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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES HAIRSTON,	)	**DOCKET NO. 46665-2019**
	)	
Petitioner-Appellant,	)	**(Bannock County District Court No. CV-2018-1033)**
	)	
v.	)	
	)	**CAPITAL CASE**
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

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

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I. ARGUMENT

The State tries in vain to avoid dealing with the substance of Mr. Hairston's compelling claims by invoking a procedural defense that is both waived and unavailing. *See* Answering Brief, filed Sept. 26, 2019 (hereinafter "Ans. Br."), at 6–17. Then, on the merits, the State misconstrues both the nature of Mr. Hairston's claims and the applicable law. *See id.* at 17–42. The State's efforts fall short on both fronts.

A. The State's Timeliness Defense Fails

The State contends that Mr. Hairston's petition is time-barred, but its theory is waived, and at any rate meritless.

1. The State Waived Its Timeliness Defense

Because the State's position on timeliness in this appeal was not even remotely articulated below, it is waived.

In post-conviction proceedings, "the time bar of the statute of limitations is an affirmative defense that may be waived if it is not pleaded by the defendant." *Cole v. State*, 135 Idaho 107, 110 (2000).[1] That principal is rooted in the fact that untimeliness "does not result in a jurisdictional defect," *id.*, which holds true of capital post-conviction cases in particular, *see Stuart v. State* (*Stuart II*), 149 Idaho 35, 42 (2010).

For the first time on appeal, the State maintains that Mr. Hairston's claims are barred because they were not raised within forty-two days of when they were available, as required by

[1] In this brief, unless otherwise noted, all internal quotation marks and citations are omitted and all emphasis is added.

Idaho Code § 19-2719(5)(a). *See* Ans. Br. at 11–17. The problem for the State is that it never said anything like that in the district court. There is no reference to Idaho Code § 19-2719 in any pleading filed by the State below. That includes, most significantly, the State's answer to the amended petition and the dismissal papers regarding that pleading. *See* R. 725–36. In the entire course of the proceedings in the trial court, the State only even mentioned § 19-2719 twice. It did so in the following passing remarks at oral argument before the district judge: "[W]e would move to dismiss under Idaho Code 19-2719 and submit that the Court does lack jurisdiction in this case. I don't think 2719 is a mechanism to bypass all standards for Post Conviction Relief." Tr. 14. There is not the slightest indication in that vague statement that the prosecutor believed the claims were precluded by the forty-two-day rule. Indeed, he did not breathe a word, either in writing or at the argument, about the forty-two-day provision at all. Nor did he ever cite the sub-sections that gave birth to the forty-two-day limit, § 19-2719(3), (5)(a), or the case that fixed that specific amount of time, *see Pizzuto v. State*, 146 Idaho 720, 727 (2008), or any of the decisions that later enforced it, *see, e.g.*, *Dunlap v. State*, 159 Idaho 280, 293 (2015); *Fields v. State*, 155 Idaho 532, 535 (2013).

Furthermore, a bare reference to § 19-2719 as a whole plainly does not preserve an argument that a petition is precluded by a very particular rule codified in a very particular sub-section of that statute. As confirmed by the heading of the statute, it deals with "[s]pecial appellate and post-conviction procedure for capital cases." Thus, it governs *all* capital post-conviction actions. In a sense, then, *every* motion to dismiss a capital post-conviction petition is brought pursuant to § 19-2719. That does not mean that every such motion maintains that the

petition is late under the forty-two-day rule, which this motion clearly did not. *See State v. Gonzales*, --- Idaho ---, 450 P.3d 315, 320 (2019) ("[A]n issue only mentioned in passing and unsupported by any cogent argument or authority is not preserved for appeal.").

Sensing that it faces a serious preservation problem, the State first suggests preemptively that the prosecutor's comments at oral argument sufficiently covered the forty-two-day time bar. *See* Ans. Br. at 12. In particular, the State points to the following passage:

> [W]e are not here – the Court is not here to make new law based on ABA[2] resolutions or standards being applied in other jurisdictions. The controlling authorities that we have, the Idaho Supreme Court and the US Supreme Court, nothing compelling or controlling has come out. The last really controlling case that the Petitioner cited that would apply here is *Roper*,[3] from 2005, and that applied . . . cruel and unusual to under the age of eighteen.

Tr. 14–15. Contrary to the State's unsupported intimation otherwise, this language has no connection to the forty-two-day rule. By ruminating on the "controlling authorities" and their limitations, the State was merely positing that Mr. Hairston's claim was not a winning one under the law. That is a merits attack. It bears no relationship to the forty-two-day timeline.

Slightly more plausibly, the State seeks to distract from the prosecutor's silence on the forty-two days and focus instead on the allusions he *did* make to timeliness. *See* Ans. Br. at 11. What the State conveniently overlooks there is *what* the prosecutor wrote about timeliness. Namely, he repeatedly advanced the notion that the petition was time-barred under a statute that undeniably has no bearing here: Idaho Code § 19-4902(a). In both of the two pleadings the

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[2] American Bar Association.

[3] *Roper v. Simmons*, 543 U.S. 551 (2005).

prosecutor used to lodge his timeliness challenge, he looked to § 19-4902(a) and *not* to § 19-2719. *See* R. 726, 731, 734, 736. Section 19-4902(a) provides that a petition must be filed within one year of the direct appeal concluding. It is part of the Uniform Post-Conviction Procedure Act, which yields to § 19-2719 in capital cases in the event of a conflict. *See Fields*, 155 Idaho at 535. Because § 19-4902(a) is at odds with § 19-2719(5) in terms of when the petition is due, the latter statute is the pertinent one in any capital case. The State confirms as much on appeal, where it depends solely on § 19-2719(5) and not § 19-4902(a). In overview, then, the State below offered only the wrong statute on timeliness with the wrong limitations period. That is not good enough for preservation purposes.

With so little of its own work to use, the State turns to Mr. Hairston's, stressing that *he* analyzed § 19-2719(5) below. *See* Ans. Br. at 11. As noted earlier, though, timeliness "may be waived if it is not pleaded *by the defendant*." *Cole*, 135 Idaho at 110. Mr. Hairston has no obligation to the State to do its job for it. In light of *Cole*'s rule, *the State* has to utilize in district court whatever defenses it wants considered on appeal. It simply did not do so with the forty-two-day rule.

This Court has recently reaffirmed the importance of strictly construing preservation requirements and holding them against the State when it does not fulfill them. In *State v. Wolfe*, 165 Idaho 338, 150 (2019), the prosecutor below chose one angle to defend the lawfulness of a search under the Fourth Amendment. On appeal, the Attorney General selected another. Not permissible, this Court concluded, as "[t]he State's position significantly broaden[ed] and misrepresent[ed] the argument made by the prosecutor below." *Id.* at 151. As the Court

explained, "simply stating . . . a general proposition . . . is not enough to raise every specific theory or principle of law within it." *Id.* Moreover, "[a]llowing the State to merely" make a generic point "without arguing the proper legal theory applicable to the issue at hand would effectively nullify the State's burden" to substantiate its position. *Id.*

Wolfe is directly on point. Just as in that case, the prosecutor here proffered a broad defense (untimeliness) while selecting a distinct theory for its applicability (the one year non-capital limitations period running from the end of the direct appeal). Just as in that case, the Attorney General here stuck with the broad defense (untimeliness) while switching on appeal to a different and equally distinct theory for its applicability (the forty-two day capital limitations period running from the availability of the claim). Just as in that case, the appellate argument has been waived, for the "law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Id.*

Below, the district court correctly discerned that while the State "made generic statements" about timeliness, it "did not cite to the specific statute governing post-conviction procedures in capital cases or offer any reasoning to support its claims," and "did not dispute" Mr. Hairston's explanation as to timeliness. R. 771. "The State's cursory statements" about timeliness, the district court continued, were inadequate to make out the defense. R. 772. As established above, the district court's reasoning was eminently well-founded. There is no basis for this Court to take up the State's newfangled timeliness theory.

2. The Petition Was Timely

If the Court does consider the substance of the State's view on timeliness, that view should be rebuffed.

At bottom, the State's timeliness argument has two premises: 1) some of the science supporting an extension of *Roper* and its progeny existed more than forty-two days before Mr. Hairston filed his petition; and 2) inmates in other jurisdictions have been urging similar claims over the last several years. *See* Ans. Br. at 12–17. Neither premise gets the State to a finding of untimeliness.

As for the first point, while it is true that certain studies were conducted before 2018, the State forgets that science alone does not show an evolving standard of decency. Aside from the scientific world, the test takes into account the feelings of the legal community and society as a whole, in part as they can be divined in "the views that have been expressed by respected professional organizations." *Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.32 (1988) (plurality opinion). When *Thompson* struck down the death penalty for those younger than sixteen, it relied in part on an ABA resolution opposing the practice. *See id.* That is the precise type of document at issue now, for Mr. Hairston's triggering event was ABA Resolution 111, which implored "each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense." R. 280, 660. As per *Thompson*, the constitutional significance of an ABA resolution in this context is beyond debate. Further, until the ABA announced in that resolution that late adolescents "should be exempted from capital punishment," R. 663, the movement had not yet

crystallized into a consensus among informed scientists and lawyers. Importantly, the resolution was directed at "each jurisdiction that imposes capital punishment," R. 660, rather than the limited audience for the sorts of scientific papers the State is fixated on. That made the resolution a tipping point that gave Mr. Hairston a foundation for his claims, and he could not legitimately have brought them beforehand.

Even with respect to the science itself, the fact that some research had favored Mr. Hairston's claim in earlier years did not demonstrate a "national consensus" on the subject, *Roper*, 543 U.S. at 567, which is what an evolving-standards claim must have. The sorts of sporadic papers referred to by the State are not equivalent to a consensus. Nor can the State even claim that such papers would speak to the pivotal factor of "state practice." *Roper*, 543 U.S. at 563; *accord Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (emphasizing the centrality of "state activity" in an evolving-standards analysis); *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002) (commenting on how a "practice" had become "uncommon" in declaring it prohibited by the evolving standards of decency). It was the ABA resolution that announced that it was "*now* both appropriate and necessary to address the issue of late adolescence and the death penalty because of the overwhelming legal, scientific, and societal changes of the last three decades." R. 663; *see* R. 661 ("In light of this evolution of both the scientific and legal understanding surrounding young criminal defendants and broader changes to the death penalty landscape, it is *now* time for the ABA to revise its dated position and support the exclusion of individuals who were 21 years old or younger at the time of their crime."). There is no evidence in the record—and the Attorney General has not suggested—that any prestigious, nationwide organizations with

comparable status to the ABA made any similar declaration before the issuance of Resolution 111. Because that resolution cemented the status of the consensus, it began the ticking of Mr. Hairston's clock.

Finding no luck on the actual consensus, the State resorts to the irrelevant fact that capital defense lawyers were "increasingly making this constitutional claim" in the years preceding Mr. Hairston's current post-conviction case. Ans. Br. at 13. However, as the State's own brief thoroughly documents, these were cases in which courts overwhelmingly *rejected* the claim and found *no* national consensus in favor of a *Roper* extension. *See id.* at 16–17, 23–30. If anything, these cases confirm that the national consensus did *not* exist until the ABA resolution was promulgated, that Mr. Hairston did not until that moment have available to him "sufficient facts to file the post-conviction proceeding," *Pizzuto*, 146 Idaho at 727, and that his petition was consequently timely.

In the same vein, it is also significant that, of all the many decisions denying *Roper*-extension claims cited by the State, it seems that only two of them were published after the ABA resolution. One did not even mention the ABA resolution, let alone reject it as a basis for the claim. *See generally Commonwealth v. Towles*, 208 A.3d 988 (Pa. 2019). And while the other decision did allude to the resolution and deny the claim, it appeared to do so on the belief that it was improper for a state high court to reevaluate the *Roper* cutoff until the U.S. Supreme Court has, *see Foster v. State*, 258 So. 3d 1248, 1254 (Fla. 2018), *cert. denied*, 140 S. Ct. 152 (2019), a line of reasoning that Mr. Hairston debunks below, *see infra* at 14–17. There are no well-

reasoned authorities to support the rejection of the ABA resolution as a proper marker that the consensus has passed the threshold.

To validate its approach to timeliness, the State presses *Pizzuto* into service, *see* Ans. Br. at 14–15, but the analogy is inapt. The State zeroes in on the following text from *Pizzuto*: "[t]he reasonable time at issue is the time necessary to develop sufficient facts to file the post-conviction proceeding, not the time necessary to develop all facts that will be offered in an attempt to prove the claim," 146 Idaho at 727. When the Court so clarified, though, it had before it a claim that the petitioner was intellectually disabled[4] and as a result exempt from the death penalty, *id.* at 722. Significantly, intellectual disability is an objective fact about the person that is essentially set in stone after he has his eighteenth birthday. *See id.* at 728 (explaining how one of the elements of intellectual disability is onset before the age of eighteen). All of the information about the individual that is necessary to explore the issue exists from that point onward, and it is only a matter of gathering it.

By contrast, the core of an evolving-standards claim like the one at bar now is that it is defined by changing circumstances in the world. *See Hall*, 572 U.S. at 708 (reminding that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice"); *Graham v. Florida*, 560 U.S. 48, 85 (2010) ("Society changes."). Before circumstances have adequately changed, there is no real claim at all. It follows that, with respect to a *Roper*-extension claim, "[t]he reasonable time . . . to

[4] The *Pizzuto* Court used the term "mentally retarded," 146 Idaho at 722, but "intellectually disabled" is now the preferred nomenclature, *see, e.g.*, *Hall v. Florida*, 572 U.S. 701, 704 (2014).

develop sufficient facts to file the post-conviction proceeding," *Pizzuto*, 146 Idaho at 727, *is* the time it takes for the national consensus to emerge. Mr. Hairston waited for that moment to come in the form of the ABA resolution, rendering his petition timely.

Another way to conceptualize why Mr. Hairston's claim complies with the statute of limitations is to apply the whole *Pizzuto* quote to his situation: "The reasonable time at issue is the time necessary to develop sufficient facts to file the post-conviction proceeding, not the time necessary to develop all facts that will be offered in an attempt to prove the claim." *Id.* In the case before the Court, the ABA resolution solidified the consensus and accordingly permitted Mr. Hairston to *file* his petition, which he supported with the best evidence then at hand. *See* R. 130–38 (describing how the initial petition was accompanied by data provided by the Idaho Department of Correction and newspaper articles, as they were the only sources that could be located within such a short period of time). He then used the period allotted for amending his petition to *develop* the facts, primarily by marshalling court documents to corroborate all of the allegations he had made. *See* R. 718. Mr. Hairston acted diligently and just as the post-conviction scheme intended him to. This is a far cry from a case where the predicate for a claim was "knowable" earlier and simply had not yet been discovered through investigation. *See Fields*, 155 Idaho at 535. Mr. Hairston's claim only became knowable when the consensus existed, and he promptly filed within forty-two days of that and, his limitations period satisfied, *then* continued to develop the facts underlying his timely petition.

As another part of its effort to prove the claim was available earlier, the State quotes a Fifth Circuit decision opining that it was only "commonsense" "that 18-to-20-year-olds tend to

be more impulsive than young adults aged 21 and over." Ans. Br. at 15. Although Mr. Hairston agrees with the State's apparent insinuation that his petition is bolstered by commonsense, commonsense has never been the metric by which evolving-standards claims are judged. Rather, as spelled out in detail above, the test is whether there is a national consensus, and that is what Mr. Hairston's petition is based on.

Taking a different tack, the State objects to the use of the ABA resolution here because of the Court's previous commentary on the organization's guidelines for capital defense lawyers. *See id.* at 15. As an initial matter, the guidelines question is a red herring. The ABA resolution at issue here is not a piece of guidance to capital defense lawyers on how best to represent their clients, as the guidelines referenced by the State are. It is instead an acknowledgment by the country's foremost legal association that a certain practice is no longer consistent with our central values as a society. The State has no authority or argument for why the Court can ignore *that* type of document. It is an understandable omission, for—as stated earlier—the U.S. Supreme Court explicitly relied upon an ABA resolution when it outlawed capital punishment for those under fifteen. *See Thompson*, 487 U.S. at 830 & n.32 (characterizing an ABA resolution on the issue as one of "the views that have been expressed by respected professional organizations," and germane to the constitutional question). That is demonstrably more on point than the State's tenuous references to attorney guidelines. Plus, the State's position fails even on its own terms. While this Court has declined in the State's cited cases to expressly adopt such guidelines, it presumably did not discount them altogether, as they have to be considered as a matter of binding federal constitutional law. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524

(2003) (reminding that the U.S. Supreme Court has "long referred" to the ABA standards "as guides to determining what is reasonable").

Lastly, it is important to examine the pernicious consequences of the State's approach to timeliness. It is the State's perspective that the claim is both too early and too late. That is, the State insists at the same time that the claim should have been brought earlier and that no national consensus exists even now. If true, that would mean that Mr. Hairston was compelled to proffer the claim at a historical moment when it was unsupported—and potentially even frivolous—only to have it inevitably denied by the courts. Had he done so, and then later tried to raise the claim again when new facts put it on firmer footing, there is little doubt that the State would have wielded res judicata to defeat the claim for the very reason that it had been asserted earlier—a doctrine the Attorney General has consistently depended on in similar circumstances, including in Mr. Hairston's own case. *See, e.g.*, *Hairston v. State*, 144 Idaho 51, 58 (2007), *vacated on other grounds*, 552 U.S. 1227 (2008); *McKinney v. State*, 133 Idaho 695, 707–08 (1999); *Stuart v. State* (*Stuart I*), 118 Idaho 865, 867 (1990).

In the world dreamed up by the State, Mr. Hairston's claim would be doomed no matter where and when it was raised. Imagine that forty-nine states had enacted legislation forbidding the execution of offenders between the ages of eighteen and twenty-one, and that it happened with five states every year starting the year of Mr. Hairston's sentencing. If Mr. Hairston raised the claim after the first five jurisdictions acted, the State would say it was premature because no national consensus had arrived. If he raised the claim at any point thereafter, the State would say it was barred by res judicata. And if he waited until later, the State would say it was untimely.

Under the State's view, there could be a nearly unanimous, undeniable trend in favor of the claim and yet it would still never result in relief. Put another way, Mr. Hairston would have a winning constitutional claim, a post-conviction statute designed to afford him an opportunity to raise such claims, and yet no possibility of ever prevailing. That Kafkaesque vision cannot be the law. Such a regime would plainly violate Mr. Hairston's right to a free and fair post-conviction proceeding and his right to access the courts under the Due Process clauses of the U.S. and Idaho Constitutions. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985). It would be equally unlawful for the related reason that it would create a situation in which Mr. Hairston has a right without a remedy. *See Swain v. Fritchman*, 21 Idaho 783, ---, 125 P. 319, 329 (1912).

In short, the State's timeliness defense is meritless. If considered, the Court should not sustain it. Last but not least, as amply demonstrated by the briefing in this case, the substantive issue presented is an important one of first impression. That being the case, public policy strongly counsels in favor of the Court issuing a reasoned opinion on the merits.

B. Mr. Hairston's Death Sentence Is Unconstitutional Because He Was Under Twenty-One At The Time Of The Offense

Having dealt with the State's purported procedural bar, Mr. Hairston now focuses on the merits of the claims. He begins with his first claim, i.e., that his death sentence is categorically cruel and unusual by virtue of his age. After that, Mr. Hairston will address his second claim—namely, that his death sentence is unconstitutional because the mitigating factors associated with youth were not adequately considered when the penalty was imposed.

Mr. Hairston's first claim has two alternative bases: that national evolving standards preclude his execution and that state-wide evolving standards do the same. He will speak to each in turn.

1. National Evolving Standards

The State's first line of attack on the national-evolving-standards piece of Mr. Hairston's claim is to question this Court's authority to independently interpret the U.S. Constitution, *see* Ans. Br. at 21–23, a power that has been fundamental to its identity for the entirety of its existence.

As support for its unusual take on this issue, the State principally relies on the U.S. Supreme Court's admonition that it brings to bear its "own judgment" in assessing the evolving standards of decency. *See id.* at 22. The State reads this phraseology to mean that *only* the U.S. Supreme Court's judgment can codify an expansion of the evolving standards. *See id.* It takes little effort to see the irrationality of the State's interpretation. The U.S. Supreme Court consults its own judgment in its own cases by necessity. It is, after all, the Court deciding the case. The Court obviously would not defer to the judgment of another tribunal. Yet that certainly does not imply that *other* courts cannot consider their *own* judgment in adjudicating their *own* cases.

Roper proves the point. In the decision below there, the Missouri Supreme Court did precisely what Mr. Hairston is advocating here. It recognized that the evolving standards of decency had continued to grow since the U.S. Supreme Court's latest pronouncement, and that the age of eligibility for capital punishment had thereby increased under the Constitution. *See Roper*, 543 U.S. at 559–60. Far from criticizing the state high court, *Roper* affirmed its ruling

and quoted approvingly from its decision. *See id.* at 567. It is true, as the State stresses, that the dissent in *Roper* complained about the Missouri Supreme Court's independent exercise of its own judgment. *See* Ans. Br. at 22. Nevertheless, at the risk of stating the obvious, a dissent is not the law. The majority opinion is, and it had no problem with the fact that the state high court did its job and interpreted the federal constitution by its own lights. As the Missouri Supreme Court rightly stated in *Roper* itself, "decisions as to standards of decency are to be decided by current standards, not ones of years ago" and "that is just what the issue before this Court requires [it] to do: determine whether the evolving national consensus bars the imposition of the death penalty . . . today, even though it did not bar it fourteen years ago." *Simmons v. Roper*, 112 S.W.3d 397, 406–07 (Mo. 2003) (en banc); *see Hall*, 572 U.S. at 708 (reminding that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice"); *Graham*, 560 U.S. at 85 ("Society changes.").

It is the State's impression that Mr. Hairston is asking this tribunal to "overrule" the U.S. Supreme Court. Ans. Br. at 22. He is not. Mr. Roper was seventeen at the time of his offense. *See Roper*, 543 U.S. at 555. The U.S. Supreme Court adheres to the principle that it is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). Sticking to that approach, the Supreme Court in *Roper* decided only that it was unconstitutional to execute a [redacted] It had no occasion to consider an older defendant.

More significantly, *Roper* was decided on the basis of the data that was extant in 2005. Nearly fifteen years later, the world has changed. To recognize the changes is in no way to

imply that the U.S. Supreme Court erred at the time it ruled. *See* Sam Kamin, *Infrequency as Constitutional Infirmity*, 51 Tex. Tech L. Rev. 95, 106 (2018) ("The determination of whether death comports with contemporary societal norms is necessarily limited to the time at which it was made."). There is no difference between a consideration here of whether *Roper* extends to older defendants and a consideration in any case of how U.S. Supreme Court precedent applies to a new fact pattern. In the closely related context at issue in *State v. Shanahan*, 165 Idaho 343, ---, 445 P.3d 152, 158–59 (2019), *cert. denied*, --- S. Ct. ----, 2019 WL 6107870 (2019), for instance, the Court concluded that Eighth Amendment law concerning juvenile life sentences can be implicated in scenarios where the individual will ultimately be eligible for parole. It did so even though the U.S. Supreme Court had only dealt with fixed life cases in that area. *See id.*; *see also id.* at 164 (Brody, J., dissenting) ("I respectfully dissent from the Court's decision to *expand* the U.S. Supreme Court's holding in *Miller v. Alabama*, 567 U.S. 460 (2012)" because "*Miller* required this Court to re-examine *fixed* life sentences" and not "indeterminate sentences."). Bringing federal constitutional law to bear on novel facts is not, as the State conceives it, improper. It is this Court's own, unquestionable, independent duty. *See Zwickler v. Koota*, 389 U.S. 241, 248 (1967) ("[S]tate courts also have the solemn responsibility, equally with the federal courts, . . . to guard, enforce, and protect every right granted or secured by the constitution of the United States.").

The State makes a similar mistake when it contends that "[n]ot only has the Supreme Court refused to expand *Roper* to murderers between the ages of 18 and 21, but just this last spring the Court denied certiorari in a case asking the Court for such an expansion." Ans. Br. at

23. This sort of language suggests that the Supreme Court has held that developments since *Roper* do not alter its holding. It hasn't. The Supreme Court has never addressed that question one way or another. And over the course of many years it has issued the "frequent admonition" that "'[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J., respecting the denial of certiorari) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

The State's idea that the U.S. Supreme Court would resent a lower tribunal's fresh consideration of an important legal question deeply misunderstands the nature of the judicial system. Contrary to that idea, the Supreme Court has "in many instances recognized that when frontier legal problems are presented, periods of percolation in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); *see State of Maryland v. Balt. Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of certiorari) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."). The Supreme Court, and the legal system as a whole, benefit from the considered analysis of an issue by different jurists. It only stunts the law for courts to avoid an issue altogether, especially when the issue revolves around circumstances that are by definition in flux.

Finding no succor on its misdirected federalism argument, the State proceeds to the substance. Its first sally is to observe that no appellate court has, to date, expanded *Roper* in the

direction Mr. Hairston is pushing for. *See* Ans. Br. at 23–25. Granted. Nonetheless, the absence is not particularly compelling. As Mr. Hairston pointed out earlier, only two of the cases cited by the State were decided after the pivotal ABA resolution came onto the scene, and neither of them grappled in any fair or meaningful way with its significance. *See supra* at 8. For all intents and purposes, the question presented here has not truly been answered by any of the decisions arrayed by the State. It must be answered here in the first instance, and it should be answered in Mr. Hairston's favor.

Those preliminary objections dispensed with, the State has little to say about the heart of Mr. Hairston's claim: the powerful evidence of a societal shift away from death sentences for late adolescents. The few points the State does have on that front are largely refuted by unequivocal holdings by the U.S. Supreme Court. For starters, the State dismisses the import of data about who is being executed and how old they are. *See* Ans. Br. at 26–27. That belief is not shared by the Supreme Court, which has labeled "[s]tatistics about the number of executions" one of the "measures of consensus." *Kennedy*, 554 U.S. at 433.

Similarly, the State posits that gubernatorial moratoria on executions are not pertinent to the inquiry. *See* Ans. Br. at 25. The Supreme Court disagrees. *See Hall*, 572 U.S. at 716 (counting states with moratoria in a capital evolving-standards case). And rightly so: governors are selected by the people to represent their values, and when they halt the machinery of death, that makes a telling statement about the sentiments of their constituents.

In one final departure from binding precedent, the State discounts international developments regarding countries who oppose the death penalty in all instances, since they

supposedly do not shed any light on the age-cutoff question. *See* Ans. Br. at 28. Notwithstanding the State's preferences, the U.S. Supreme Court has instructed that the analysis must take into account the jurisdictions that have "abandoned the death penalty altogether as part of the consensus against" its use against a particular age group, *Roper*, 543 U.S. at 574, and that includes international jurisdictions, *see Thompson*, 487 U.S. at 830. Whatever merits these various notions of the State's might have in a vacuum, the U.S. Supreme Court's methodology trumps them.

Even more tenuously, the State recites a list of Idaho statutes allowing eighteen-year-olds to take part in various activities. *See* Ans. Br. a 27–28.[5] Unfortunately for the State, the statutes tell us little about "*contemporary* standards of decency." *Roper*, 543 U.S. at 562. The age limits in each of them were set years ago, and have not been revisited since. *See* Session Laws 1927, ch. 261, § 2 (creating what later became Idaho Code § 46-102 and establishing eighteen as the age of eligibility for the state militia); Session Laws 1971, ch. 211, § 1 (passing Idaho Code § 15-2-501 in 1971, concerning the making of wills, which is the same now as it was then); Session Laws 1972, ch. 8, § 1(lowering the age requirement for jury service in Idaho Code § 2-209 to eighteen, where it remains today); Session Laws 1996, ch. 423, § 1 (promulgating Idaho Code § 15-5-433(b) in 1996 and setting an age limit for conservatorship that has to date never

[5] The State situates its list of Idaho statutes in the section of its brief on the national standards, *see* Ans. Br. at 27–28, so Mr. Hairston deals with it under that rubric. Insofar as the State is asserting that the statutes go to Mr. Hairston's Idaho-specific argument, they cannot serve that function—Mr. Hairston is relying there chiefly on uniform sentencing practices from the capital punishment arena in particular, which these laws do not undermine.

been amended); Session Laws 2004, ch. 127, § 1 (enacting Idaho Code § 18-1523(e) in 2004 with an age limit on tattooing and piercing that has not been altered thereafter); Session Laws 2007, ch. 30, § 2 (codifying, in 2007, an age limit for organ donation that remains in effect in Idaho Code § 39-3404). The oldest of these provisions have been around for almost a century, almost all have existed for decades, and *none* of them are truly new. A batch of laws that have been on the books for so long without modification does not detract from "the consistency of the direction of change" that Mr. Hairston has demonstrated. *Roper*, 543 U.S. at 566; *accord Atkins*, 536 U.S. at 315.

So, too, for the more general age limitations the State gets from *Farmer v. State*, 268 So. 3d 1009 (Fla. Dist. Ct. App. 2019). *See* Ans. Br. at 27. By the State's own account, none of those rules are new. They represent holdovers from an earlier era. Contrastingly, Mr. Hairston pointed to continuing developments in the recognition of twenty-one as the better line between adults and children. *See* Opening Brief, filed Aug. 28, 2019 (hereinafter "Opening Brief" or "Opening Br.") at 11–13. To name just a few examples, eligibility for juvenile court jurisdiction and to buy cigarettes is increasingly being *raised* from eighteen to twenty-one. *See id.* at 12–13. Likewise, the legalization of marijuana only began in 1996—the very year Mr. Hairston was sentenced—and "the age of purchase has uniformly been set at twenty-one" in the various states that have subsequently taken the plunge. Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temp. L. Rev. 769, 778 (2016). Correspondingly, "[f]or many years, states varied their age-out age" for foster care "between sixteen to twenty-one, with most setting the age at eighteen" and it has only been in the twenty-

first century that "[m]ost states now have extended their age of aging out to twenty-one." Ramesh Kasarabada, *Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts to Improve Consequences of Aging Out*, 17 CUNY L. Rev. 145, 153 (2013). This is uniquely contemporary data that is tied with unique closeness to the time period most relevant to the claim here.

In a nutshell, the *evolution* is all in Mr. Hairston's favor. *See Cruz v. United States*, No. 3:11-cv-787, 2018 WL 1541898, at *22 (D. Conn. March 29, 2018) ("While there is no doubt that some important societal lines remain at age 18, the changes discussed [in the ABA resolution] reflect an *emerging trend* toward recognizing that 18-year-olds should be treated different from fully mature adults.").

A special comment is warranted with regard to the State's emphasis on Idaho Code § 20-509(1) and its provisions allowing juveniles fourteen and over to be treated as adults by the criminal justice system. *See* Ans. Br. at 28. For one thing, a statute selecting *fourteen* as the cut-off point can hardly illuminate much when we already know from *Roper* that the relevant constitutional minimum is *at least* eighteen. Section 20-509 (1) would at best support an argument that fourteen-year-olds can be executed and that ship sailed more than thirty years ago, when the U.S. Supreme Court proscribed the execution of those fifteen and under. *See Thompson*, 487 U.S. at 838. For another thing, the State's argument is circular. To rely on § 20-509(1) is to essentially say that Idaho should be able to treat young defendants as adults because Idaho treats young defendants as adults. That kind of tautological reasoning does not assist the Court's inquiry.

The State's appeal to non-binding cases from other jurisdictions fares no better. *See* Ans. Br. at 23–25. Although the State depicts these eight cases as a mountain of precedent weighing against Mr. Hairston's *Roper*-extension claim, only one is actually apropos.

Initially, two of the cases are not *Roper*-extension decisions at all, for they involve non-capital matters. *See United States v. Lopez-Cabrera*, No. 1:11-cr-1032, 2015 WL 3880503, at *1 (S.D.N.Y. June 23, 2015), *aff'd*, 933 F.3d 95 (2d Cir. 2019); *Farmer*, 268 So. 3d at 1009–10.

Next, the State misreads *Otte v. State*, 96 N.E.3d 1288 (Ohio Ct. App. 2017). The inmate in that case attempted to skirt around Ohio's established post-conviction scheme by instead seeking declaratory relief. *See id.* at 1290–93. On appeal, the court's holding was only that he could not do so under Ohio procedural law. *See id.* Of course, Ohio law has no bearing here, nor does the question of whether a declaratory-relief action would be a suitable vehicle for Mr. Hairston's claim—since he did not pursue one.

The State's reliance on *Mitchell v. State*, 235 P.3d 640 (Okla. 2010), is equally misplaced. Unlike Mr. Hairston, Mr. Mitchell did not argue for a categorical exclusion from capital punishment, let alone raise a claim based on new evidence; rather, he contended that *his particular* youthful qualities exempted him from the death penalty "in light of the mitigating evidence he presented." *Id.* at 658.

Continuing this theme, every case in the State's long string-cite is distinguishable. In *United States v. Mitchell*, 502 F.3d 931, 981 (9th Cir. 2007), the prisoner "offer[ed] no objective indicia" of a national consensus, which Mr. Hairston has amply done more than ten years later. *Garcia v. Dir., TDCJ-CID*, 73 F. Supp. 3d 693, 709–10 (E.D. Tex. 2014), *COA denied*, 793 F.3d

513 (5th Cir. 2015), involved the strict standards governing federal habeas review, which have no purchase here. The court in *Towles* rejected a state-constitutional claim, leaving unilluminated the Eighth Amendment issue that Mr. Hairston has presented. 208 A.3d at 1009. When *Thompson v. State*, 153 So. 3d 84, 177–78 (Ala Crim. App. 2012), took up *Roper*, it was in the context of a theory that the defendant's "mental age" was that of a juvenile, which is not Mr. Hairston's theory.

That leaves the State with only one of the many cases on its over-inflated list: *Foster*, from the Florida Supreme Court. *Foster* was wrongly decided for reasons spelled out earlier. *See supra* at 14–17. More importantly, one solitary decision hardly manifests the kind of overwhelming trend the State advertises. Recently, a state trial judge in Kentucky and a federal appellate judge in Tennessee have both recognized that *Roper*'s cutoff must be adjusted upwards. *See* Opening Br. at 5, 29 (discussing the Kentucky case and *Pike v. Gross*, 936 F.3d 372, 383–86 (6th Cir. 2019) (Stranch, J., concurring)). This is a brand-new issue, where much of the latest scientific and legal evidence is of young vintage—which also, incidentally, sets the instant appeal off from many of the cases in the State's laundry list, dating as they do from 2007 and including several decided a number of years ago. It would be unreasonable to have expected more precedent to have accumulated when the consensus has just formed.

And in all events, this Court is free to choose whichever side is the sounder one in the debate, no matter what the scorecard reads elsewhere. *See, e.g.*, *In re Cooke's Estate*, 96 Idaho 48, 52–54 (1973) (adopting "the rationale supporting the minority rule, as set forth in" a single California case, instead of the approach taken by six other states). As exhaustively explained

here and in the Opening Brief, Mr. Hairston has the better argument and that is reason enough to rule in his favor. There is no magic number of other courts necessary to render a rule constitutional. If it is constitutional, it must be applied.

In the alternative to all of the foregoing, if the Court adopts the State's view that it cannot extend the Eighth Amendment to ban the death penalty for nineteen-year-olds as a matter of federal constitutional law, it undeniably has that ability under Article I, Section 6 of the Idaho Constitution, and it should—for the same reasons surveyed here and in the Opening Brief—so interpret that provision. *See State v. Thompson*, 114 Idaho 746, 748 (1988) ("[I]n interpreting provisions of our constitution that are similar to those of the federal constitution we are free to extend protections under our constitution beyond those granted by the United States Supreme Court under the federal constitution.").

2. Evolving Standards In Idaho

As with the national evolving standards, the State's rebuttal on the Idaho-specific component of the claim is both factually and legally erroneous.

The State's misapprehensions begin at the outset, with the applicable legal framework. To the State's mind, Mr. Hairston's theory only works if Idaho's cruel-and-unusual provision is construed as broader than its federal analogue. *See* Ans. Br. at 30. Not so. As elaborated in the Opening Brief, because the Eighth Amendment calls for an evolving-standards test on a national scale pursuant to federal constitutional law, and because Idaho's cognate clause contains identical language, the latter demands the same inquiry on a state-wide basis. *See* Opening Br. at 18–19. The state constitution need not be more generous than the federal one for the foregoing

principles to hold true. They need only be equal. In that sense, Mr. Hairston's claim fits comfortably within the Court's typical practice of applying Idaho's cruel-and-unusual provision so that it "track[s] the U.S. Supreme Court's Eighth Amendment jurisprudence." *State v. Draper*, 151 Idaho 576, 599 (2011).

In an analogous situation in *State v. Santiago*, 122 A.3d 1, 13 (Conn. 2015), the court pronounced the death penalty unlawful within its jurisdiction under the state constitution because it had "become incompatible with contemporary standards of decency *in Connecticut*" in part because of sentencing practices there. The court did so while continuing to hew to a prior decision that "broadly adopted, as a matter of state constitutional law, th[e] federal framework for evaluating challenges to allegedly cruel and unusual punishments." *Id.* at 16. As in *Santiago*, a holding that the adolescent death penalty offends the state constitution here is not a departure from the U.S. Supreme Court's precedent. Quite the opposite: such a holding is *dictated* by a faithful application of that precedent.

Additionally, the rarity of the adolescent death penalty in Idaho runs afoul not just of the state constitution, but of the Eighth Amendment as well. When "young offenders" obtain sentences so far out of the mainstream for their peers that it is like they were "struck by lightning," the penalties are cruel and unusual in the federal constitutional sense. *Thompson*, 487 U.S. at 833. The same principles apply when capital punishment in a particular state has become "so wantonly and so freakishly imposed" due to the dynamics in that jurisdiction. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1061 (C.D. Cal. 2014), *rev'd on other grounds*, 806 F.3d 538 (9th Cir. 2015). Idaho's late-adolescent death sentence, which has not been meted out a single

time since Mr. Hairston's case, fits the bill to a tee, and it transgresses the federal constitution. No holding about the state constitution of any kind, let alone one broadening it, is necessary to reach that result.

The State's response to the specific Idaho data is just as unpersuasive. On that score, the State's first salvo is to accentuate the fact that "the death penalty can still be imposed against 18 to 21 year-old murderers in each county" since "there have been no legislative enactments or judicial decisions barring imposition of the death penalty in any Idaho county." Ans. Br. at 32. In terms of legislation, one must ask why lawmakers would spend their time on such a bill when no adolescents are currently being sentenced to death or have been in the last two decades. *See* Opening Br. at 19. Given the absence of any state-wide problem, the absence of legislation is hardly telling. Legislators are not in the business of coming up with solutions for non-existent issues. *See Atkins*, 536 U.S. at 316 (recognizing that "there is little need to pursue legislation barring the execution" of a particular class of people when they are not actively being executed). As *Graham* recognized, jurisdictions that technically permit a type of sentence but do "not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate." *Graham*, 560 U.S. at 67. That is precisely the case with Idaho's counties and adolescent death sentences.

As for judicial decisions, the rejoinder is to the same effect: Mr. Hairston is the only one who has ever raised the claim, and he is doing so in the very case before the Court. The silence of the courts does not mean they favor the State. It means only that the issue is arising for the first time now.

Curiously, the State portrays Mr. Hairston's claim as a challenge to prosecutorial discretion. *See* Ans. Br. at 32. In fact, it is the opposite. Mr. Hairston is not contesting the decisions by county prosecutors—he is championing them. Their overwhelming tendency to shy away from capital charges against late adolescents is a vindication of Mr. Hairston's claim, and he does not contest it in the slightest.

The State expresses skepticism of the notion that prosecutorial decisions can substantiate an evolving-standards claim. *See id.* ("Hairston has provided no authority for the proposition that, because individual county prosecutors exercised their discretion and declined to seek the death penalty, the death penalty as applied to 18 to 21 year-olds is unconstitutional."). Its uncertainty is easily resolved with a glance at the U.S. Supreme Court's caselaw, which has instructed on this very issue that "the judgments of . . . prosecutors weigh heavily in the balance." *Thompson*, 487 U.S. at 833. That stands to reason. Prosecutors, and particularly elected ones like many of Idaho's, are physically and politically close to the citizens for whom they work. They are well-situated to reflect the values of those citizens, and when they uniformly avoid a certain practice it can fairly be assumed that is because it "is inconsistent with basic principles of decency." *Graham*, 560 U.S. at 82. That is presumably why the U.S. Supreme Court asks how many defendants in the class at issue have been sentenced to death, not how the others happened to receive lesser penalties. *See Thompson*, 487 U.S. at 833.

What's more, whenever a court considers whether a certain type of death sentence is compatible with the evolving standards, it consults "the infrequency of its use even where it remains on the books." *Roper*, 543 U.S. at 567. "And if we are searching for actors besides the

jury who can cause a significant case-by-case drop in the death penalty rate by their actions alone, prosecutors must be the primary focus." Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 Tex. L. Rev. 1929, 1948 (2006). This is so because "the prosecutor controls the initial decision over whether to seek the death penalty and, later, whether to accept or reject a plea that avoids a death sentence," making his conduct "probably the most influential of any actor in affecting death sentencing rates." *Id.* Because the U.S. Supreme Court's precedent places a premium on the rate at which death sentences are imposed, and because prosecutors shape that rate, their decisionmaking has a constitutional place in the analysis. That is especially so in Idaho. A death sentence here is only handed out when the prosecutor notices his intent to go after one. *See* Idaho Code § 18-4504A. Prosecutors are, more than anyone, accurate barometers of Idaho's appetite for the death penalty.

Consider the ramifications of the State's position to the contrary. What if there were five first-degree murders by late adolescents every year in every Idaho county for twenty-five years, and the prosecutors in every case opted not to pursue death? There would then be 5,500 consecutive non-death sentences. As the State sees things, that would reflect no state-wide consensus, because prosecutors were the ones steering the process away from death, even though they are presumably chosen for their jobs because they follow the mores of their constituents. That would not be rational, and the State's model is a poorly constructed one.

The State's ironic strategy of discounting the choices made by county prosecutors would be problematic for Mr. Hairston's claim if any other decision-maker in the state was acting in a

contrary fashion. But they are not. When Idaho judges have been in a position to sentence young defendants to death, they have—like prosecutors—declined to do so. Strikingly, they refrained from resorting to capital punishment with explicit reference to the defendants' youth as one of the reasons for their leniency. *See* R. 425 (stating in the Lundquist case that the "Court had, prior to sentencing, advised counsel for both parties that it did not view the death penalty as a valid sentencing option in view of the age of the defendant at the time the murder was committed" even though the prosecution had pursued death); *accord State v. Lundquist*, 134 Idaho 831, 837 (2000) ("The maximum sentence available to the district court in this case was an order of execution as capital punishment. However the court concluded it was not an appropriate case to impose the death sentence."); R. 519 (declining to impose death in the Thurman case, in part because the defendant "was barely [redacted] at the time of the commission of the crime, and a rather immature eighteen at that," which was "a significant factor" in considering the sentence). Simply stated, the relevant decision-makers are in complete accord that death sentences for late-adolescent defendants are no longer harmonious with Idaho values.

The State is laboring under the further misapprehension that, of the dozens of first-degree murder cases that have been brought against late adolescents in Idaho in the last two decades and led to non-death sentences, "only one" "involved a murder where a statutory aggravating factor was present." Ans. Br. at 32. From that, the Attorney General seemingly draws the inference that such defendants are receiving life sentences because of the facts of their crimes, not because of a consensus against the state-sanctioned killing of young offenders. The premise is flawed, fatally undermining the resulting conclusion. Idaho's statutory aggravators come into play only

when the prosecutor is pursuing capital punishment. *See* Idaho Code § 19-2515(9) ("The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt *before a sentence of death can be imposed* . . . ."). In the vast majority of the cases relied upon by Mr. Hairston, the prosecutor elected not to seek death. As a consequence, the sentencer had no occasion to pass upon whether any aggravators were present or not. The absence of such findings is an outgrowth of the fact that Idaho prosecutors are overwhelmingly refraining from capitally charging late-adolescent first-degree murder defendants, which is one of the central planks of Mr. Hairston's argument. By drawing attention to that gap, the State is only strengthening Mr. Hairston's claim.

And as referenced above, in the few cases where prosecutors have pursued death sentences against such defendants, it is judges who have refrained from imposing them, indicating that the system has through one actor or another expressed its condemnation of the practice. Notably, one of those judges did find a capital aggravator, *see* R. 516, before opting for life partly because of the defendant's youth, *see* R. 519. Plainly, it is not the absence of aggravators that has moved Idaho away from executing the young—it is society's disapproval of the practice.

In addition, in the cases where death was not sought, it surely *could* have been had the prosecutors involved been so inclined. Per Idaho law, the existence of a single statutory aggravator can sustain a death sentence. *See* Idaho Code § 19-2515(9). Idaho has a capital aggravator for several relatively common types of first-degree murders, including those where the killing involved multiple victims; where it was done for payment; and where it accompanied

robbery. *See* § 19-2515(9)(b), (d), (g). As set forth in Mr. Hairston's Opening Brief, there are offenses in each of those categories involving defendants in his age cohort who wound up with life sentences. *See* Opening Br. at 23–25. There can be no serious debate that all of those defendants were legally eligible for capital punishment, i.e., they would have faced capital charges if their prosecutors had wanted them to.

Idaho also has three exceptionally amorphous capital aggravators—to wit, one for "heinous, atrocious or cruel" ("HAC") murders, § 19-2515(9)(e), one for when the accused displays an "utter disregard for human life," § 19-2515(9)(f), and one for when the defendant has shown "a propensity to commit murder," § 19-2515(9)(i). As a recent dissenting opinion from this Court perceptively put it, the HAC aggravator has no natural limiting principle, since "[a]rguably, every person convicted of murder has committed a crime one would consider horrible" and "atrocious," and "most consider any murder an 'utter disregard' for human life." *State v. Hall*, 163 Idaho 744, 839–40 (2018) (Kidwell, J., dissenting), *cert. denied*, 139 S. Ct. 1618 (2019); *accord Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) ("To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'"). Mr. Hairston concedes that these propositions from *Hall* were offered in dissent, as the majority upheld the aggravators against constitutional vagueness assaults. Still, regardless of whether the aggravators are so broad as to be unconstitutional, they are unquestionably broad enough for a prosecutor to *allege* them in any first-degree murder case he chooses to. In that regard, *all* of

Mr. Hairston's non-death cases were potentially capital, and *all* of them reflect a consensus not to execute youthful defendants.

At a bare minimum, no one could deny that prosecutors might well have sought death under the HAC aggravator for a murder where the defendant "inflicted a protracted beating in which the victim was terrorized and tortured" and "taunted and mocked his victim"; a murder where the victim was beaten to death by a baseball bat and a large wrench; a murder where the defendant beat a child to death; and a murder where the victim was kicked, struck with rocks, and thrown off a cliff. *See* Opening Br. at 23 (reciting all of those facts with reference to the particular cases involved). Each of those cases could easily have been prosecuted capitally. None of them were. That, along with the complete absence of any death sentence for a person in the relevant age range, is strong evidence of a state-wide consensus.

In a last-ditch maneuver to evade the strength of Mr. Hairston's claim by mischaracterizing its jurisprudential origin, the State critiques the theory as "more akin to proportionality analysis, which the Supreme Court long ago reasoned is not constitutionally required." Ans. Br. at 33. In the case cited by the State, the Supreme Court drew a line between proportionality review "in the traditional sense," i.e., an inquiry into whether a punishment is "inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime," as opposed to a different mode of proportionality review, which evaluates whether a particular punishment is "unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime." *Pulley v.*

Harris, 465 U.S. 37, 43 (1984). *Pulley* relieved state courts of having to engage in the latter, while leaving the former line of cases untouched. *See id.* at 43–44.

Contrary to the State's mislabeling, Mr. Hairston's claim falls neatly within the classic family of proportionality cases, which later grew to include *Roper* itself. *See* 543 U.S. at 571 ("Retribution is not *proportional* if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). That precedent is alive and well, and Mr. Hairston's claim entails a straightforward application of it. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) ("The concept of proportionality is central to the Eighth Amendment."). To be sure, a comparison between Mr. Hairston's case and others is called for, as it illustrates Idaho's evolution beyond the extermination of the young by demonstrating that the development has been driven by the age of the defendants and not the nature of the offenses. Even so, that does not alter the essence of Mr. Hairston's claim, which is that a consensus has formed against such executions, situating his case squarely within an old and vibrant series of Supreme Court precedents.

Evidence of the consensus continues to mount as we speak. In *State v. Coleman*, Idaho Sup. Ct., No. 46772, the Court has before it proof that yet another adolescent convicted of first-degree murder was spared the death penalty. The relevant documents are at pages 19–20, 78–79, and 371-73 of the clerk's record in that case. Collectively, they demonstrate that Mr. Coleman was nineteen at the time of the offense, that he was convicted of first-degree murder, and that he was sentenced to forty years fixed. To the extent it is necessary, Mr. Hairston respectfully asks

the Court to take judicial notice of that information. *See* I.R.E. 201(d) (laying out the requirements for judicial notice); *McKinney v. State*, 162 Idaho 286, 290 n.2 (2017) (applying I.R.E. 201 in a post-conviction case). News reports corroborate the same basic facts. *See* Taylor Viydo, *Washington man who killed cab driver in North Idaho gets life sentence*, KREM, Jan. 3, 2019, available at https://perma.cc/4XGJ-HDGM. With the Coleman case, the total number of young defendants convicted of first-degree murder between the time of Mr. Hairston's sentencing in 1996 and today has gone up to at least twenty-six. *See* Opening Br. at 19–20. The number of death sentences in that group remains a stark *zero*. It is difficult to imagine more definitive evidence of a consensus than an unbroken pattern extending over twenty-three years.

In closing its section on Mr. Hairston's Idaho-centric claim, the State perplexingly decries Mr. Hairston's theory as "nothing more than an attempt to eliminate the death penalty." Ans. Br. at 36. Mr. Hairston does not follow the State's logic. In reality, his claim would impact a *single* death sentence: his own. For he is the only person on Idaho's death row who was under twenty-one at the time of the offense. Like the current residents of death row, future defendants would be unaffected by a decision in Mr. Hairston's favor. As he has exhaustively shown with uncontroverted evidence, no young defendants are being sentenced to death as it is, and none have been for more than two decades. An opinion granting Mr. Hairston relief would only codify a situation that the people of Idaho have already accepted. Such an opinion would not prevent prosecutors from taking any actions they desire to take. It would simply prevent the State from executing the only man who was given a death sentence that is now entirely

inconsistent with the punishment meted out to every other defendant in his age bracket to be charged since then.

3. The District Court Applied The Wrong Standard

In his Opening Brief, Mr. Hairston exposed how the district court went astray by employing "a presumption in favor of the" State that is only properly triggered when a litigant is targeting the constitutionality of a statute, which he has not done. *See* Opening Br. at 25–27. The State now weakly defends the district court's misplaced methodology. *See* Ans. Br. at 33–34. Its first strategy is to seek refuge under *Stuart II*. *See id.* at 33–34. The case is unavailing. In *Stuart II*, the petitioner *was* questioning the constitutionality of a statute—in particular, Idaho Code § 19-2719, the provision governing capital post-conviction litigation. *See* 149 Idaho at 40. Mr. Hairston, to repeat, is not. The State's comparison does not withstand even the briefest scrutiny.

With no precedent to help it, the State falls back on the convoluted reasoning that Mr. Hairston's theory "is governed by the same standards as those involving the constitutionality of a statute because he is contending that the state and federal constitutions do not permit the imposition of the death penalty involving 18 to 21 year-old murderers." Ans. Br. at 34. "In other words," the State tries to clarify, Mr. Hairston "is asking this Court to interpret the state and federal constitutions to prohibit the imposition of the death penalty for 18 to 21 year-old murderers, which is the same as having this Court interpret whether a statute permits the execution of such murderers." *Id.* Mr. Hairston confesses that he cannot make heads or tails of the State's argument. The State has not identified a statute whose constitutionality Mr. Hairston

is protesting. Nor has it supplied a single case in which this Court applied the presumption at issue in the absence of such a statute. Its argument boils down to the notion that a general constitutional claim is similar to a challenge to a statute because the State thinks they are similar. That is hardly convincing, and there is nothing in the Court's precedent to substantiate it.

Despite the State's best efforts, it fails to rehabilitate the district court's erroneous test, and reversal or remand remain appropriate.

C. Mr. Hairston's Death Sentence Is Unconstitutional Because The Mitigating Factors Associated With His Youth Were Not Given Proper Consideration

Nearly everything in the preceding sections of this reply brief applies with equal measure to Mr. Hairston's second claim—that his youth received constitutionally inadequate attention at sentencing. He will not dwell on the same arguments further, and will focus here only on refuting the handful of points by the State that are specific to the second claim.

To begin, the State endeavors to limit the caselaw underlying Claim Two to the life-sentence context and wall them off from the capital arena. *See* Ans. Br. at 39 ("[N]o court has expanded *Miller* or *Montgomery* to murderers between 18 and 21 that have also been sentenced to death."). The distinction is unsound. *Miller* flows from the "foundational principle" that the "imposition of a State's *most severe penalties* on juvenile offenders cannot proceed as though they were not children." 567 U.S. at 474. Death is self-evidently an even *more* severe punishment than life without the possibility of parole. If the Eighth Amendment applies to the former, it a fortiori applies to the latter. *See Roper*, 543 U.S. at 568 ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.").

On a more granular level, the State misses the legal import of *People v. House*, --- N.E. 3d ---, 2019 WL 2718457 (Ill. Ct. App. 2019), in several respects. The first is to suggest that *House* somehow has less bearing here because it homed in on *Miller* for its inspiration rather than *Montgomery*. *See* Ans. Br. at 39. So what? In its most salient sentence, the *House* court wrote that "[a]lthough the Court in *Roper* delineated the division between juvenile and adult at 18, we do not believe that this demarcation has created a bright line rule." 2019 WL 2718457, at *12. *House* went on to apply the U.S. Supreme Court's juvenile caselaw to a first-degree murder defendant who was nineteen at the time of the offense. *See id.* at *12–14. That is precisely what Mr. Hairston is lobbying for here. No matter what precedent it cited, the reasoning in *House* is spot-on and weighs in favor of Mr. Hairston's claim.

The State's second misstep on *House* is to become distracted by the fact that the court there was construing the Illinois Constitution rather than the Eighth Amendment. *See* Ans. Br. at 39–40. As before, the substance of the reasoning is what counts, and it supports relief here.

The State's final blunder on *House* is to attribute significance to the Illinois Supreme Court's vacatur of an *earlier* version of the decision. *See id.* But it is the *post*-vacatur iteration that Mr. Hairston relied upon in his Opening Brief, *see* Opening Br. at 33, and it is still good law in Illinois. The prior remand is neither here nor there. And if there is something more on-point about the intermediate court's earlier opinion, then there is in any event nothing stopping this tribunal from using it as persuasive authority. This Court is not bound by any judicial opinions from Illinois, regardless of their source, so it can pick and choose the decisions it finds most deserving.

Apart from *House*, Mr. Hairston relied in his Opening Brief on *Cruz*. *See* Opening Br. at 33. Lacking any ground for distinguishing *Cruz*, since it directly supports Mr. Hairston's claim, the State complains that it represents the isolated view of a single judge and that "every other court has rejected an extension of *Miller*." Ans. Br. at 40. Of course, that is untrue. As just noted, *House* effectively created such an extension. More to the point, this is a fast-moving, cutting-edge area of the law. The ABA resolution that symbolizes a turning point on the issue only went into force last year, and very few courts have had an opportunity to consider its significance. *See supra* at 8. It is also noteworthy that attorneys general around the country have, like their peers here, advanced the argument that state judges are powerless to move the constitutional age limits in the cruel-and-unusual context until the U.S. Supreme Court does. Even though the argument is specious, *see supra* at 14–17, it has met with some success elsewhere. *See, e.g.*, *Foster*, 258 So. 3d at 1254. It is not equitable for attorneys general to artificially create stagnancy in an area of law and then use that very stagnancy as a justification for keeping things the way they are.

To top things off, it is misleading for the State to ask "how there can be a national consensus when every other court has rejected an extension of *Miller*." Ans. Br. at 40. Aside from the fact that it is false to say that every court has so ruled, the State's question confuses the nature of the consensus at issue. It is not a consensus among *courts*. It is a consensus among society, as evidenced most prominently by the views of the scientific community, "respected professional organizations" like the ABA, *Thompson*, 487 U.S. at 830 & n.32, and the legal system. Those are the sources Mr. Hairston has assembled here, and they justify relief.

Roper confirms that the small number of favorable decisions on Mr. Hairston's claim is no impediment to relief. There, the petitioner alerted the state supreme court to a single judicial decision forbidding the use of the juvenile death penalty, and even that decision did not do so because of any nationwide consensus. *See* Petitioner's Brief, Simmons v. Luebbers, 112 S.W.3d 397 (Mo. 2003) (No. SC 84454), 2003 WL 24219767, at *76–77 (discussing *State v. Furman*, 858 P.2d 1092 (Wash. 1993)). That did not stop the Missouri Supreme Court from finding such a consensus, nor the U.S. Supreme Court from affirming. *See Simmons*, 112 S.W.3d at 406–13; *see also Roper*, 543 U.S. at 560–79. *Atkins* is to the same effect. The petitioner in that case did not cite a single decision finding a national consensus against executing the intellectually disabled. *See* Brief for Petitioner, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452), 2001 WL 1663817. Yet as revealed by the U.S. Supreme Court a few months later, the consensus was there. *See Atkins*, 536 U.S. at 311–21. Simply put, the reluctance of some courts to recognize new facts on the ground does not change the constitutional reality.

It is not too surprising that courts have been slow to embrace the scientific and societal developments around late adolescents. Courts are cautious, and that is often for the best. Sometimes, society gets ahead of the courts. Here, it has done so, and this Court is now in a position to give constitutional recognition to a fact that society has already accepted: that it is barbaric to execute people for acts they committed when they were too young for us to trust them with alcohol. Like the Missouri Supreme Court in *Roper*, history would congratulate this tribunal for its foresight, courage, and fidelity to the law if it so ruled.

II. CONCLUSION

When all is said and done, the State's response brief is more notable for what it lacks than what it contains. It has no meaningful rejoinder to Mr. Hairston's compelling scientific evidence. It has no explanation for the dramatic data Mr. Hairston has presented about state and national sentencing practices. And it has no sound penalogical basis for why the Court should refuse to acknowledge the manifest differences between adolescents and adults. All the State has to offer are tepid attempts to avoid the merits of a serious constitutional issue and to constrict this Court's authority. It does so through a procedural argument that was never made below, an anemic description of this Court's power that is contradicted by the entire structure of our judicial system, and a shallow appeal to the notion that because the law said one thing more than a decade ago it should never say another thing on the subject again, no matter how much new information has come to light. These assertions are all far too feeble to stand in the way of Mr. Hairston's powerful constitutional claim and he should be granted relief or at least a remand.

Respectfully submitted this 22nd day of November 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage pre-paid where applicable, addressed to:

L. LaMont Anderson	_____ U.S. Mail
Deputy Attorney General	_____ Hand Delivery
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