COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2017-SC-000436-TG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. ERNESTO SCORSONE, JUDGE
INDICTMENT NO. 14-CR-161

TRAVIS M. BREDHOLD — APPELLEE

BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

Respectfully Submitted By:

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CERTIFICATION

I, Amy E. Halbrook, an attorney, hereby certify that on this twenty-fifth day of June, 2018, ten (10) originals of this Brief of National Association for Public Defense and Kentucky Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Appellee were served via hand delivery upon Hon. Susan Stokely Clary, Clerk of the Supreme Court, Room 235, 700 Capital Ave., Frankfort, KY 40601, with one (1) copy served via first class U.S. Mail upon: Hon. Ernesto Scorsone, Fayette Circuit Court, 120 N. Limestone, Lexington, KY 40507; Hon. Lou Anna Red Corn, Fayette County Commonwealth Attorney, 444 E. Main St., Lexington, KY 40507; Hon. Jason B. Moore, Office of the Attorney General, 1024 Capitol Center Dr., Suite 200, Frankfort, KY 40601; and Hon. Timothy G. Arnold, Department of Public Advocacy, 5 Mill Creek Park, Suite 101, Frankfort, KY 40601.

AMY E. HALBROOK

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE AND INTEREST OF *AMICI CURIAE*

National Association for Public Defense (NAPD) is a national organization that brings together more than 15,000 practitioner members practicing in all fifty (50) states. NAPD members specialize in the defense of constitutional rights, particularly the rights of indigent clients, and NAPD members represent young people against whom the death penalty is sought. As such, NAPD members have a direct and substantial interest in the issue of whether 18-20-year-olds are categorically ineligible to be sentenced to the death penalty. NAPD members have expertise in Eighth Amendment jurisprudence and are able to provide insight into relevant law and research not fully addressed by the parties.

Kentucky Association of Criminal Defense Lawyers (KACDL) is a Kentucky nonprofit corporation with attorney members practicing in all regions of the Commonwealth. It exists to promote the proper administration of criminal justice by a variety of means in a number of Kentucky venues, placing special emphasis on issues crucial to practice in the Court of Justice. KACDL lawyers, as members of the Kentucky Bar in private practice and indigent defense, have a vital interest in the question presented by this case. KACDL supports the National Association for Public Defense's statements as to its ability to assist the Court with specialized information on this critical issue.

This Brief will assist the Court by demonstrating that (1) youths aged 18-20 are a unique class because of their distinct legal and cultural status; (2) youths aged 18-20 are developmentally different than individuals aged 21 and over; (3) a categorical exemption is warranted because (a) a national consensus against the execution of youths aged 18-20 exists based on infrequency of the practice; and (b) the practice of executing youths aged

18-20 is disproportionate because it serves no legitimate penological goal; and (4) a categorical exemption is appropriate.

STATEMENT OF THE CASE

This case involves an appeal from Fayette Circuit Court. Travis Bredhold was indicted on charges of Murder, First Degree Robbery, Theft by Unlawful Taking of $10,000 or More, and three Class A Misdemeanors. (TR I, 40-42.) He was eighteen years and five months old at the time of the alleged events. (TR I, 9.) The Commonwealth noticed intent to seek the death penalty if he was convicted of eligible offenses. (TR I, 99). Mr. Bredhold, through counsel, filed a motion to declare the Kentucky death penalty statute unconstitutional—in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections Two, Eleven and Twenty-Six of the Kentucky Constitution—insofar as it permitted capital punishment for defendants aged 18-20 at the time of their offense. (TR III, 386-87.) On August 1, 2017, the Fayette Circuit Court sustained Mr. Bredhold's motion and held that "Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense." (TR V, 662-674.) The Kentucky Supreme Court is asked to review whether the death penalty constitutes cruel and unusual punishment when imposed on youths aged 18-20.

ARGUMENT

The Eighth Amendment requires courts to assess a challenged sentencing practice in light of the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). To determine evolving standards of

decency, courts are to consider objective criteria and their own independent judgment. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). A court may exempt a class of offenders from a punishment if it finds a national consensus against the practice and it independently determines that the punishment is disproportionate to the level of culpability of the class members. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

After considering national trends and newly discovered developmental data, the United States Supreme Court declared the death penalty unconstitutional as applied to the mentally disabled in 2002, *see Atkins,* 536 U.S. at 304, and youths seventeen and under in 2005, *see Roper*, 543 U.S. at 577. In deciding those cases, the Court found a national consensus against the practice of executing such individuals and that members of each class were categorically less culpable than traditional adult offenders. *Atkins*, 536 U.S. at 316; *Roper*, 543 U.S. at 571. Five years after *Roper*, the Court categorically exempted youths seventeen and under from life incarceration without the possibility of parole (Juvenile Life Without the Possibility of Parole, "JLWOP") sentences for non-homicide crimes. *Graham v. Florida*, 560 U.S. 48, 50 (2010). In *Graham* the Court found a national consensus against JLWOP for non-homicide crimes where the practice was rarely imposed even where statutorily allowed, with one state imposing a "significant majority" (77 of 123 or 62.6%) of JLWOP sentences and ten others imposing the remainder (46 of 123 or 37.39%). *Id.* at 64. In *Miller v. Alabama* the Court categorically exempted youths seventeen and under from mandatory JLWOP sentences, emphasizing that youths presented greater possibility of rehabilitation than adults. 567 U.S. 460, 471 (2012) (citing *Roper*, 543 U.S. at 570).

A categorical exemption is proper in Mr. Bredhold's case as it was in *Atkins*, *Roper*, *Graham* and *Miller*. Youths aged 18-20 are frequently treated differently under the law than adults twenty-one and over. Data shows that capital punishment is imposed upon youths aged 18-20 at the time of their offense at a frequency similar to the imposition of JLWOP for non-homicide crimes in *Graham*. 560 U.S. at 64-66. Recent developmental research indicates that, like the youths in *Roper*, youths aged 18-20 are categorically less culpable than offenders twenty-one and over. The categorical ban on capital punishment should be extended to protect youths aged 18-20 from cruel and unusual punishment.

I. YOUTHS AGED 18-20 ARE A UNIQUE CLASS BECAUSE OF THEIR DISTINCT LEGAL AND CULTURAL STATUS

While society draws the line at eighteen for some purposes, it also draws the line at twenty-one for many other purposes.

A. Youths Aged 18-20 Are Frequently Treated Differently Under the Law than Individuals 21 and Over

Child protection and educational laws frequently treat youths aged 18-20 as distinctly different from individuals over twenty-one. *See, e.g.*, KRS 625.025 (extending state wardship to age twenty-one to allow youths to participate in educational programs or assist the child to establish independent living); KRS 200.503 (extending community-based services until twenty-one for children with severe emotional disabilities); KRS 635.060 (allowing the Juvenile Court to extend commitment until twenty-one to establish independent living); KRS 158.100(1) (requiring school districts to provide high school services for all students of high school grade under twenty-one); KRS 158.100(2) (allowing school districts to provide high school service for a refugee or legal alien until graduation or age twenty-one, whichever occurs first); 704 KAR 7:090 (requiring school

districts to provide a free, appropriate public education to homeless students "between the ages of five (5) and twenty-one (21)"); KRS 157.200 (requiring school districts to provide special education services to exceptional children and youth under twenty-one).

Many Kentucky criminal laws also treat youths aged 18-20 as different from individuals over twenty-one. *See, e.g.*, KRS 532.080 (persistent felony offender sentencing enhancements not imposed on youths who committed felonies while aged 18-20); KRS 510.060 (Rape in the third degree not imposed on youths aged 18-20 when the defendant engaged in intercourse with a victim under sixteen or victims for whom the defendant provides a foster home); KRS 244.085 (prohibiting minors under twenty-one from possessing or purchasing alcohol); KRS 189A.010 (setting blood alcohol limits for DUI at .02 for youths aged 18-20 compared to .08 for twenty-one and over).

Many Kentucky laws impose age-related restrictions on activities that require a high level of judgment and responsibility. *See, e.g.*, KRS 117.035 (requiring members of county board of elections to be twenty-one or over); KRS 95.762 (requiring police and fire applicants to be twenty-one or over unless they have five years' experience); KRS 201.140 (requiring parole officers to be over twenty-one); KRS 237.110 (requiring applicants for a license to carry a concealed deadly weapon to be twenty-one or over); KRS 281A.120(1) (allowing drivers 18-20 to apply for commercial driver's license for intrastate commerce but not allowing them to drive a school bus or a vehicle hauling hazardous material); KRS 186.412(1)(a)-(c) (requiring drivers 18-20 to have a valid instruction permit for at least 180 days while individuals twenty-one and over must have one for at least 30 days); KRS 189.285 (requiring youths aged 18-20 to wear protective

headgear at all times while operating or riding as a passenger on a motorcycle while motorcycle drivers twenty-one and over not required after one year).

These state laws are consistent with national laws that treat youths aged 18-20 as different from individuals twenty-one and over. *See, e.g.*, Fostering Connections to Success and Increasing Adoption Act of 2008 § 201(a), 42 U.S.C. § 6751(8)(A)-(8)(B)(i)(III)(2016) (defining a child eligible for foster care as an individual who "has not attained 18,19, or 20 years of age"); 18 U.S.C. § 5031 (defining juvenile as "a person who is under 18 years of age, or for purposes of proceedings and disposition because of an act of juvenile delinquency, a person who is under 21 years of age"); 18 U.S.C. § 922(b)(1),(b)(2),(c)(1) (prohibiting individuals aged 20 and younger from purchasing handguns); 10 U.S.C. § 6911 (requiring parental consent for 18-20-year-olds to enlist as an aviation cadet); Patient Protection and Affordable Care Act § 1001, 42 U.S.C. 300gg-14 (2016) (extending ability to receive parents' health care coverage to 26).

This list of laws is not exhaustive but provided as an example of state and federal laws that treat youths aged 18-20 differently than individuals twenty-one and over. Ample precedent exists for treating the 18-20 population differently when it is developmentally appropriate; doing so takes into account this population's unique status.

B. Youths Aged 18-20 Are Frequently Subject to Different Cultural Norms than Individuals 21 and Over

As our understanding of adolescent development has evolved, as reflected in *Roper* and its progeny, American cultural norms have evolved to reflect a better understanding of adolescence. An analysis of census data from 2014 indicates that people aged 18-20 are more likely to be living with their parents than alone or with a

partner for the first time in the modern era. Richard Fry, *For the First Time in Modern Era, Living with Parents Edges Out Other Living Arrangements for 18-to-34-Year Olds* (Pew Research Center, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/05/2016-05-24_living-arrangemnet-final.pdf (last visited June 19, 2018). In 1960, the average age at a first marriage was 20 for women and 23 for men; in 2017, it had climbed to 27.4 for women and 29.5 for men. U.S. Census Bureau, *Census Historical Marital Status Tables, Table MS-2 Estimated Median Age at First Marriage, by Sex: 1890 to Present* (Nov. 2017), https://www.census.gov/data/tables/time-series/demo/families/marital.html (last visited June 19, 2018). In addition to deferring independent living and marriage, a 2012 study from The National Center for Education Statistics found that seventy percent of young people in the United States now pursue education and training beyond secondary school, which has implications for independence. Jeffrey J. Arnett, *Emerging Adulthood*, NOBA Textbook Series (2018) (ebook), http://noba.to/3vtfyajs (last visited June 19, 2018). An individual is dependent on his or her parents for educational financial aid purposes until age twenty-four. Federal Student Aid, U.S. Department of Education, *Dependency Status* (2018), https://studentaid.ed.gov/sa/fafsa/filling-out/dependency (last visited June 19, 2018).

Individuals aged 18-20—once considered full adults—are treated in recent academic literature as emerging adults. Jeffrey J. Arnett, an expert in emerging adulthood, describes the emerging adult population as "no longer adolescents, but not yet adults, on the way to adulthood, but not there yet." Jeffrey J. Arnett, *Does Emerging Adulthood Theory Apply Across Social Classes? National Data on a Persistent Question*, http://www.jeffreyarnett.com/emergingadulthoodsocialclass2016.pdf. Arnett provides

five characteristics of emerging adulthood that distinguishes it from other stages of adulthood: (1) the age of identity explorations; (2) the age of instability; (3) the self-focused age; (4) the age of feeling in-between; and (5) the age of possibilities. *Id.* Arnett describes emerging adults as being self-focused, and engaged in a process of identity development. *Id.* The qualities of emerging adults can be easily compared to those used to describe juveniles in *Roper*, where the Court found that juveniles lack maturity and have an underdeveloped sense of responsibility. 543 U.S. at 569. *Roper* describes youths' traits as transitory because "the character of a juvenile is not as well formed as that of an adult." *Id.* at 570. The characteristics of teens described in *Roper*—which meant juveniles could not be considered the worst offenders—are comparable to the characteristics of emerging adults, and are consistent with the characteristics used to distinguish emerging adulthood from other stages of adulthood. Cultural norms and academic research indicate that individuals in their late teens and early twenties are regarded differently as a group—and more like adolescents—now than in years past.

II. YOUTHS AGED 18-20 ARE DEVELOPMENTALLY DIFFERENT THAN INDIVIDUALS 21 AND OVER

The Court in *Miller* noted "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments." *Miller,* 567 U.S. at 471 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010). The Court in *Roper*, *Graham* and *Miller* relied heavily on recent developmental data in coming to this position. The same developmental data applies to youths aged 18-20. "Recent advances in behavior and neuroscience research confirm that brain development continues well into a person's twenties, meaning that young adults

have more psychological similarities to children than to older adults." Vincent Schiraldi et al., *Community-Based Responses to Justice-Involved Young Adults*, NEW THINKING IN COMMUNITY CORRECTIONS (National Institute of Justice, Washington, D.C.), Sept. 2015, at 1,3. For a summary of current research on adolescent development in the 18-20 population, *see* AMERICAN BAR ASSOCIATION, SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE, *RESOLUTION 111 AND REPORT: DEATH PENALTY DUE PROCESS REVIEW PROJECT* 7-8 (2018), https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/2018_hod_midyear_111.pdf (citing over fifteen articles regarding the developmental tendencies of 18-21-year-olds).

The Fayette County trial court heard testimony from Dr. Laurence Steinberg in *Com. v. Diaz* and *Com. v. Smith* (15-CR-00584-001 and 15-CR099584-002) during a hearing on a challenge to Kentucky's Death Penalty statute. (VR 7/17/17, 8:33:13-9:31;32). The trial court in this matter supplemented the record in this matter with Dr. Steinberg's testimony. (TR V, 660). Dr. Steinberg's research on youth development has been previously cited by the United States Supreme Court. *See Roper,* 543 U.S. at 569, 570, 573; *Miller,* 567 U.S. at 471. He testified in *Diaz* and *Smith* that "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen, nineteen, and twenty year olds that were made about sixteen and seventeen year olds in *Roper.*" (VR 7/17/17, 9:02:32-50.) Presented with the specific issue of whether the death penalty is unconstitutional as applied to 18-20-year-olds, the same reasoning applied in *Roper* should be applied to this population.

III. THE COURT'S TWO-PART EXEMPTION ANALYSIS REQUIRES CATEGORICAL EXEMPTION

The Court may exempt a class of offenders from a punishment if it finds a national consensus against the punishment based on the infrequency of its practice and it independently determines that the punishment is disproportionate to the level of culpability of its class members. *Roper*, 543 U.S. at 555.

A. A National Consensus Exists Against Execution of Youths Aged 18-20 Based on the Infrequency of the Practice

In *Roper*, the Court indicated that the sufficient objective indicia of a national consensus were (1) the rejection of the juvenile death penalty in a majority of States; (2) the infrequency of its use in the States that still have the death penalty; and (3) the trend towards abolishing the practice. *Id.* Building on the reasoning in *Roper*, the Court in *Graham* found a national consensus against JLWOP for non-homicide crimes where eleven jurisdictions imposed the penalty with one state imposing a "significant majority" (77 of 123) of the sentences. *Graham,* 560 U.S. at 64. The Court in *Graham* considered both the number of offenders who were sentenced to JLWOP and the "frequency of the practice in proportion to the opportunities for its imposition." *Id.* at 66. At the time *Graham* was decided, six states had abolished life without parole sentences for juvenile offenders while thirty-seven states and the District of Columbia still allowed them. *Id.* at 49. Seven states permitted JLWOP sentences, but limited the sentences to homicide crimes only. *Id.* Eleven states imposed life without parole sentences on non-homicide offenders, with Florida imposing 77 of the 123 sentences (62.6%). *Id.* at 64.

Death penalty rates have declined for the entire population. Currently, thirty-six (36) states "have either abolished the death penalty, have executions on hold, or have not carried out an execution in at least 5 years." Death Penalty Information Center, *Death Penalty on Hold in Most of the Country,* (July 30, 2014),

https://deathpenaltyinfo.org/node/5829 (last visited June 19, 2018). While thirty-one states still statutorily allow the death penalty for people over eighteen, almost half of those states have declared state moratoria on the death penalty since 1992, with most moratorium states temporarily prohibiting the practice in the last five years. *Id.* Of states that do allow the death penalty and have no explicit moratoria, eight have *de facto* moratoria. Death Penalty Information Center, *Death Penalty in Flux*, https://deathpenaltyinfo.org/death-penalty-flux (last visited June 19, 2018). In addition, execution is highly localized as only three percent of the nation's 3,066 counties account for fifty percent of death sentences. Kentucky Coalition to Abolish the Death Penalty, *Unfair, Broken, and Arbitrary,* http://kcadp.org/why-abolish-the-death-penalty-in-kentucky/unfair-broken-abitrary/ (last visited June 19, 2018).

The death penalty is an infrequent practice in general, and youths aged 18-20 are executed considerably less frequently than adults over twenty-one. Between January 1, 2005 (the year *Roper* was decided) and March 1, 2018, fourteen states executed ninety (90) youths aged 18-20, with over 65 percent of those executions occurring in only two states (Texas and Ohio); Texas alone accounted for 52 of the 90 (57.78%) executions of 18-20 year-olds between January 1, 2005 and March 1, 2018. Clark County Prosecuting Attorney, Indiana, *U.S. Executions Since 1976*, http://clarkprosecutor.org/html/death/esexecute.htm (last visited June 19, 2018) [hereinafter *U.S. Executions Since 1976*]; Death Penalty Information Center, *Execution List 2014*, https://deathpenaltyinfo.org/execution-list-2014 (last visited June 19, 2018); Death Penalty Information Center, *Execution List 2015*, https://deathpenaltyinfo.org/execution-list-2015 (last visited June 19, 2018); Death

Penalty Information Center, *Execution List 2016*, https://deathpenaltyinfo.org/execution-list-2016 (last visited June 19, 2018); Death Penalty Information Center, *Execution List 2017*, https://deathpenaltyinfo.org/execution-list-2017 (last visited June 19, 2018); Death Penalty Information Center, *Execution List 2018*, https://deathpenaltyinfo.org/execution-list-2018 (last visited June 19, 2018).

Applying the reasoning in *Graham*, a national consensus against execution of youths aged 18-20 is evidenced by the infrequency of its practice. The Court in *Graham* found a national consensus based on infrequency where JLWOP sentences had been imposed for non-homicide crimes one hundred twenty-three times by eleven states with one state (Florida) imposing a "significant majority" of the sentences (77 of 123). 560 U.S. at 64. In the years since *Roper*, the death penalty has been imposed on youths aged 18-20 ninety times in fourteen states with one state (Texas) imposing a significant majority of the sentences (52 of 90 or 57.78%). *U.S. Executions Since 1976*. The instant numbers and those considered in *Graham* are significantly similar when considering the "frequency of the practice in proportion to the opportunities for its imposition." *Graham* at 66. In addition to being cruel and unusual for the entire 18-20 population, racial minorities are disproportionately affected by the practice of capital punishment. *See U.S. Executions Since 1976* (of persons executed between January 2006 and July 2014 for crimes committed when they were between 18 and 20, 64% were racial minorities.)

B. The Death Penalty for Youths Aged 18-20 is Disproportionate Because it Serves No Legitimate Penological Goal

"A sentence lacking any penological justification is by its nature disproportionate to the offense." *Graham*, 560 U.S. at 71. The death penalty is intended to serve two

penological goals: retribution and deterrence. *See Atkins,* 540 U.S. at 302. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Graham*, 560 U.S. at 71 (citing *Tison v. Ariz*, 481 U.S. 137, 149 (1987)). Justice requires a "graduated and proportioned" punishment for the crime. *Weems v. United States*, 217 U.S. 349, 367 (1910). Retribution becomes disproportionate when a person with diminished culpability is given the ultimate penalty. *Roper*, 543 U.S. at 571; *see also Graham*, 560 U.S. at 71. The Court in *Roper* stated, "the differences between juveniles and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." 543 U.S. at 572-73. The Court held that youths under 18 were not fully developed, were more susceptible to peer pressure, and were more capable of change than adults and, therefore, could not be considered the "worst" offenders eligible for the death penalty. *Roper,* 543 U.S. at 569-70. Dr. Steinberg, relied on in the trial court Mr. Bredhold's case, testified that the same arguments applied to juveniles in *Roper* could now be made about youths aged 18-20. (VR 7/17/17, 9:02:32-50.) Given the diminished culpability of youths aged 18-20, capital punishment does not meet the goal of retribution for this population. This problem is exacerbated by the fact that youths are more likely than adults to be wrongfully convicted, with false confessions making wrongful criminal convictions more likely for innocent young people than innocent older adult offenders. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in a Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004).

The imposition of the death penalty on youths aged 18-20 does not serve the penological goal of deterrence. There is no consensus as to whether capital punishment

has a deterrent effect on the general population. John J. Donohue & Justin Wolters, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 843 (2005). Even if it were proven that the death penalty had a deterrent effect on some adults, the Supreme Court has observed that the diminished culpability of juveniles makes them less susceptible to its effects. *Thompson v. Okla.*, 487 U.S. 815, 834 (1988). As their brains are still developing, youths cannot perform the appropriate cost-benefit analysis necessary to understand the full consequences of their actions. *Id.* at 837. The cognitive and behavioral capacities that reduce moral culpability also "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 320. Given their reduced capacity to comprehend execution as a consequence, capital punishment does not meet the penological goal of deterrence for youths aged 18-20.

IV. A CATEGORICAL EXEMPTION IS PROPER RATHER THAN ARGUING MITIGATION ON A CASE-BY-CASE BASIS

Youth may be considered as a mitigating factor against the death penalty. *See* KRS 532.025(20)(b)(8). A jury may, however, be unable to properly assess youth as a mitigating factor when "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." *See Roper*, 543 U.S. at 572-73. *See also Atkins*, 536 U.S. at 320-21; *Graham*, 560 U.S. at 77-78. A case-by-case approach exposes an offender to the death penalty by a subjective decision and places a tremendously difficult responsibility on trial court judges to differentiate between offenders who are truly incorrigible and those who have the ability to change. *Graham,* 560 U.S. at 77. In addition, young people have a difficult time

trusting counsel, controlling impulsivity, and weighing long-term consequences, all of which increases the risk of ineffective representation. *Id.* at 78. A categorical approach minimizes the risk of a case being skewed by an immature defendant who understands neither the proceedings of the case nor the consequences of his or her decisions. *Id.* at 78-79. Adherence to a bright-line rule, rather than considering mitigation on a case-by-case basis, is appropriate, efficient, and best ensures fairness for youths aged 18-20.

CONCLUSION

Based upon the foregoing, the order of the Fayette Circuit Court declaring Kentucky's death penalty statute unconstitutional must be affirmed.

Respectfully Submitted,

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