

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES HAIRSTON,)	
)	
Petitioner-Appellant)	
)	No. 46665-2019
v.)	
)	Bannock Co. CV-2018-1033
STATE OF IDAHO,)	
)	CAPITAL CASE
Respondent.)	

BRIEF OF JUVENILE LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER-APPELLANT JAMES HAIRSTON

Appeal from the District Court of the Sixth Judicial District for Bannock County.
Honorable Robert C. Naftz, District Judge presiding.

Andrew Parnes, ID Bar No. 4110
LAW OFFICE OF ANDREW PARNES
P.O. Box 5988
671 First Avenue North
Ketchum, ID 83340
(208) 726-1010
aparnes@mindspring.com

Jonah J. Horwitz, ID Bar No. 10494
FEDERAL DEFENDER SERVICES OF IDAHO
Capital Habeas Unit
702 W. Idaho, Suite 900
Boise, Idaho 83702
Jonah_Horwitz@fd.org

Counsel for Appellant James Hairston

Marsha L. Levick, PA Bar No. 22535
Riya Saha Shah, PA Bar No. 200644
Katrina Goodjoint, DC Bar No. 1034099
JUVENILE LAW CENTER
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551
mlevick@jlc.org

L. LaMont Anderson
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
lamont.anderson@ag.idaho.gov

Counsel for Respondent State of Idaho

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ii

INTEREST AND IDENTITY OF AMICI CURIAE..... 1

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

 I. RESEARCH INDICATES BRAIN FUNCTIONS ASSOCIATED WITH YOUTH
 AND RELIED UPON BY THE U.S. SUPREME COURT IN *ROPER V. SIMMONS*
 AND ITS PROGENY ARE STILL DEVELOPING IN YOUNG ADULTS..... 3

 II. STATES AROUND THE COUNTRY HAVE MODIFIED EXISTING
 LEGISLATION TO CONFORM WITH EVOLVING VIEWS OF ADULTHOOD..... 7

 III. THE EIGHTH AMENDMENT REQUIRES INDIVIDUALIZED SENTENCING
 BEFORE IMPOSING HARSH SENTENCES ON YOUNG ADULTS 11

CONCLUSION..... 13

CERTIFICATE OF SERVICE 14

TABLE OF CASES AND AUTHORITIES

	Page(s)
Cases	
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	4, 11
<i>Commonwealth of Kentucky v. Bredhold</i> , No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Ct. Aug. 1, 2017).....	12
<i>Cruz v. United States</i> , No. 11-CV-787(JCH), 2018 WL 1541898 (D. Conn. 2018).....	12
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	3, 12
<i>Hall v. Florida</i> , 572 U.S. 701 (2014).....	4
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	3, 11, 12
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989).....	4
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	3, 4, 8, 11
<i>Stanford v. Kentucky</i> , 492 U.S. 361 (1989).....	4
<i>State v. O’Dell</i> , 183 Wash.2d 680, 358 P.3d 359 (Wash. 2015) (<i>en banc</i>).....	12, 13
Statutes	
8 U.S.C.A. § 1101.....	9
18 U.S.C.A. § 922.....	9

18 U.S.C.A. § 5031	9
42 U.S.C.A. § 290bb-25b.....	9
42 U.S.C.A. § 290bb-36.....	9
42 U.S.C.A. § 12291	9
Idaho Code § 18-3302.....	11
National Minimum Drinking Age Act, 23 U.S.C.A. § 158 (West 1984)	8
Other Authorities	
ABA Resolution 111: Death Penalty Due Process Review Project Section of Civil Rights and Social Justice, Report to the House of Delegates at 3, https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf	6
Alexandra O. Cohen, <i>When Does a Juvenile Become an Adult? Implications for Law and Policy</i> , 88 TEMP. L. REV. 769 (2016).....	7, 8
Eighth Amendment	4
The Council of the City of New York, Committee Report of the Human Services Division, Committee on Health, at 12 (2013).....	8
Elizabeth S. Scott et al., <i>Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy</i> , 85 FORDHAM L. REV. 641 (2016).....	5, 10
GAO, REPORT TO THE SUBCOMMITTEE ON WORKER & FAMILY SUPPORT, COMMITTEE ON WAYS & MEANS, HOUSE OF REPRESENTATIVES, FOSTER CARE: STATES WITH APPROVAL TO EXTEND CARE TO PROVIDE INDEPENDENT LIVING OPTIONS FOR YOUTH UP TO AGE 21, 9 (2019).....	7
H.R. 88, 128 Leg., 1st Reg. Sess. (Me. 2017).....	7
Laurence Steinberg, <i>A 16-Year-Old is as Good as an 18-Year-Old—or a 40-Year-Old—at Voting</i> , L.A. TIMES (Nov. 3, 2014), http://www.latimes.com/opinion/op-ed/la-oe-steinberg-lower-voting-age-20141104-story.html	10

Laurence Steinberg, <i>A Social Neuroscience Perspective on Adolescent Risk-Taking</i> , 28 DEV. REV. 78 (2008).....	6
Laurence Steinberg et al., <i>Age Differences in Future Orientation and Delay Discounting</i> , 80 CHILD DEV. 28 (2009).....	5
Linda C. Fentiman, <i>A New Form of WMD? Driving with Mobile Device and Other Weapons of Mass Destruction</i> , 81 UMKC L. REV. 133 (2012).....	10
Margo Gardner & Laurence Steinberg, <i>Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study</i> , 41 DEV. PSYCHOL. 625 (2005).....	5
Melissa S. Caulum, <i>Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System</i> , 2007 WIS. L. REV. 729 (2007).....	5
<i>Minimum Age to Purchase & Possess</i> , GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/#state (last visited Aug. 13, 2019).....	9
Miriam Aroni Krinsky & Theo Liebmann, <i>Charting a Better Future for Transitioning Foster Youth: Executive Summary of Report From a National Summit on the Fostering Connections to Success Act</i> , 49 FAM. CT. REV. 292 (2011).....	7
<i>National Minimum Drinking Age: Hearing on H.R. 4892 Before the Subcomm. on Alcoholism and Drug Abuse of the S. Comm. on Labor and Human Resources</i> , 98th Cong., 48 (1984).....	9
State of California, Hearing Before the Assembly Committee on Public Health and Developmental Services, 2015 Second Extraordinary Session, at 3 (August 25, 2015) (Bill Analysis), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0001-0050/abx2_8_cfa_20150821_151507_asm_comm.html	8
Tobacco 21 Fact Sheet, https://tobacco21.org/tobacco-21-fact-sheet	8
<i>What is the Legal Gambling Age?</i> , LEGAL GAMBLING USA, https://www.legalgamblingusa.com/articles/what-is-the-legal-gambling-age.html (last visited Aug. 13, 2019).....	9

INTEREST AND IDENTITY OF AMICI CURIAE

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as laid out in the brief of Appellant.

SUMMARY OF THE ARGUMENT

The U.S. Supreme Court has recognized that the imposition of the death penalty upon certain classes of individuals constitutes excessive punishment in violation of the Eighth Amendment. Juveniles are exempt from that punishment based on the Court's recognition of their diminished culpability due to characteristics that typify youth—immaturity, impetuosity, susceptibility to negative peer influences, and a lack of fully-formed character. These characteristics, more than the specific age of the offender, determine the class of individuals for whom the death penalty is unconstitutional.

Although the Supreme Court has acknowledged that it is the characteristics of youth that require constitutional protection, and not a specific chronological age, it has also stated that an age-based line must be drawn. In determining where to draw this line, the Court has looked to

national consensus on the demarcation of adulthood, as reflected in state sentencing practices and legislation, as well as the scientific community's own growing understanding of human development. Accordingly, in the context of the death penalty, the Court has repeatedly revised or altered its articulation of the line between juveniles and adults to account for society's evolving views.

In *Roper v. Simmons*, the Court ruled that imposing the death penalty on juvenile offenders who committed capital crimes prior to age 18 constituted cruel and unusual punishment in violation of the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 567-68 (2005). Citing developments in the law and social science that reflected a new national consensus regarding adolescent development, the Court overruled its earlier decision in *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (upholding the death penalty for juveniles convicted of homicide when they were 16 or 17 years old), *abrogated by Roper v. Simmons*, 543 U.S. 551, 559-60, 575 (2005). In the fourteen years since *Roper* was decided, the objective indicia of national consensus—including state death penalty and sentencing practices, legislative developments, and empirical research—have once again evolved, requiring courts nationwide to revisit prior case law and compelling the conclusion that the line between childhood and adulthood must now be moved to 21.

From laws regulating the consumption, purchase or possession of tobacco and marijuana to laws extending the period of time for provision of child support and foster care, recent legislative changes reveal an emerging national consensus that individuals under the age of 21 should also be considered less culpable for their criminal acts than fully-developed adults. Moreover, these legislative trends have been informed by neuroscientific and social science research which

demonstrate that the regions of the brain associated with the developmental characteristics identified in *Roper*, including the regulation of judgment and self-control, are still maturing in individuals at least through age 21. James Hairston, who was 19 at the time of his offense, is well within this age range.

ARGUMENT

I. RESEARCH INDICATES BRAIN FUNCTIONS ASSOCIATED WITH YOUTH AND RELIED UPON BY THE U.S. SUPREME COURT IN *ROPER V. SIMMONS* AND ITS PROGENY ARE STILL DEVELOPING IN YOUNG ADULTS

The Supreme Court has acknowledged that the developmental differences between children and adults require either the categorical prohibition of certain punishments or the individualized consideration of a defendant’s youthful characteristics prior to imposition of certain harsh sentences routinely meted out to adults. *See Roper v. Simmons*, 543 U.S. 551, 572-74, (2005) (holding that imposing the death penalty on individuals convicted as juveniles violates the Eighth Amendment’s prohibition against cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (holding that imposing life without parole on individuals convicted as juveniles of nonhomicide offenses violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding that the mandatory imposition of life without parole on individuals convicted as juveniles of homicide offenses violates the Eighth Amendment and requiring “individualized sentencing for defendants facing the most serious penalties”).

Consistent with its Eighth Amendment jurisprudence accounting for evolving standards of decency, the Supreme Court has periodically re-examined its analysis of which offenders qualify for a categorical exemption to the death penalty. The Supreme Court has held that “[t]he Eighth

Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Hall v. Florida*, 572 U.S. 701, 708 (2014) (citing *Weems v. United States*, 217 U.S. 349, 378 (1910)). Certain classes of offenders have been categorically exempt from the death penalty, including juveniles. *See Roper*, 543 U.S. at 575. In *Roper*, where the Court banned the death penalty for all youth who committed homicides below the age of eighteen, the Court overruled its earlier decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had upheld the death penalty for juveniles convicted of homicide when they were 16 or 17 years old. *Roper*, 543 U.S. at 575. The Supreme Court also revisited its decision several times on the execution of intellectually disabled individuals. *See Penry v. Lynaugh*, 492 U.S. 302, 334-35 (1989) (concluding that the Eighth Amendment did not mandate a categorical exemption from the death penalty for intellectually disabled offenders in part because only two states had barred imposition of the death penalty), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (barring execution of intellectually disabled offenders and rejecting *Penry* due to evolving standards of decency, as demonstrated by the fact that only a minority of states allowed such execution). Most recently, in *Hall*, the Supreme Court determined that the definition of intellectually disabled could not be a rigid determination based solely on IQ. *Hall*, 572 U.S. at 723-24. The Court reasoned that such a demarcation based on IQ score failed to account for medical evidence and unanimous professional consensus. *Id.* at 721-22. The Court found that “[i]ntellectual disability is a condition, not a number” and “that the IQ test is imprecise.” *Id.* at 723. The Court further reasoned that using an imprecise test to gauge eligibility for the death penalty is unconstitutional because it could risk executing individuals who meet the criteria for intellectual disability, but whose IQ was higher than 70. *Id.*

Recent research similarly demands a reconsideration of the evolving standards relied upon in *Roper* given that the developmental differences initially observed in children are present in young adults as well. Social science has repeatedly underscored that young adults, compared to older adults, are more prone to risk-taking, acting in impulsive ways that likely influence their criminal conduct, and are not yet mature enough to anticipate the future consequences of their actions. *See, e.g.*, Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641, 644 (2016); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *CHILD DEV.* 28, 35 (2009). Young adults also face the same types of susceptibility to peer pressure as younger children. *See* Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 *WIS. L. REV.* 729, 731-32 (2007) (“When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual’s future behavior and structural brain development.” (citing Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 *HUM. BRAIN MAPPING* 766, (2006))). Another study examined 306 individuals in 3 age groups—adolescents (defined as individuals aged 13-16), youths (defined as young people aged 18-22), and adults (defined as individuals 24 and older)—and found that “although the sample as a whole took more risks and made more risky decisions in groups than when alone, this effect was more pronounced during middle and late adolescence than during adulthood” and that “the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions.” Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference,*

and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 DEV. PSYCHOL. 625, 632, 634 (2005). The presence of friends has also been shown to double risk-taking among adolescents (mean age 14), increasing it by fifty percent among young adults (mean age 20), but having no effect on older adults (mean age 34). Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 90-91 (2008). These characteristics are important for courts to consider when imposing the harshest sentence possible—the death penalty.

The American Bar Association analyzed the research regarding “newly-understood similarities between juvenile and late adolescent brains” in its February 2018 resolution urging jurisdictions to prohibit the imposition of the death penalty on any individual who was 21 years old or younger at the time of the offense. *See* ABA Resolution 111: Death Penalty Due Process Review Project Section of Civil Rights and Social Justice, Report to the House of Delegates at 3, <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf> [hereinafter ABA Resolution 111]. As explained by ABA Resolution 111, because the death penalty is the most severe and irrevocable sanction available, it should only be imposed on the most blameworthy defendants who have committed the worst crimes. *Id.* at 11. The ABA relied on this research to conclude that young adults “share a lesser moral culpability with their teenage counterparts,” insufficient to justify imposition of the death penalty. *Id.*

Sentencing a 19-year-old to death does not reflect current standards of decency informed by social science.

II. STATES AROUND THE COUNTRY HAVE MODIFIED EXISTING LEGISLATION TO CONFORM WITH EVOLVING VIEWS OF ADULTHOOD

Over the last decade, nationwide reforms have extended the age of adulthood to 21. States have, among other areas, (1) created at least 50 special courts targeted specifically at young adults ages 18 to 21; (2) adopted “youthful offender” laws providing a hybrid of special protections to individuals 18-21; and (3) extended the obligation to pay child support until the child is at least 21. Further, all states that have legalized recreational marijuana to date have prohibited its use by persons under 21. Alexandra O. Cohen, *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 778 (2016). States drew the line at 21 based on consideration of the same factors relied on in *Roper*—limited ability for impulse control, susceptibility to peer pressure, and propensity for risky behavior. *See, e.g.*, H.R. 88, 128 Leg., 1st Reg. Sess., at 1 (Me. 2017) (“[E]nsuring that possession and use of recreational marijuana is limited to persons who are 21 years of age and older is necessary to protect those who have not yet reached adulthood from the potential negative effects of irresponsible use of a controlled substance.”).

Since *Roper*, 26 states, prompted in part by federal guidance, have extended the age at which young people can remain in foster care to 21. GAO, REPORT TO THE SUBCOMMITTEE ON WORKER & FAMILY SUPPORT, COMMITTEE ON WAYS & MEANS, HOUSE OF REPRESENTATIVES, FOSTER CARE: STATES WITH APPROVAL TO EXTEND CARE TO PROVIDE INDEPENDENT LIVING OPTIONS FOR YOUTH UP TO AGE 21, 9 (2019). This legislation—and federal support for extending the age to 21—is based on the notion that young people may not be prepared for independent living at 18, when their character is not yet fully formed and when propensity for risky behavior still exists. *See* Miriam Aroni Krinsky

& Theo Liebmann, *Charting a Better Future for Transitioning Foster Youth: Executive Summary of Report From a National Summit on the Fostering Connections to Success Act*, 49 FAM. CT. REV. 292, 292 (2011) (citing evidence that individuals ages 18 to 21 who remain in foster care are “far less likely to be victims or perpetrators of crime and violence”); *cf. Roper*, 543 U.S. at 570 (identifying as a salient characteristic of youth an individual’s “vulnerability and comparative lack of control over their immediate surroundings”).

Additionally, many states and municipalities have raised the age for purchasing tobacco—one of the four primary legislative comparisons noted in *Roper*—from 18 to 21. Cohen, *supra*, at 779. At least 22 states and 485 cities and counties in 29 states have similar legislation pending. Tobacco 21 Fact Sheet, <https://tobacco21.org/tobacco-21-fact-sheet>. The legislative history behind this trend in tobacco laws is premised on the notion that society now widely recognizes certain characteristics encapsulating youth, including “immaturity” and “susceptib[ility]” to “addictive properties,” extend to 21. The Council of the City of New York, Committee Report of the Human Services Division, Committee on Health, at 12 (2013); *see also* State of California, Hearing Before the Assembly Committee on Public Health and Developmental Services, 2015 Second Extraordinary Session, at 3 (August 25, 2015) (Bill Analysis), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0001-0050/abx2_8_cfa_20150821_151507_asm_comm.html (“[Today,] the evidence and need are clear on the legal age for tobacco and now is time for us to make this change.”).

Similarly, there are a significant number of longstanding laws that use 21 as the marker between children and adults for the regulation of activities that require particular maturity and impulse control. For instance, all fifty states require an individual to be 21 to purchase alcohol. *See* National

Minimum Drinking Age Act, 23 U.S.C.A. § 158 (West 1984). The corresponding federal legislative history affirms that 21 was chosen out of concern for the “recklessness” and “immaturity” of those under 21. *National Minimum Drinking Age: Hearing on H.R. 4892 Before the Subcomm. on Alcoholism and Drug Abuse of the S. Comm. on Labor and Human Resources*, 98th Cong., 48 (1984). Notably, this legislative history cites empirical evidence that raising the age to 21, because of qualities of susceptibility and vulnerability between the ages of 18 and 21, decreases deaths and injuries “among [] youthful drivers.” *Id.* at 48.

In addition, most states have set the legal age of gambling at 21, *see What is the Legal Gambling Age?*, LEGAL GAMBLING USA, <https://www.legalgamblingusa.com/articles/what-is-the-legal-gambling-age.html> (last visited Aug. 13, 2019); the Federal Juvenile Delinquency Act shields juveniles under 21, *see* 18 U.S.C.A. § 5031; youth is defined in the United States Code to extend to 21 or older in many, if not most, statutes;¹ and federal law (and at least 14 state laws) set 21 as the age for purchasing handguns from licensed dealers. *See generally* 18 U.S.C.A. § 922(b)(1); *Minimum Age to Purchase & Possess*, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/#state> (last visited Aug. 13, 2019).

¹ *See, e.g.*, 8 U.S.C.A. § 1101(b)(1) and (c)(1) (defining youth for purposes of immigration, nationality and naturalization as under 21); 42 U.S.C.A. § 290bb-25b(a)(3) (defining “youth” at 21 for programs established to reduce underage drinking; 42 U.S.C.A. § 290bb-36(l)(4) (defining “youth” as 10 to 24 years of age for youth suicide early intervention and prevention strategies as determined by the Substance Abuse and Mental Health Services Administration); 42 U.S.C.A. § 12291(a)(45) (defining youth as 11 to 24 years old for purposes of the Violence Against Women Act).

Although states continue to set 18 as the relevant marker for certain other regulated activities noted in *Roper*—i.e. voting, marrying without consent, entering the military and serving on juries—the rationales sustaining those laws are based on different characteristics than those underpinning *Roper*. For example, voting, marriage and jury duty are not activities that are highly susceptible to impulsive or risky behavior: they allow a person time to “gather evidence, consult with others and take time before making a decision.” Laurence Steinberg, *A 16-Year-Old is as Good as an 18-Year-Old—or a 40-Year-Old—at Voting*, L.A. TIMES (Nov. 3, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-steinberg-lower-voting-age-20141104-story.html>. By contrast, the purchase or use of tobacco or alcohol, living without parental guidance or committing a capital crime are all emotionally arousing activities, where immaturity, vulnerability and susceptibility to influence, and underdeveloped character come into play.

The national consensus, as evinced by state legislation, now clearly sets the line for adulthood at 18 or lower when considering activities characterized by considered, logical decision-making, while simultaneously recognizing that when it comes to activities characterized by “emotionally arousing conditions,” the age of adulthood should be set at 21. Scott, *supra*, at 652. For example, while most states set 18 as the demarcation for securing a commercial driver’s license, federal law requires an individual to be 21 to operate a commercial motor vehicle. Linda C. Fentiman, *A New Form of WMD? Driving with Mobile Device and Other Weapons of Mass Destruction*, 81 UMKCL REV. 133, 141-42 (2012). This demonstrates the federal government’s understanding that when considering characteristics including heightened propensity for risky behavior or lack of impulse control, the age should be extended to 21. Similarly, this distinction and society’s evolved view of the

age range during which the *Roper* characteristics are present prompted states to extend the age for tobacco purchase to 21. Furthermore, in Idaho, only residents age 21 or older are eligible for a license to carry a concealed weapon . Idaho Code § 18-3302(11)(a).

The distinction between these two distinct strains of legislation is confirmed by the Supreme Court’s prior opinions. In *Atkins*, the Court held that the ability of a class of persons to know right from wrong is not the test for determining whether the imposition of the death penalty on that class of persons is constitutional. *Atkins*, 536 U.S. at 318. Rather, it is an individual’s inability to “control impulses, and to understand the reactions of others,” that diminish personal culpability and warrant exemption from the harshest punishments. *Id.*; *see also Roper*, 543 U.S. at 571. When looking at legislation that is based on the same set of characteristics identified in *Roper*, execution now fits squarely into the category of laws that set the line for adulthood at 21. For the same reasons that states have pushed the age of adulthood to age 21, states should no longer administer the death penalty on individuals under age 21.

III. THE EIGHTH AMENDMENT REQUIRES INDIVIDUALIZED SENTENCING BEFORE IMPOSING HARSH SENTENCES ON YOUNG ADULTS

In striking down the death penalty and limiting life without parole sentences for juveniles, the Supreme Court emphasized that “[b]ecause juveniles have diminished culpability and greater prospects for reform, . . . ‘they are less deserving of the most serious punishments.’” *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). Even when youth commit heinous crimes, the Court has reaffirmed that a young offender is entitled to an individualized sentencing hearing prior to the imposition of harsh sentences because their age and its attendant characteristics weigh against the

proportionality of the punishment. *Miller*, 567 U.S. at 479-80. Individualized sentencing is necessary for young adults as well to ensure they are not improperly subjected to death or life without parole. An offender’s youth must be considered as, “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Graham*, 560 U.S. at 76. Thus, a life without parole sentence is unconstitutional if it “precludes consideration of” an adolescent’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 567 U.S. at 477.

Recent court decisions reflect this evolving framework. For example, a Kentucky Circuit Court found that the state’s death penalty statute was unconstitutional as applied to individuals under the age of 21, citing research demonstrating that those individuals were “psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty.” *Commonwealth of Kentucky v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 at 1* (Ky. Cir. Ct. Aug. 1, 2017), *appeal docketed*, No. 2017-SC-000436 (Ky. Feb. 15, 2018). Similarly, a the federal district court applied *Miller* to vacate a life without parole sentence as applied to an 18-year-old defendant, noting that most courts that did not extend *Miller* failed to consider the adolescent development of older adolescents and young adults. *Cruz v. United States*, No. 11-CV-787(JCH), 2018 WL 1541898 (D. Conn. 2018), *appeal docketed*, No. 19-989 (2d Cir. Apr. 16, 2019). In a related vein, the Washington Supreme Court barred application of the state’s mandatory minimum sentencing provisions to a defendant over age 18. *State v. O’Dell*, 183 Wash.2d 680, 696, 358 P.3d 359, 366 (Wash. 2015) (*en banc*). The Court held that the defendant’s youthfulness could be a mitigating factor justifying a sentence below the standard sentencing range even when

defendant is over 18, in part because brain development related to behavior control continues to develop into a person's 20s. *Id.* at 364-66.

These decisions are further evidence of the trend toward extending constitutional sentencing protections to young adults 18-21 years old at the time of their offense, not unlike Mr. Hairston.

CONCLUSION

Wherefore, Juvenile Law Center respectfully requests that for the foregoing reasons this Honorable Court should find that capital punishment for young adults is unconstitutional and remand this case for resentencing in accordance with *Miller*.

Sincerely,

/s/ Andrew Parnes

Andrew Parnes, ID Bar No. 411
LAW OFFICE OF ANDREW PARNES
P.O. Box 5988
671 First Avenue North
Ketchum, ID 83340
(208) 726-1010
aparnes@mindspring.com

Marsha L. Levick, PA Bar No. 22535
Riya Saha Shah, PA Bar No. 200644
Katrina Goodjoint, DC Bar No. 1034099
JUVENILE LAW CENTER
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551
mlevick@jlc.org

Counsel for Amici Curiae

Dated: August 29, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August 2019, I caused a true and correct copy of the foregoing document to be served as follows:

Jonah J. Horwitz

Federal Defender Services

E-Service: Jonah_Horwitz@fd.org

L. LaMont Anderson

Deputy Attorney General

E-Service: lamont.anderson@ag.idaho.gov

/s/ Andrew Parnes

Andrew Parnes