Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
EXECUTION SCHEDULED FOR JUNE 6, 2023

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CAPITAL CASE

QUESTION PRESENTED

Nineteen-year-old Michael Tisius was charged with two counts of first-degree murder for the killings of two officers guarding a small, rural jail. Recently released from jail himself, Mr. Tisius returned at the behest of the older, manipulative inmate Roy Vance, to help Vance escape. Vance's plan was for Mr. Tisius and Tracie Bulington to use a gun to get the jailers to give them the keys to the cells, lock the jailers in a cell, free Vance, and then flee. Due to Mr. Tisius's immature brain and cognitive impairments affecting him at the time of the offense, the plan went poorly, and in a panic, Mr. Tisius shot and killed the two jailers.

Mr. Tisius's age, challenges in his prefrontal cortex impairing his ability to make wise decisions in high pressure situations, a history of mental illness (including auditory processing challenges), and a brief life riddled with serious physical abuse by his brother and staggering neglect by his mother and father, caused this senseless tragedy. Since incarceration in 2001, Mr. Tisius has peacefully existed, channeling his energies into skillful artistic creations. A psychologist who evaluated Mr. Tisius over 20 years (since 2003) believes his present-day maturity reflects the exact trajectory medical experts would expect of a juvenile offender.

The case presents the following question:

> Do executions of persons who committed their crimes when they were under the age of 21, or, at the least, the execution of a 19-year-old offender who suffered from significant mental impairments due to his immature and underdeveloped brain, violate the Eighth Amendment?

RELATED PROCEEDINGS

United States Supreme Court:

Michael Tisius v. State of Missouri, No. 11-10906 (Oct. 1, 2012) (cert denied)
Michael Tisius v. Paul Blair, No. 21-8153 (Oct. 3, 2022) (cert denied)
Michael Tisius v. David Vandergriff, No. 22-7398 (pending)

United States Court of Appeals for the Eighth Circuit:

Michael Tisius v. Paul Blair, No. 21-1682 (Jan. 12, 2022) (habeas corpus appeal)

United States District Court for the Western District of Missouri:

Michael Tisius v. Richard Jennings, No. 4:17-CV-00426-SRB (Oct. 30, 2020) (habeas corpus)

Supreme Court of Missouri:

Michael Tisius v. David Vandergriff, No. SC100059 (state habeas proceeding) (pending)

State of Missouri v. Michael Tisius, No. SC84036 (direct appeal) (Dec. 10, 2002)

Michael Tisius v. State of Missouri, No. SC86534 (first post-conviction appeal) (Jan. 10, 2006)

State of Missouri v. Michael Tisius, No. SC91209 (resentencing direct appeal) (March 6, 2012)

Michael Tisius v. State of Missouri, No. SC95303 (second post-conviction appeal) (April 25, 2017)

Circuit Court of Boone County, Missouri:

State of Missouri v. Michael Tisius, No. 01CR-164629 (trial) (Oct. 1, 2001)

Michael Tisius v. State of Missouri, No. 03CV-165704 (first post-conviction proceeding) (Nov. 4, 2004)

State of Missouri v. Michael Tisius, No. 01CR-164629 (resentencing) (Sept. 28, 2010)

Michael Tisius v. State of Missouri, No. 12BA-CV02901 (second post-conviction proceeding) (Sept. 3, 2015)

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Michael Tisius was the petitioner in the case below and is an indigent death-sentenced prisoner within the Missouri Department of Corrections. He was represented in the Court below by Elizabeth Unger Carlyle and Keith O'Connor.

David Vandergriff, Warden of Potosi Correctional Center, was the respondent in the case below. He was represented in the court below by Assistant Missouri Attorney General Andrew Crane.

Pursuant to Rule 29.6, no parties are corporations.

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The Missouri Supreme Court's March 1, 2023, order denying Mr. Tisius's petition for habeas corpus is unpublished and appears in the Appendix at p. 1a.

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Missouri Supreme Court denied Mr. Tisius's petition for habeas corpus on March 1, 2023. App. p. 1a. This petition is timely under Rule 13.1.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states, in pertinent part, that "cruel and unusual punishments [shall not be] inflicted."

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

After Mr. Tisius had completed his state appeal and post-conviction proceedings and federal habeas corpus proceedings, he filed a petition for writ of habeas corpus in the Missouri Supreme Court. App. p. 2a. Without full briefing or argument, that court denied the petition in an unexplained order on March 1, 2023. App. p. 1a.

This Court must construe the state court's summary ruling as a ruling on the merits. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the

claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011); *accord Harris v. Reed*, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis).

The claim in this petition was asserted below in accordance with state procedural law, which supports the presumption of a merits ruling. *See Richter*, 562 U.S. at 99. Mr. Tisius's Eighth Amendment claim asserts his execution is unconstitutional because he was only nineteen when he committed murder. That claim was brought in habeas corpus, which lies in Missouri when the prisoner's conviction or sentence violates the constitution or laws of Missouri or the United States. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. 2003); *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001). Habeas corpus is available in Missouri when a prisoner's sentence exceeds what the law authorizes. *State v. Whitfield*, 107 S.W.3d 253, 269 (Mo. 2003). Such an error "cannot be waived," even by the prisoner's failure to raise the claim in earlier proceedings. *Id.* If indeed the Eighth Amendment forbids the death penalty for Mr. Tisius, the Missouri Supreme Court has authority to sustain the claim on habeas corpus because the sentence "is in excess of that authorized by law." *Id.* The "usual waiver rules will not apply" when the prisoner's claim, if sustained, would deprive the state of the power to impose the death penalty on him or her. *State ex rel. Simmons v. Roper*, 112 S.W.3d

397, 400–01 (Mo. 2003), *aff'd sub nom. Roper v. Simmons*, 543 U.S. 551 (2005). Thus, the merits of Mr. Tisius claim are properly before this Court.

B. PERTINENT FACTS

Mr. Tisius met Roy Vance while he was incarcerated at Randolph County Jail in Huntsville, Missouri, for a probation violation on a misdemeanor stealing charge. Mr. Tisius was a young 19; Vance was an old 27.

Vance was in Randolph County Jail because he had recently attempted to escape from another small, rural Missouri jail. Vance told all his fellow inmates that he expected to spend the next 50 years in prison. Vance provided attention and direction to Mr. Tisius, much like a father would. Interviews completed by federal

habeas counsel of the inmates housed in the same jail pod as the two described Mr. Tisius as idolizing Vance and Vance as "grooming" Mr. Tisius to do his bidding.

When Mr. Tisius was released, Vance gave him instructions to return and help him escape. Vance continued to apply pressure to Mr. Tisius, and ultimately, Mr. Tisius, with the assistance of Vance's girlfriend, Tracie Bulington, returned to the jail late at night to attempt Vance's escape plan.

In these intensely emotional circumstances, Mr. Tisius panicked and shot two jailers. Although the state argued that circumstantial evidence supported deliberation, there was no evidence any of the co-conspirators discussed killing anyone during the planning of the escape; a gun was to be used to scare the jailers only. Dr. Stephen M. Peterson, the psychiatrist who first evaluated Mr. Tisius in 2003, noted at that time that

> Michael Tisius yearned for a father figure he never had (Roy Vance was 8 years his senior and used that to manipulate Michael. . . . Roy Vance planned the breakout and introduced the idea of bringing a gun. . . . Michael saw Roy Vance as his only male friend). Michael Tisius looked up to Roy Vance in way he never looked to any other man, was so needful/naïve that he didn't perceive his being used. . . . Michael Tisius had a history of severe physical abuse by his older brother which rendered him very vulnerable to manipulation by an idealized figure such as Roy Vance (along lines of identifying with an aggressor for identity and protection).

The combination of Vance's peer pressure and the volatile, fear-inducing, anxious and emotional circumstances surrounding the jail break/murder are critical facts for this Court to consider as it evaluates whether the 19-year-old Mr. Tisius's death sentence is constitutional as applied.

Mr. Tisius has been incarcerated since arrest on the morning of the homicide on June 22, 2000. He was 19 that day and is 42 now. Prison adjustment expert James Aiken prepared a report in 2018 as part of the federal habeas litigation identifying Mr. Tisius as an exemplary prisoner.[1] During his incarceration, Mr. Tisius has painted several murals within the Potosi Correctional Center, including in the Special Needs Unit ("SNU") for inmates with developmental disabilities. Mo. Dept. of Corr., Therapy & Treatment, available at: https://doc.mo.gov/programs/education/therapy-treatment (last visited April 6, 2023), and the Puppies for Parole program. https://doc.mo.gov/programs/puppies-parole (last visited May 18, 2023).

In August 2022, Dr. Peterson evaluated Mr. Tisius for a third time. He first met Mr. Tisius in 2003, when Mr. Tisius was 22 years old. He believed that at the

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[1] While in prison, Mr. Tisius was convicted of possessing contraband, specifically an unmodified boot shank found in his radio, prior to his second sentencing. The uncontroverted evidence was that the item was placed there by another coercive prisoner. With respect to this infraction, prison expert James Aiken stated in his report:

> Assessment of this violation, which is conducted in a prison operational context, reveals that Mr. Tisius has not attempted or inflicted bodily harm to another inmate or staff member with or without a weapon, he has not demonstrated a chronic history of violent behavior while in lawful confinement. . . . It is also noteworthy from a correctional assessment perspective that the piece of metal from the boot is not reported to have been sharpened on either end or manipulated in some way to be used as a weapon. In my experience incidents of this kind are largely resolved without adjudication in court. That is to say an incident of this sort in my experience would most likely not be prosecuted criminally.
>
> App. p. 75a.

time of the offense, Mr. Tisius "was suffering from untreated mental disease, was experiencing diminished mental capacity, and was substantially under the manipulated influence of Roy Vance." App. p. 43a. Dr. Peterson evaluated Mr. Tisius again in 2013, when he was 32 years old. At that point he "still demonstrated immature thinking as his abstract reasoning was concrete rather than abstract, suggesting though he was in his early 30s his maturity of reasoning plateaued in mid adolescence." App. p. 44aa. In August of 2022, when Dr. Peterson evaluated Mr. Tisius most recently, he explained, "Socially, Michael Tisius experienced delayed maturation of adolescent brain functioning as a consequence of untreated childhood physical abuse/neglect." App. p. 59a. However, over the course of his time in confinement,

> Michael Tisius has made a successful transition to nonviolent living within the Missouri DOC. Michael Tisius demonstrates no current psychiatric or psychological data to suggest he has underlying fulminate or unexpressed violent tendencies. All psychological evaluations from 2003 forward to 2022 demonstrate the opposite of any antisocial mindset. He has had no conduct violations for at least 10 years.
>
> Michael Tisius has made an excellent institutional adjustment. His psychiatric/psychological functioning is stable. Though Michael Tisius doesn't feel mature, he has matured, and continues to show promise for ongoing personal growth.
>
> This maturing process over time for Michael Tisius was evident during three evaluations by this writer, spanning 20 years of assessments (2003, 2012, 2022). In addition, during 2018, bracketed by this evaluator's assessments, independent psychologists Love and Watson as well as psychiatrist Woods came to the same conclusions.
>
> Michael Tisius has come to grips with the gravity of his offense and is living a peaceful life. He has learned self-control, has empathy for

> others, shows empathy for the men he killed, is no longer impulsive, and is seeking to make the best life he can in his current situation.
>
> App. p. 63a.

Dr. Peterson concurred with Mr. Aiken that "Michael Tisius could be safely maintained in the Missouri prison system while properly confined in a secure environment the rest of his life." *Id.*

REASONS FOR GRANTING THE WRIT

As it did in 1988[2] and 2005,[3] this Court should now extend the bright line age to 21 for those exempted by the Eighth Amendment from the death penalty. In *Roper v. Simmons*, this Court recognized that juveniles — because of their developing brains — are less morally culpable than adults. Since *Roper*, the law,[4] neuroscience development,[5] and sentences imposed on 18–21-year-old offenders,[6] and social attitudes[7] all recognize that brain development continues into people's

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[2] *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (exemption raised to 16).
[3] *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (exemption raised to 18).
[4] *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).
[5] App. p 88a; *APA Resolution on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known as the Late Adolescent Class*, Am. Psych. Ass'n. (Aug. 2022), https://www.apa.org/about/policy/resolution-death-penalty.pdf.
[6] John H. Blume et al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921, 938-45 (2020) (Blume et. al); Dr. Baumgartner Declaration, App. pp. 174a-175a
[7] Blume et al. at 936-38; id. at 367, n.80 ("It is also worth noting that there is a social and moral difference between affirmative rights to engage in adult conduct and the negative right to not be subjected to adult punishment. This is because, as

mid-twenties and that under-21 offenders, just like under-18 offenders, have decreased moral culpability. This decreased moral culpability neuters the two Eighth Amendment justifications for capital punishment: retribution[8] and deterrence.[9] Accordingly, Michael Tisius (19) cannot constitutionally be executed in light of his age at the time of the offense as well as his mental impairments.

The Founding Fathers recognized England's common law doctrine of *in favorem vitae* ("in favor of life"),[10] which manifested itself, in modern times as "death is different."[11] Before the founding of this nation, England's 17th and 18th Century jurisprudence demonstrates an inherent judicial bias in favor of life, which

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one scholar has explained, '[u]nlike other laws that regulate behavior, criminal punishment involves finding people morally blameworthy,' and the 'defining characteristic' of criminal punishment is 'state censure.' Thus, not extending *Roper* to people over 18 'overlook[s] the important and unique goals for imposing criminal punishment of treating equally culpable offenders equally and making individualized inquires of culpability for society's harshest punishments.'") (internal citations omitted).

[8] Retribution's, or revenge's, justification exists for "a narrow category of the most serious crimes" committed by the most serious offenders. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Decreased culpability based on genetically-controlled brain growth renders the entire class *per se* less culpable than their older adult counterparts and outside this "narrow category."

[9] Deterrence in capital cases exists "only when a murder is the result of premeditation and deliberation." *Id.* Contemporary accepted scientific research shows 18-21 are more prone to act upon impulse without any "cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Thompson*, 487 U.S. at 837.

[10] *See e.g.* Blackstone, Commentaries, Amendments V and VI, Document 14, 4:298-307, 317-19, 342-50, 352-55, at *V (But in criminal cases, or at least in capital ones, there is, *in favorem vitae,* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.).

[11] *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (J. White concurring) (cited for this quote thenceforth).

focused rigorous examination on criminal procedure.[12] The Founding Fathers recognized the heightened judicial responsibility in capital cases, because they viewed judicial equity powers as animated by "an entire theory of moral knowing."[13]

Mr. Tisius does not rely on a theoretical construct. Rather, he relies on the very real 20-year historical observation of Mr. Tisius by Dr. Peterson. To Mr. Tisius's knowledge, no applicant to this Court has asked for the categorical exemption to be raised to 21 based on direct objective observation of an offender

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[12] HALE, 2 HISTORY OF THE PLEAS OF THE CROWN, at 335 ("where any statute. . . hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons as are expressly comprised within such statutes, for *in favorem vitae & privilegii clericalis* such statutes are construed literally and strictly"). "Ouster of clergy" refers to the doctrine of the "benefit of clergy," a common law device by which a capital conviction could be mitigated to another, less harsh punishment. *See* BLACKSTONE, 4 COMMENTARIES 372. The capital statutes at issue "ousted" this benefit from certain classes of larceny and other crimes by specifying that it was not available upon conviction. The effect of strictly construing such statutes was to convict the defendant of the more general common-law version of the felony (e.g., larceny) rather than the statutory felony (e.g., robbing from an unoccupied house, *see* 39 Eliz. c. 15), thus preserving his benefit of clergy. *See* HALE, *supra,* at 525 (discussing conviction of clergyable common law crime even where nonclergyable statutory terms are not met); *see also* HAWKINS, 3 PLEAS OF THE CROWN, at 248 (noting the "settled rule, that all statutes are to be construed strictly in favour of life, and that no parallel case, which comes within the same mischief, shall be construed to be within the purview of it, unless it can be brought within the meaning of the words"); HAWKINS, 4 PLEAS OF THE CROWN, at 261 ("all statutes which take away clergy, are to be construed strictly *in favorem vitae*"). The rule applied to the construction of capital indictments and other criminal procedural rules as well. HALE, *supra,* at 336 ("the indictment must precisely bring the party within the case of the statute, otherwise, altho possibly the fact itself be within the statute, and it may so appear upon the evidence, yet if it be not so alledged in the indictment, the party, tho convict, shall have his clergy"); *see also* FOSTER, CROWN LAW, at 423 (3d ed. 1792).

[13] Peter Charles Hoffer, *Principled Discretion: Concealment, Conscience, and Chancellors,* 3 Yale J. of Law & Hum. 53, 81 (1991); *see also* Gordon S. Wood, Creation of the American Republic, 1776-1787, at 303 (1969) (on the rise of the view of the judicial role as requiring moral responsibility and integrity).

recording his brain development in real-time. This evidence provides definitive proof that executing the now 42-year-old Mr. Tisius for his 19-year-old brain would be an as-applied violation of the Constitution. Certiorari should be granted, 18 years after *Roper* and 36 years after *Thompson v. Oklahoma,* to continue this Court's proud tradition of "moral knowing," as it extends capital punishment's categorical exemption to 21 years.

I. BRAIN SCIENCE ESTABLISHES THAT THE BRAIN OF A 19-YEAR-OLD IS NOT FULLY MATURE.

Mr. Tisius's brain had not fully matured when he committed this offense. Current scientific evidence supports the view that the human brain does not mature fully until a human is in his early twenties. This lack of maturity principally affects brain functions governing decision-making, judgment, and impulse control. Because of this change in the scientific landscape—recognized in legal shifts, sentencing trends and societal/legislative action extending the juvenile age to 21—there is no meaningful difference between a 17-year-old brain and a 19-year-old brain. Thus, under the evolving standards of decency, there is no legitimate justification for prohibiting the death penalty for 17-year-olds but not 19-year-olds. Mr. Tisius's death sentence for conduct committed at age 19 is therefore unconstitutional. Additionally, Mr. Tisius's individual characteristics—including his brain defects and dysfunction, particularly in the areas of frontal-striatal and temporal lobe functioning, and his reformed character witnessed by Dr. Peterson—preclude his execution under the Eighth Amendment.

Dr. Laurence Steinberg, "a developmental psychologist specializing in adolescence, broadly defined as the second decade of life," (App. p. 88a) has conducted extensive research concerning the level of maturity of the brains in 19-year-olds. Dr. Steinberg has applied this research to the circumstances of Mr. Tisius's case.

Dr. Steinberg's report explains that research from the last decade shows that, particularly under ***highly emotional circumstances***, late adolescents "are more like individuals in early and middle adolescence in their behavior, psychological functioning, and brain development" and less like adults. App. p. 91a and 98a. *See also* Blume et al., 930-31 (2020). Dr. Steinberg explained, under emotionally arousing conditions, "the brain of a 18- to 21-year-old functions in ways that are similar to that of a 16- or 17-year-old." This propensity for immature brain function is exacerbated when an individual has endured repeated trauma and abuse.

Dr. Paula Lundberg-Love, a psychologist who evaluated Mr. Tisius to evaluate the depth of trauma in his childhood and its effect on his adolescent brain at the time of the offense, explained that "traumatic experience produces such a strong and overwhelming fight-or-flight response that it compromises certain regulatory effects of the brain which have negative long-term biological consequences." App. 147a. Anxiety further exacerbates immature brain dysfunction.

In the last ten years, studies of brain maturation have revealed that several processes of brain development regarding judgment and decision-making continue until at least age 21. App. p. 93a. By 2015, neuroscientists agreed that brain

maturation continues well into late adolescence, the period from ages 18 to 21. *Id.* at App. pp, 91a, 93a. Further evidence elaborating on this finding continues to accumulate today. *Id.* at App. p. 93a. Additionally, the brain regions that have the most influence on character formation are the last to mature, so late adolescents ' characters are not yet fully formed. *Id.* at App. p. 94a. New evidence also shows that late adolescents, like younger teenagers, remain amenable to change and can profit from rehabilitation. *Id.* In short, medical science shows that the brains of individuals between ages 18 and 21 are more neurobiologically like those of younger teenagers than previously had been thought. *Id.*

Recent neurobiological and psychological research also shows that individuals in their late teenage years and early twenties are less emotionally mature than adults. *Id.* at App. p. 95a. This psychological immaturity is caused by a "maturational imbalance" between the brain's limbic system and the prefrontal cortex. *Id.* at App. pp. 100a, 101a. While the limbic system is responsible for sensation- and reward-seeking, the prefrontal cortex regulates self-control, impulse-control, advance planning, cost-benefit analysis, and resisting peer pressure. *Id.* at App. p. 101a. However, they develop and mature at different times; the limbic system undergoes dramatic changes around puberty (usually in early adolescence) whereas the prefrontal cortex continues to undergo significant development into the mid-twenties. *Id.*

This imbalance can have several effects. First, adolescents are more likely to underestimate the risks involved in a situation. *Id.* at App. p. 96a. Adolescents are

less likely to appreciate the number, severity, and likelihood of risks and have greater difficulty weighing the costs and benefits of each option. *Id.* Second, adolescents from ages 18 to 21 are more likely than adults to engage in "sensation-seeking" behaviors, or behaviors that are exciting or novel. *Id.* As such, adolescents tend to focus more on the potential rewards of a given situation, such as admiration from their peers, than on potential costs. *Id.* Third, late adolescents have reduced impulse-control. *Id.* at App. p. 97a. They are less likely to consider potential consequences and subsequently are less likely to plan in advance. *Id.*

Fourth, developments in basic cognitive abilities, including logical reasoning and memory, occur before developments in emotional maturity, which includes self-control, the ability to adequately consider the risks and rewards of various options, and the ability to resist coercive pressure from others. *Id.*; *see also* Arthur MacNeill Horton and Cecil R. Reynolds, *Trajectory of the Development of Executive Functioning: Implications for Death as a Penalty as Applied to the Late Adolescent Class*, 7 J. of Pediatric Neuropsychol. 66 (2021). Dr. Steinberg noted, "Heightened susceptibility to emotionally laden and socially charged situations renders adolescents more vulnerable to others' influence, and in such situations young people are even less able to consider and weigh the risks and consequences of a chosen course of action." App. p. 107aa. This means that while an adolescent may have the capability to reason logically and understand the difference between right and wrong, he may nevertheless not be able to conduct himself in an accordingly

appropriate manner due to his lack of emotional maturity and susceptibility to the influence of others. *Id.* at App. pp. 97a, 98a.

The effect of this gap in cognitive abilities and emotional maturity is magnified when the adolescent is in situations with heightened emotions such as fear or anxiety. *Id.* at App. p. 98a. Relative to adults, adolescents 'thinking deficiencies related to judgment and self-control are greater in these circumstances. *Id.*

The effects of juvenile brain immaturity wane as individuals become adults. As brain structures develop and mature, a majority of adolescent offenders "age out of crime" by their mid-twenties. *Id.* at App. pp. 104a, 105a. Likewise, most adolescent criminal behavior is a result of "transient developmental immaturity," not permanent bad character. *Id.* at App. p. 105a.

In 2022, the American Psychological Association (APA)[14] passed a resolution recognizing that developmental science conducted since *Roper v. Simmons* shows that significant maturation of the brain continues through at least age 20,

> especially in the key brain systems implicated in a person's capacity to evaluate behavioral options, make rational decisions about behavior, meaningfully consider the consequences of acting and not acting in a particular way, and to act deliberately in stressful or highly charged emotional environments, as well as continued development of personality traits (e.g., emotional stability and conscientiousness) and what is popularly known as "character[.]"

[14] The APA includes "more than 133,000 researchers, educators, clinicians, consultants, at all stages of their careers, as well as students among its members." APA, *APA Resolution on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known as the Late Adolescent Class*, 1 (Aug. 2022) (available at https://www.apa.org/about/policy/resolution-death-penalty.pdf) ("APA Resolution").

App. p. 363a. The resolution further recognizes that significant development of the brain regions referred to as executive control systems, including but not limited to the prefrontal cortex and its connections throughout the brain, "continues beyond the age of 20." *Id.* Accordingly, "the same youthful and immature characteristics that apply to categorically exempt 16- and 17-year-olds [from the death penalty] are similarly present in 18- to 20-year olds, rendering them less culpable and less susceptible to any deterrent value of the death penalty." *Id.*[15]

Widely accepted medical science shows that mental capacities of juveniles, especially those relevant for criminal culpability such as executive functions, are not fully mature by age 18.[16] Furthermore, the specific findings of Drs. Steinberg,

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[15] The American Bar Association (ABA) similarly has recognized that since *Roper v. Simmons*, "a wide body of research has . . . provided us with an expanded understanding of behavioral and psychological tendencies of 18 to 21 year olds . . . including that 18 to 21 year olds have a diminished capacity to anticipate the consequences of their actions and control their behavior in ways similar to youth under 18." ABA House of Delegates, *Resolution*, Am. Bar Ass'n. 6-7 (2018) (available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2018_my_111.pdf) (last visited Apr. 27, 2023). These studies show that "[l]ate adolescents, like juveniles, are more prone to risk-taking[,] . . . act more impulsively than older adults[,] . . . and are not fully mature enough to anticipate future consequences." *Id.* at 7.

[16] This science also provides the basis for changes to behavioral diagnostic criteria formerly linked to age 18. "As of 2013, the Diagnostic and Statistical Manual of Mental Disorders (5th ed.; DSM-5; American Psychiatric Association, 2013) eliminated the age-18 cutoff for the expression and diagnosis of some developmental disorders, recognizing that the developmental period extends to age 18 and beyond." APA Resolution at 1. Similarly, "consistent with this recognition of the extended nature of the developmental period, in 2021, the 12th edition of the American Association of Intellectual and Developmental Disabilities (AAIDD) Manual increased the age of onset criterion for the diagnosis of intellectual disability (a neurodevelopmental disorder) from age 18 to age 22 (AAIDD, 2021)." *Id.* at 1-2.

Love, Woods, Watson, Nadkarni, and Peterson in this case show that in addition to not being fully mature, Mr. Tisius's brain was further compromised at the time of the offense.[17] Given this evidence, it is unfair to assign an adult level of culpability to Mr. Tisius instead of a juvenile one.

II. ATTITUDES CONCERNING THE MATURITY OF 19-YEAR-OLD OFFENDERS HAVE SHIFTED.

In addition to the medical and scientific communities, legal institutions and society recognize that the brains of those under 21 years old—like those under 18—are sufficiently immature such that all individuals under 21 are undeserving of death sentences. "Statistics about the number of executions" are relevant to evolving standards of decency analysis. *Kennedy v. Louisiana,* 554 U.S. 407, 433 (2008). Legislation, court and gubernatorial decisions are relevant as well. *See Roper,* 543 U.S. at 563-65; *Atkins v. Virginia,* 536 U.S. 304, 313-17 (2002). These sources establish a strong trend away from executing defendants younger than 21.

1. Executions of Youthful Offenders in Decline since *Roper*

With respect to the death penalty specifically, no such individual would be executed for any offense in 26 states and the District of Columbia, as all those jurisdictions have either abolished the death penalty or have suspended executions

[17] App. pp. 88a (Steinberg), 110a (Love), 227a (Woods), 177a (Watson), 293a (Nadkarni), 41a (Peterson).

through moratoria.[18] Thus, in a majority of states, a defendant who was 19 at the time of the offense would not be executed.

In six more states, although the death penalty remains on the books, the states have effectively abandoned the practice of executing persons for offenses committed before they were 21 years of age ("under-21 defendants").[19] Three of those states do not have a single under-21 defendant in their death-sentenced population.[20] Of those three states, only one has executed an under-21 defendant in the modern era. That execution, in Utah, took place 30 years ago.[21]

Four other states currently have death-sentenced, under-21 defendants but have not actually sentenced or executed any under-21 defendants in a long time.

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[18] The 23 states that have abolished the death penalty are Alaska, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Virginia, West Virginia, Washington, and Wisconsin. The three states with moratoria are California, Oregon, and Pennsylvania. Death Penalty Information Center, *State by State*, available at https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Jan. 12, 2023). The governor of Oregon recently commuted all outstanding death sentences to life without parole sentences. State of Oregon Newsroom, Governor Kate Brown Commutes Oregon's Death Row (available at https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=76509) (last visited Jan. 11, 2023).

[19] These states are Wyoming, Utah, Montana, Nevada, North Carolina and Kentucky. John Gramlich, *California is One of 11 States that have the Death Penalty but haven't used it in More than a Decade*, Pew Research Center (March 14, 2019) (available at https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/) (last visited Jan. 12, 2023).

[20] These states include Wyoming, Montana, and Utah.

[21] Willam Andrews was sentenced to death for a crime he committed at 19 and was executed in 1992. *Hi-Fi Murders*, Wikipedia, available at https://en.wikipedia.org/wiki/Hi-Fi_murders (last visited Jan. 12, 2023).

Kansas has one death-sentenced, under-21 defendant. He was sentenced in 2000 (Kansas has not executed anyone since 1965.) In Nebraska, there have not been any executions since 1997, there has not been an under-21 defendant executed since 1996, and the only current death-sentenced, under-21 defendant was sentenced in 2002. Idaho has also moved away from under-21 defendant death sentences. In Kentucky, of the 35 death-sentenced inmates, only two are under-21 defendants, and the more recent of those to receive his sentence was sentenced over 30 years ago in 1989. Moreover, a circuit court in Kentucky recently held the death penalty was disproportionate punishment for offenders under the age of 21. *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 (Fayette Cir., Ky. Aug. 1, 2017).[22]

Since *Roper* there has been a marked decline in death sentences and executions in the 18-20 age group across the country. For example, in 2006 (one year post-*Roper*), 18 new death sentences were adjudged against offenders between the ages of 18 and 20. Dr. Baumgartner Declaration, App. p. 175a. In the last several years, there have been few or none. Specifically, there were:

- seven in 2017;

- one in 2018;

[22] The Kentucky Supreme Court did not find to the contrary; rather, the court held this issue was not justiciable because the defendants had not yet been sentenced. *Commonwealth v. Bredhold*, 599 S.W.3d 409, 423 (Ky. 2020). The court explained that should one of the defendants be sentenced to death, the court anticipates that the "the psychological and neurobiological characteristics of offenders under twenty-one (21) years old generally, as well as of the [defendants] specifically, will be fully developed by all parties and both the trial court and this Court will have the scientific evidence necessary to address a truly justiciable constitutional issue." *Id.*

- two in 2019;

- zero in 2020; and

- zero in 2021.

Id. Yet, between 2004 and 2015 (as an example), 18–20-year-old offenders comprised 14-19% of all homicide arrestees nationwide. Blume et al., *supra,* at 940. In more recent years, these numbers have fallen; according to FBI data, between 2017 and 2019, 18–20-year-olds made up 12–14% of homicide offenders with a known age.[23] Since only people arrested for homicides can ever receive the death penalty, this is definitive evidence of a downward trend—a national consensus—against the death penalty for under 21 offenders.

Executions have followed a similar decline. The years of 2006–2011 averaged just under 11 executions of late-adolescent offenders per year. *Id.* In recent years, that average has dropped to just under three per year. *Id.*

Since *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. Banc 2003), was decided by the Missouri Supreme Court, Missouri has executed only ***two*** offenders

[23] Criminal Justice Information Services Division, *2017 Crime in the United States: Expanded Data Table 3*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/expanded-homicide-data-table-3.xls (last visited May 19, 2023); Criminal Justice Information Services Division, *2018 Crime in the United States: Expanded Homicide Data Table 3*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-3.xls (last visited May 19, 2023); Criminal Justice Information Services Division, *2019 Crime in the United States: Expanded Homicide Data Table 3*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-3.xls (last visited May 19, 2023).

in the 18-20 age group. Among Missouri's 17 current death-sentenced prisoners, only Terrance Anderson and Michael Tisius are in the late-adolescent age group.

Nationwide, the trend continues, with 24 states providing that older adolescents should not be treated as adults once they are in the juvenile court system. Alabama, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, and Washington have all extended juvenile court jurisdiction to age 21 (the individual statutes vary in how the jurisdiction is exercised, but all recognize the issue raised here.)[24] In Illinois, the state appellate court held that imposing a mandatory life sentence on a 19-year-old violated the disproportionate penalties clause of the Illinois Constitution. *People v. House*, 142 N.E. 756, 764 (Ill. App. 2019). The Supreme Court of Illinois later remanded this case for factual development in the circuit court regarding the evolving science on juvenile maturity and brain development. *People v. House*, 185 N.E.3d 1234, 1240-41 (Ill. 2021).

[24] In 2014, the United States Department of Justice recommended that the age for criminal courts in the United States be raised to at least age 21. Phil Bulman, Nat'l Inst. Of Justice, NCJ No. 242653, *Young Offenders: What Happens and What Should Happen* 2 (2014). This recommendation was based on neuroscientific research suggesting that individuals ages 18 to 24 are more similar to younger teenager in regard to brain development than to adults. *Id.* These age limits indicate recognition that brain development and psychological maturity continues well past age 18 and into an individual's twenties. *See* Blume et al., *supra* at 936.

2. Laws and society view persons under 21 more like teenagers than adults

Society consistently considers individuals under age 21 to be more similar to teenagers than to adults. An increasing number of both federal and state laws reflect this widespread attitude. For example, all 50 states and the District of Columbia have adopted 21 as the minimum-age restriction for the purchase, possession, or consumption of alcohol. Blume et al., *supra,* at 935-36 (citing *Highlight on Underage Drinking*, Nat'l Inst. On Alcohol Abuse and Alcoholism) (available at https://alcoholpolicy.niaaa.nih.gov/underage-drinking) (last visited Jan. 11, 2023). Many states (including Missouri) have adopted the same age for the purchase, possession, or consumption of marijuana. U.S. News & World Report, *Where is Marijuana Legal? A Guide to Marijuana Legalization*, April 24, 2003, available at: https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization (last visited April 26, 2023); Mo. Const. Art. XIV § 2. Licensed gun dealers are prohibited under United States federal law from selling handguns and ammunition to individuals under 21. 18 U.S.C. § 922(b)(1) (2012); 27 C.F.R. § 478.99(b) (2012). Importantly, these age restrictions are categorical restrictions, meaning that even if an underage individual can show that he possesses personal adult maturity, he will still be barred from the prohibited activity. Blume et al., *supra,* at 935-36. *Roper* looked to age limits on marriage and

voting as indicia of states' views of juvenile immaturity, and this Court should see the myriad of ways society views those under twenty-one as just as immature.[25]

"In the years since *Roper*, new and amended laws have increasingly reflected the country's recognition of the differences in the development between those under and over 21. There are over 3000 laws across the USA that limit a person's privileges or abilities based on not achieving the age of 21." Alex Meggitt, *Trends in Laws Governing the Behavior of Late Adolescents up to Age 21*, 7 J. of Pediatric Neuropsychol. 74 (2021). Much of this restrictive legislation recognizes a limited capacity of those under 21 for

> decision-making in highly stressful and extremely arousing circumstances (sometimes referred to as issues of decision-making during hot-versus-cold cognition) but other laws appropriately grant increasing rights to this age group when evaluating the maturity required to make careful/considered choices such as about personal health care, voting, and other matters that need not to be made, and typically are not made, rashly in emotionally volatile circumstances as are the criminal actions that make such youth currently eligible for death as a penalty.

APA Resolution, at 2-3.

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[25] It is also worth noting that there is a social and moral difference between affirmative rights to engage in adult conduct and the negative right not to be subjected to adult punishment. This is because, as one scholar has explained, "[u]nlike other laws that regulate behavior, criminal punishment involves finding people morally blameworthy," and the "defining characteristic" of criminal punishment is "state censure." Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. Crim. L. & Criminology 667, 690–91 (2014). Thus, not extending *Roper* to people over eighteen "overlook[s] the important and unique goals for imposing criminal punishment of treating equally culpable offenders equally and making individualized inquiries of culpability for society's harshest punishments." *Id.* at 691.

For example, in 2019, Congress raised the minimum age to purchase tobacco products from 18 to 21. 21 USC § 387f(d)(3). Before this legislation, 19 states and the District of Columbia had already enacted provisions raising the age to purchase tobacco products to 21, and in 2019, an additional 13 states followed suit. Since 2009, federal law has prohibited anyone under 21 from obtaining a credit card without a co-signer. 15 U.S.C. § 1637(c)(8).

The recognition of the lack of responsible decision-making among persons ages 18 to 21 is also reflected in the fact that 41 states require a person to be 21 to operate a fireworks display. Four of these states raised the age after *Roper*, and seven more established an age requirement for the first time since *Roper*.

A 2020 article in the *Annual Review of Law and Social Science* documented the change in the legal community's response to 18-21-year-olds, including the "emergence of young adult courts and correctional programs" as well as specialized training of court personnel in developmental science.[26] "The end result is a growing

[26] In 2016, a report was prepared for the Department of Justice "to identify those programs addressing the developmental needs of young adults involved in the criminal justice system." Connie Hayek, *Environmental Scan of Developmentally Appropriate Criminal Case Justice Responses to Justice-Involved Young Adults*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, June 2016 at 1. In the report, young adults were identified as "persons between the ages of 18 to 25 years." *Id.* at 2. The report identifies a variety of initiatives and innovations nationwide, designed to protect late adolescents—for example, Young Adult Courts in San Francisco, California (begun in 2015 for ages 18-25), Omaha, Nebraska (begun in 2004 for up to age 25), Kalamazoo County, Michigan (begun in 2013 for ages 17-20), Lockport City, New York, and New York, New York (begun in 2016 for ages 18-20). *Id.* at 25-29. The report also details probation/parole programs, programs led by prosecutors, community-based programs, hybrid programs, and prison programs. *Id.* at 30-40. The report is

recognition of young adulthood as a distinct and special developmental phase of life that may require differential treatment in the justice system." B.J. Casey et al, *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*, 16 Annu. Rev. Law Soc. Sci. 9.1, 9.14 (2020) (available at http://fablab.yale.edu/sites/default/files/publications/Casey et al 2020AnnRevLS16CH09.pdf) (last visited Jan. 11, 2023).

III. EVIDENCE ABOUT MR. TISIUS'S OWN BRAIN AT THE TIME OF THE OFFENSE ESTABLISHES THAT HIS EXECUTION WOULD BE "CRUEL AND UNUSUAL PUNISHMENT."

In addition to the impairments of a typical 19-year-old brain, at the time of the offense Mr. Tisius suffered from additional brain impairments. However, more recent evidence demonstrates that his juvenile character deficiencies have been reformed.

As noted above, the psychiatrist who evaluated Mr. Tisius three times over the span of nearly twenty years noted both his immaturity in 2003 and his current adaptation as a more mature adult in 2022: "Michael Tisius is now 41 years old and

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exhaustive and demonstrates a nationwide, growing, and nonpartisan recognition of the need to protect late adolescents from the full brunt of criminal penalties.

Other specialized approaches for individuals who commit their crimes before they have reached their early to mid-twenties are rapidly developing. The Brooklyn District Attorney's Office, in partnership with the Center for Court Innovation, is piloting a separate court system, with a variety of alternatives to incarceration for persons who commit misdemeanors between the ages of 16 and 24. See http://www.broklynda.org/young-adult-bureau/. In 2015, California expanded the requirement of a parole hearing for prisoners who were under age 23 at the time of committing specified offenses (up from age 18 under previous law). S.Bill 261, Chapter 471, codified at Cal. Penal Code § 3051 (eff. Jan. 1, 2016).

has made a successful transition to nonviolent living within the Missouri DOC. . . . He has learned self-control, has empathy for others, shows empathy for the men he killed, is no longer impulsive, and is seeking to make the best life he can in his current situation." App. p. 63a

Neuropsychologist Dr. Dale Watson and neuropsychiatrist Dr. George Woods have examined Mr. Tisius. They found that Mr. Tisius suffers from brain defects and dysfunction, particularly in the areas of frontal-striatal and temporal lobe functioning. App. pp. 212a, 213a, 253a, 254a. For example, Mr. Tisius has impairments in memory functions, which are part of the brain's limbic system. App. p. 224a. Neuropsychological testing shows that Mr. Tisius's brain dysfunction "impacts him in many different ways":

> • "He demonstrated a profound degree of forgetfulness on tasks of verbal memory; marked deficits in motor programming that included motor perseveration in speech (stuttering) and movement, with associated cognitive perseverations; apparent motor impairments; significant "signal-detection" deficits across memory, attentional and auditory processing tasks; and a severe degree of microsmia (loss of the sense of smell)." App. p. 224a.
>
> • "[H]e has trouble responding to stimuli in a controlled manner such that his behavior can be erratic and hindered by impulsivity." App. p. 224a.
>
> • "Mr. Tisius also has difficulty accurately discriminating between correct responses and incorrect responses due to a kind of internal 'noise. 'Thus, he has significant 'signal-detection 'deficits across memory, attentional, and auditory processing tasks . . . Mr. Tisius at times also demonstrates deficits in his capacity to think and problem solve using verbal fluid reasoning skills." App. p. 225a.

Mr. Tisius also suffers from seizures. App. pp. 253a, 254a; App. pp. 296a, 300a. A recent neurological evaluation shows that he suffers from the brain disorder

of epilepsy, and was suffering from seizures or seizure-like impairments at the time of the offense. App. p. 301a.

Mr. Tisius also suffers from post-traumatic stress disorder, the symptoms of which include anxiety, extremely poor self-esteem, vulnerability, poor social skills, and depression App. p. 253a. Throughout his childhood and adolescence, he also exhibited extreme vulnerability and suggestibility. App. p. 254a. His

> cognitive impairments, difficulty with understanding complex language, poor executive functioning, "getting stuck" mentally, and executive function deficits lead to a vulnerability to rely upon others. This is exacerbated by his complex trauma history, where no one helped him develop coping mechanisms as a child and undermined his independence. Mr. Tisius has an increased vulnerability to being groomed, which was observed throughout his life.

Id.

Mr. Tisius was suffering from all these impairments at the time of the offense. As Dr. Woods explained, "[g]iven all of his deficits, Mr. Tisius has been vulnerable to being taken advantage of all his life. His ability to effectively weigh and deliberate, sequence his thinking, understand social cues and recognize social context is impaired. This is especially true in new, novel, and stressful situations." App. p. 229a. "At the time of the offense, Mr. Tisius brain deficits exacerbated those one would see in a normal adolescent brain . . . and resulted in increasingly poor adaptive functioning." App. p. 258a. Brain dysfunction due to epilepsy further impaired Mr. Tisius's "ability to use appropriate decision-making during that time of intense stress . . . ." App. p. 301a.

New evidence also shows how Roy Vance manipulated Mr. Tisius's immaturity to serve Vance's own purposes. Vance had a prior conviction for attempted escape, and Vance also masterminded a heist in which he employed false pretenses to coax a younger and vulnerable acquaintance to assist him in stealing from Vance's employer. *See* Records from *State v. Vance*, No. 41RO10000013, App. p. 302aa. Richard Lockett—who was Vance's dupe in Vance's prior crime—has explained how Mr. Tisius thought the world of Vance and how Vance used that fact to manipulate Mr. Tisius.

Thomas Antle, who was confined in jail with Mr. Tisius and Vance, observed Vance bragging about recent escape attempts and described manipulative Vance was and that Mr. Tisius was "glued" to Vance. App. p. 317a. Derek Freese observed Mr. Vance's prior escape attempt and Mr. Vance's influence over the younger, less sophisticated inmates like Mr. Tisius. App. p. 318a. James Foote similarly observed Mr. Vance's influence on Mr. Tisius and was "awestruck at by how quickly Vance manipulated Tisius[.]" *I*App. pp. 317a-318a. Geraldo Arteaga observed that at the time of the offenses. "'Roy programmed Mike . . . Roy was very organized . . . Roy already had him – there wasn't nothing I could do.'" App. p. 319a.

Tracie Bulington explained how Mr. Vance dealt with Mr. Tisius, who "was the type of kid that was looking for acceptance." App. p. 328a. She observed Mr. Tisius to be childlike, immature for his age, looking for love and a father figure, and idolizing Mr. Vance: "Mike went on and on about how Roy was good to him and had been there when he was down or needed something[;]"and "Mike's face used to light

up when he was able to talk to Roy." App. p. 327a. However, "[t]he way Mike talked about Roy was very different than the way Roy talked about him." *Id.*

Ms. Bulington also observed critical post-crime evidence of remorse and of a lack of true deliberative process: "Mike was rubbing his face. He said, 'Oh my god, what did I do? What just happened?'" App. p. 329a. Mr. Tisius continues to be remorseful today. Furthermore, as *Roper* predicted ("a minor's character deficiencies will be reformed") and Dr. Steinberg's studies show (people "age out of crime" by their mid-twenties), Mr. Tisius character has, in fact, matured from what it was at age 19. *Roper*, 543 U.S. at 570; App. p. 104a.Dr. Peterson report, App. p. 52a-53a.

All the above evidence reflects the immaturity of Mr. Tisius's brain at the time of the offense. As Dr. Woods explains, "Grooming [was] the linchpin behavior in the offenses for which [Mr. Tisius] is currently sentenced to death." Dr. Woods report, App. p. 35a. In other words, but for Mr. Tisius's immature brain (with its identical youthful and immature characteristics that categorically exempt 16- and 17-year-olds from the death penalty, such as susceptibility to grooming), he would not have engaged in the conduct for which he is now sentenced to die.

The Eighth Amendment limits the death penalty "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 (emphasis added). The facts of Mr. Tisius's case both (1) support emerging research that 19-year-olds do not significantly differ from 17-year-olds in maturity and judgment,

and (2) that at the time of the offense, Mr. Tisius's brain was operating like a juvenile brain, not an adult brain. Under the Eighth Amendment, the death penalty is not appropriate for 19-year-old offenders, especially those who were as impaired as Mr. Tisius and whose immaturity was the principal reason for his conduct at the time of the offense.

IV. LEGAL STANDARD FOR MR. TISIUS'S EXEMPTION FROM THE DEATH PENALTY

Imposition of the death penalty is subject to the Eighth Amendment protection (via the Fourteenth Amendment) from a state's imposition of cruel and unusual punishments. *Roper*, 543 U.S. at 560. "While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The Eighth Amendment's prohibition of cruel and unusual punishments "reaffirms the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 560. Because the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," *Weems v. United States*, 217 U.S. 349, 378 (1910), the United States Supreme Court has adopted "evolving standards of decency that mark the progress of a maturing society," *Trop*, 356 U.S. at 100-01, because the Eighth Amendment's proscription "flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense." *Kennedy v. Louisiana*, 554 U.S. 407,

419 (2008). "[E]volving standards of decency" — measured by "national consensus"[27] — involve examination of legislative enactments[28] and "actual sentencing practices."[29]

When this Court held that the lack of maturity of persons under age 18 prohibits the use of death penalty against them because acts committed by immature persons have less moral culpability than acts committed by adults. *Roper*, 543 U.S. 551 (overturning the *Thompson* decision eighteen years earlier),[30] this Court used its independent judgment to determine whether it agreed with the national consensus. The death penalty can only be justified by two of the four penological goals: retribution and deterrence.[31]

Roper recognized that while society drew the line between childhood and adulthood at 18 the characteristics that "distinguish juveniles from adults do not disappear when an individual turns 18." 543 U.S. at 574. *Roper* also acknowledged when overturning precedent (specifically, *Thompson*), the logic underpinning the setting of the original juvenile age extends to the new age. *Id.* The Court has continued this trend: life without parole sentences cannot be imposed for non-

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[27] *Atkins*, 536 U.S. at 312-14.
[28] *Roper*, 543 U.S. at 563; *Coker v. Georgia*, 584 U.S. 584, 593-97 (1977); *Edmund v. Florida*, 458 U.S. 782, 788.
[29] *Graham v. Florida*, 560 U.S. 48, 62 (2010).
[30] For similar reasons, the U.S. Supreme Court has held that persons with intellectual disability cannot be sentenced to death. *Atkins v. Virginia*, 536 S. Ct. 304 (2002).
[31] *Gregg v. Georgia*, 428 U.S. 153, 184 (1976). The two others, incapacitation (which works exactly the same if one is dead or serving a LWOP sentence) and rehabilitation (which is impossible if the person dies), do not apply.

homicide offenses committed before age 18;[32] mandatory life without parole sentences for juvenile offenders under 18 are unconstitutional;[33] and that Court precedents "emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[34] The Court has relied on its prior precedent, including *Roper*, current common sense, advances in science and social science research showing that "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior," and the "fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control."[35] The Court concluded that "children are constitutionally different from adults for purposes of sentencing."[36]

"Because juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.'" 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). This flows back in the penological goal analysis, because "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. As for deterrence, "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles" because "[t]he likelihood that the teenage

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[32] *Graham v. Florida,* 560 U.S. 48 (2010).
[33] *Miller v. Alabama*, 567 U.S. 460 (2012)
[34] *Id.* at 472.
[35] *Id.* at 471-72 (internal quotations omitted).
[36] *Id.* at 471.

offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Id.* at 571-72 (quoting *Thompson*, 487 U.S. at 837). The Court acknowledged bright-line rules' susceptibility to criticism but has also redrawn such rules when they lack scientific and social support. *Id.* at 574, 601-02.

As the foregoing argument shows, the time has come for this Court to revisit the Eighth Amendment's application to those over 18, and to afford its protection to 19-year-olds.

CONCLUSION

For the foregoing reasons, Mr. Tisius respectfully requests the Court to grant the petition for writ of certiorari, vacate his sentences of death, and remand with instructions that Mr. Tisius be sentenced to life imprisonment without possibility of parole.

Respectfully Submitted,

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