of control. Desperate for some form of attention and structure, Mr. Foster began acting increasingly reckless and withdrawn. His grades had begun to plummet. By Kevin's first year at Riverdale High School in 1993, his grade point average was 1.91 in 9th grade. In 10th grade, Kevin's grades dropped to 1.28 grade point average. The girl he was dating at school broke up with him which left him very depressed. (PCR-1. 2455). In the Riverdale High yearbook from that year, Kevin's friends wrote that he should try not to kill himself over the summer. The entries also referred to Julie, the girl who broke up with him. Kevin's friends knew he was very depressed and they tried to give him hope for the future

(PCR-1. 2457). Eventually, Kevin dropped out of school and took a GED passing it on the first try (PCR-1. 3000-3315).

During this time period he was also prone to impulsive and reckless behavior in which he disregarded even his own life. Not long after he broke up with his girlfriend, Kevin suffered a self-inflicted gunshot wound to the abdomen which officials at the hospital believed was not an accident. (PCR-1. 2335). While he was in the hospital, his best friend died from Leukemia. (PCR-1. 2202-06). Shortly after release from the hospital Kevin then jumped off a local bridge and ended up suffering a serious staph infection which sent him back to the hospital. (PCR-1. 2208).

Eventually, Mr. Foster obtained a job working at Bunting Construction company. During his short time there, however, Mr. Foster continued acting recklessly and was a danger to both himself and his co-workers. On several different occasions Mr. Foster managed to stab himself, cut off the end of his finger with a saw, nail his fingers together with a nail gun, have a 1" square of glass cut through his foot, and get hit in the head with a metal door. (PCR-1. 388). His penchant for clumsiness and self-inflicted injury still persisted.

In similar fashion, so too did Mr. Foster's immaturity. Despite having a job and paycheck of his own, at the time Mr. Foster committed the crime, he was still highly dependent on others, including his abusive mother. At age 18 he was still

living at home and was barely removed from the environment of his violently abusive step-father. Checks written on Mr. Foster's bank account showed that his mother was still signing her son's checks, even those including his payroll checks (PCR-1. 2961-2999). Even though he had dropped out of school two years earlier and had found work, Mr. Foster was still dependent upon his mother to drive him around because his license had been suspended. (PCR-1. 1651-52). He was far from the man that the State tried to portray as responsible for his own affairs.

Dr. Gur, a neurologist, testified at the evidentiary hearing that Mr. Foster's brain was not yet fully matured at the time of the crime. (PC-R. 498). He explained that a male teenaged brain, such as Mr. Foster's, was still on-going and not fully developed at age 18. With respect to Mr. Foster, Dr. Gur testified that at the time of the crime the myelination process was still developing in someone of Mr. Foster's age. He felt this fact was significant given that the frontal lobes deal with impulse control and judgment--two things that evidence from trial and postconviction demonstrates was lacking during the month leading up to and at the time of the crime.[31]

[31] Dr. Gur noted that with Electro-magnetic Resonance Imaging (MRI), it is now possible to get an image of the working capacity, health and development of the brain (PCR-1. 2254-55). Dr. Gur requested MRI testing for Mr. Foster and counsel made a motion to the trial court for an MRI testing, which was initially granted (PCR-1. 1576-79). However, the Florida Department of Corrections (DOC), refused to transport or allow MRI testing to be done at its facility, despite Mr. Foster's offer to pay for the testing and his own expert to administer the testing

Neuropsychologist Ernest Bordini, who conducted neuropsychological testing of Mr. Foster, testified that as a result of Mr. Foster anoxic birth, frontal lobe deficits were to be expected. Dr. Bordini testified that he was surprised to see such poor results on the Wisconsin Card Sort testing from someone with Kevin's [high] IQ (PCR-1. 2326-28; 2341). Mr. Foster's verbal IQ tested at 137, but he had a 105 on nonverbal IQ. Dr. Bordini explained that only one in 200 people have such a large difference, which is an indication of right versus left hemisphere dysfunction even in people with higher IQ scores. Such a rare difference is a 'red flag' that may have impact on Kevin's behavior (PCR-1. 2347-48). Dr. Bordini noted that Mr. Foster's school records supported these concerns about discrepancy in his IQ scores and that his performance in school was very inconsistent. *Id*.

From the results of his testing, Dr. Bordini found that Mr. Foster has executive functioning frontal lobe deficits as well as mild memory deficits and some patterns of right hemisphere difficulties (PCR-1. 2359). He explained that this was significant as the frontal lobes shift gears and regulate behavior and emotions, which is significant for social and occupational functioning. (PCR-1. 2353-54). Dr. Bordini testified that he felt that "the dramatic stuff is really the executive functioning difficulties. These would translate into emotional maturity problems." (PCR-1. 2360). Dr. Bordini believed that had Mr. Foster been

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(PCR-1. 1590-98; 1599-1606). As a result, Mr. Foster was prevented from obtaining an MRI.

thoroughly tested at the time of the incident, his frontal lobe impairment would have been even worse. (PCR-1. 2356-2357).[32]

Dr. Hyde, both a neurologist and medical doctor, also conducted an examination of Mr. Foster, and found that he suffers from right hemisphere dysfunction. (PCR-1. 2734). Dr. Hyde placed emphasis on Mr. Foster's birth records, indicating low Apgar scores just after birth which were indicative of developmental issues. Dr. Hyde also noted Mr. Foster's school records indicated that Mr. Foster had to repeat the fifth grade. Dr. Hyde believed this was a result of the psychological factors and turmoil Mr. Foster was dealing with in his home life. (PCR-1. 2736). Dr. Hyde felt that Mr. Foster's history of repeated minor closed-wound head injuries were reflective of impulsive behavior or issues with motor-skills problems. (Id.). Last, Dr. Hyde also noted that the medical records of a gunshot wound Mr. Foster suffered in the abdomen not too long before the crime were also important for purpose of raising 'red flags' of a potential mood disorder as a result of the turmoil and upheaval in Mr. Foster's home life. (Id.).

[32] Mr. Foster's issues with impulsivity and decision making were echoed by Dr. Gur. Dr. Gur explained that upon his review of the raw data from Dr. Bordini's neuropsychological testing, Mr. Foster's scores on the Wisconsin Card Sorting testing, scoring two deviations below the average, was a strong indication of frontal lobe damage. (PCR-1. 2564). As Dr. Gur noted, Mr. Foster's inability to change sets of principles on the test was indicative that "[w]hen making decisions and considering the context of his actions, he's impaired." (PCR-1. 2565). Dr. Gur ultimately concluded that Mr. Foster's brain was not yet mature at the time of the crime and suffered from executive functioning impairment. (PCR-1. 2750-51).

3. Expert Reports in Support of Third Successive Motion for Postconviction Relief

As part of his litigation of his successive Rule 3.851 motion below, Mr. Foster submitted reports authored by psychologists Dr. James Garbarino and Dr. Faye Sultan. (PCR-3. 451-476). Dr. Garbarino's report explained that there now exists a new national consensus within the scientific community that recognizes that the cut-off of 18 years of age is arbitrary and not in accord with the current understanding of the scientific community. (PCR-3. 451-52). Both Dr. Sultan and Dr. Garbarino noted that the current scientific understanding of adolescent brain development was not available during earlier proceedings in Kevin Foster's case. (PCR-3. 451; 473). This new consensus establishes that the development of the adolescent brain, particularly the pre-frontal cortex area, continues until at least the mid-twenties. (PCR-3. 454; 473).

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 18-year-old

individuals. Measures of brain function and structure employing sophisticated technology support this new scientific recognition" (PCR-3. 453).

Dr. Sultan's report noted that since the time of the 2011 evidentiary hearing, medical and scientific literature dealing with brain development has advanced to reach the understanding that brain development in males often does not reach full maturity until the age of approximately twenty-five years and beyond. (PCR-3. 473). Dr. Sultan further explained that "synaptic pruning" and "myelination," two of the processes by which the brain develops neuro pathways for more efficient functioning, are still ongoing until that time. (PCR-3. 473). Both Dr. Garbarino and Dr. Sultan found that the development of Mr. Foster's brain was particularly stunted as a result of his highly tumultuous and chaotic upbringing. (PCR-3. 454; 471-72). Specifically, Dr. Garbarino noted:

> "This new understanding is especially significant to a case such as the case of Kevin Foster, who was 18 at the time of the offense, demonstrably impulsive and immature, suffering from a history marked by psychological maltreatment, and with a history of social marginality linked to his facial asymmetry and related health problems (including intellectual problems that impeded success in school-he dropped out in 10th grade and effective social relationships with positive peers). He was described as "developmentally delayed" and "slow" by people who observed him as a child. A family member with whom Kevin and his mother had lived for a period described him as demonstrating flat affect and being unconnected emotionally with others. The picture that emerges is of a child who was profoundly depressed by virtue of the psychological adversity of his family life

> and socially withdrawn in response to this atypical appearance. These accounts bolster the findings of the experts who have assessed him (e.g. Dr. Bordini) and reported a range of cognitive deficits which undermine his thinking and management of feelings-particularly in the area of "executive function"—and appear to be attributable to adverse events ranging from oxygen deprivation at birth to head injuries during childhood.
>
> What is more, the 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 adolescents (people in their 18th and 19th years) are a special class. "

(PCR-3. 453-54).

Dr. Sultan's report endorsed that sentiment as well, stating that she believed Mr. Foster's development was further delayed due to issues at his birth where he suffered perinatal asphyxia. (PCR-3. 473). She further noted that the neurological deficits in Mr. Foster were also identified by family members and within early school testing since the time of his childhood, and were also identified by experts who previously evaluated him prior to the 2011 evidentiary hearing. (PCR-3. 475). As a result, Dr. Sultan concluded that Mr. Foster's capacity to achieve brain maturation and emotional maturity was highly compromised by the combination of his life circumstances, mental illness, and brain damage. (PCR-3. 474).

As a result of these developmental delays and trauma, both Dr. Garbarino and Dr. Sultan concluded that at the time of the offense Mr. Foster was an 18-year-

old adolescent who did not possess the fully functioning and developed brain of an adult. (PCR-3. 458; 475). To that end, Dr. Garbarino opined that "the 18-year-old who killed Mark Schwebes was a lost boy, not a functioning adult sufficiently morally culpable for the most severe penalty that American law allows." (PCR-3. 458). Similarly, Dr. Sultan opined that it was her belief that "Kevin Foster was functioning with the decision-making and impulse control of a middle adolescent at the time of the offense." (PCR-3. 475-76).

What is now clear is that the newly emergent consensus within the scientific community further supports that Mr. Foster's issues with cognitive functioning and development place him within a class of individuals similar to those who were under 18 years old at the time of the crime. This is particularly so, when considering that Mr. Foster was only 10 months removed from his 18th birthday at the time he committed the crime. Most importantly, it establishes that the science which Mr. Foster now relies upon was not previously available either at the time of the United States Supreme Court decision in *Roper*, or at the time of his evidentiary hearing in 2011. For purposes of the Eighth Amendment, and Mr. Foster's eligibility for a sentence of death, this new science establishes that Mr. Foster possessed many of the exact characteristics which the *Roper* Court found militated against permitting the imposition of the death penalty to juveniles under

18 years of age. (i.e. poor decision making, immaturity, etc.). *See Roper*, 543 U.S. at 569-70.

H. Conclusion

The Circuit Court erred in finding that Mr. Foster was not entitled to an evidentiary hearing. Mr. Foster's claim that his sentence of death violates the Eighth Amendment due to his cognitive immaturity and mental health issues at the time of the crime satisfies Fla. R. Crim. P. 3.851(d)92), (e)(2). The newly emergent scientific consensus presented by Mr. Foster is a valid basis to warrant further evidentiary development at a hearing. As both Dr. Garbarino and Dr. Sultan noted, this newly emergent consensus was not previously available to Mr. Foster at the time of his prior 2011 evidentiary hearing.

Emerging science can constitute newly discovered evidence for purpose of postconviction. *See e.g., Duncan v. State*, 232 So 3d 450 (Fla. 2DCA 2017). To the extent that it may be debatable whether the newly emergent scientific consensus establishing adolescents under 21 years of age are no more cognitively developed than juveniles under 18 is newly discovered evidence, this Court should remand to permit evidentiary development. Mr. Foster's claim is not merely based on *Roper*, but rather the argument that under the Eighth Amendment the newly emergent scientific consensus should be considered, as directed by *Hall v. Florida* and *Moore v. Texas*, when determining his eligibility for a death sentence. This Court

should consider Mr. Foster's evidence of the newly emergent scientific consensus and remand in order to permit a hearing so that he may fully develop his record below.

CONCLUSION

Under the Eighth Amendment, the punishment for crimes must be graduated and proportioned to (the) offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). Evidence of Mr. Foster's immaturity and the underdevelopment of his adolescent brain establish that his was not a crime whose extreme culpability makes him deserving of execution. *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Science and society have now progressed to such a point that it is now widely accepted that there is a time of adolescence between "childhood" and "adulthood" as they were understood in *Roper*. As a result, today the brightline cut-off of eighteen years old does not accurately reflect the realities of adolescent brain development. Given the United States Supreme Court's Eighth Amendment jurisprudence, coupled with the national consensus which now exists in the scientific community, Mr. Foster can show that he is not eligible for a sentence of death. Because he is facing the most severe sanction, he must be provided a fair opportunity to show that the Constitution prohibits his execution. *See Hall*, 134 S. Ct. at 2001. Mr. Foster contends that an evidentiary hearing is appropriate, or in the alternative, that this Court should grant relief outright.

Respectfully submitted

NEAL A. DUPREE
Fla. Bar No. 311545
Capital Collateral Regional Counsel-South

/s/ Scott Gavin
SCOTT GAVIN
Florida Bar No. 0058651
Assistant CCRC-South

Office of the Capital Collateral Regional Counsel - South
1 East Broward Avenue, Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished on this day July 11th, 2018 via electronic service to Stephen Ake, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013 at capapp@myfloridalegal.com; and stephen.ake@myfloridalegal.com.

/s/ Scott Gavin
SCOTT GAVIN
Assistant CCRC-South

CERTIFICATE OF FONT COMPLIANCE

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/s/ Scott Gavin
SCOTT GAVIN
Assistant CCRC-South