

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1688

MARTIN GROSSMAN

Appellant,

v.

STATE OF FLORIDA

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

RICHARD E. KILEY
Fla. Bar No. 0558893
STAFF ATTORNEY
JAMES VIGGIANO, JR.
Fla. Bar No. 0715336
CAPITAL COLLATERAL REGIONAL
COUNSEL
MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

REQUEST FOR ORAL ARGUMENT 1

STATEMENT OF THE CASE AND FACTS..... 1

I. PROCEDURAL HISTORY 1

II. SUMMARY OF THE ARGUMENTS 3

ARGUMENT

The lower court erred in denying Mr. Grossman an evidentiary hearing on his claim that his sentence of death violates the United States and Florida Constitutional requirement of due process and prohibition of cruel and unusual punishment in light of newly discovered evidence and the United States Supreme Court case of Roper v. Simmons. The lower court should have granted

Newly discovered evidence demonstrates that Mr. Grossman’s mental state was under that of an 18 year old adolescent. 5

CONCLUSION AND RELIEF SOUGHT 24

CERTIFICATE OF SERVICE..... 25

CERTIFICATE OF COMPLIANCE 26

TABLE OF AUTHORITIES

<u>Allen v. State,</u> 636 So.2d 494, 497 (Fla. 1994)	8
<u>Eddings v. Oklahoma,</u> 455 U.S. 104, 115-116 (1982).....	19
<u>Ford v. Wainright,</u> 477 U.S. 399, 409-410 (1986).....	18
<u>Franklin v. Lynaugh,</u> 487 U.S. 164, 184 (1988).....	17
<u>Godfrey v. Georgia,</u> 446 U.S. 420, 433 (1980).....	18
<u>Grossman v. State,</u> 525 So.2d 833 (Fla. 1988)	1
<u>Grossman v. Florida,</u> 489 U.S. 1071 (1989)	1
<u>Grossman v. Dugger,</u> 708 So.2d 249 (Fla. 1997)	2
<u>Ragsdale v. State,</u> 720 So.2d 203, 207 (Fla., 1998)	5
<u>Ring v. Arizona,</u> 536 U.S. 584 (2002)	2
<u>Robinson v. State,</u> 2005 WL 1577414, *2 (Fla.) (Fla., 2005)	4
<u>Roper v. Simmons,</u> 125 S.Ct. 1183 (2005)	3,9
<u>Trop v. Dulles,</u> 356 U.S. 86, 101 (1958)	16
<u>Weems v. United States,</u> 217 U.S. 349, 378 (1910).....	17
<u>Woodson v. North Carolina,</u> 428 U.S. 280, 304 (1976).....	18
<u>Urbin v. State,</u> 714 So.2d 411, 418 (Fla. 1998)	3,9

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Grossman lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Grossman accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

Mr. Grossman was convicted of First Degree Murder as charged after a trial held October 22-31, 1985. Following the penalty phase, a jury recommended the death penalty. On March 19, 1986, the trial judge entered his written order in support of the death sentence. Mr. Grossman appealed his conviction to the Florida Supreme Court which affirmed his conviction and sentence in Grossman v. State, 525 So.2d 833 (Fla. 1988). Mr. Grossman sought review in the United States Supreme Court which denied the petition for writ of certiorari. Grossman v. Florida, 489 U.S. 1071 (1989).

A death warrant was signed on March 8, 1990. The execution was stayed by the Florida Supreme Court on April 5, 1990. Mr. Grossman filed his Rule 3.850

Motion to Vacate Judgment of Conviction and Sentence in state court. After an evidentiary hearing on May 31 - June 2, 1994 the state trial court denied the Rule 3.850 motion on October 2, 1995.

Mr. Grossman appealed the state court denial of Rule 3.850 post-conviction relief motion to the Florida Supreme Court. The Florida Supreme Court affirmed the denial of Rule 3.850 relief. Grossman v. Dugger, 708 So.2d 249 (Fla. 1997).

Mr. Grossman then timely filed a federal Petition for Writ of Habeas Corpus on September 18, 1998.

On July 22, 2002, the case was administratively closed pending the outcome of two Florida cases that raised Ring v. Arizona, 536 U.S. 584 (2002) issues. On August 14, 2003, Mr. Grossman filed a successive state habeas petition. The Florida Supreme Court rejected the petition in a one-sentence order issued May 7, 2004. Mr. Grossman filed a motion for rehearing on May 19, 2004. The motion was denied on July 15, 2004.

On July 26, 2004, Mr. Grossman's federal proceeding was reopened, and he filed his amended petition on August 25, 2004. The petition was denied by the Federal District Court on January 31, 2005. Mr. Grossman appealed to the Eleventh Circuit Court of Appeals.

Mr. Grossman filed a successive 3.851 motion in the Sixth Judicial Circuit which was denied. This appeal follows.

II. SUMMARY OF THE ARGUMENT

The circuit court erroneously denied Mr. Grossman a hearing on his newly discovered evidence claim. Newly discovered evidence establishes that Mr. Grossman, at the time of the offense when he was chronologically aged 19, was under an extreme mental or emotional disturbance. Recent scientific evidence demonstrates that Mr. Grossman's mental age at the time of the offense was significantly below the age of 18. Scientific evidence has shown that the development and maturation of the temporal lobe of the brain - the area which controls judgment and impulse - is not fully formed until age 25. Even though age at the time of the offense was raised as potential mitigation at sentencing, the mitigation was not even considered by the trial court.

The United States Supreme Court recently held in Roper v. Simmons, 125 S.Ct. 1183 (2005) that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments. This Court in Urbin v. State, 714 So.2d 411, 418 (Fla. 1998), held that the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes. Based upon the newly discovered evidence regarding brain development and the United States Supreme Court's recent holding in Roper v. Simmons, it is clear that Mr. Grossman's jury should have learned that Mr. Grossman, at the time of the offense, had the mental capacity of adolescent less than age 18.

ARGUMENT I

The lower court erred in denying Mr. Grossman an evidentiary hearing on his claim that his sentence of death violates the United States and Florida Constitutional requirement of due process and prohibition of cruel and unusual punishment in light of newly discovered evidence and the United States Supreme Court case of Roper v. Simmons.

The lower court should have granted Mr. Grossman an evidentiary hearing.

Mr. Grossman raised this claim based on newly discovered evidence in his postconviction successive 3.851 motion in the Sixth Judicial Circuit. The

circuit court denied Mr. Grossman an evidentiary hearing. The circuit court erred in denying Mr. Grossman a hearing.

This Court in Robinson v. State, 2005 WL 1577414, *2 (Fla.) (Fla., 2005) explained that:

“[A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient.” Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000). “[W]here the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied.” Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998) (citing Steinhorst v. State, 498 So.2d 414 (Fla. 1986)). However, in cases where there has been no evidentiary hearing, this Court must accept “the defendant’s factual allegations to the extent that they are not refuted by the record.” Peede v. State, 748 So.2d 253, 257 (Fla. 1999). In other words, this Court “must examine each claim to determine if it is legally sufficient, and if so, determine whether or not the claim is refuted by the record.” Atwater v. State, 788 So.2d 223, 229 (Fla. 2001).

It cannot be conclusively shown that Mr. Grossman is entitled to no relief. Nor can it be said that Mr. Grossman’s petition is legally insufficient. Furthermore, this Court has “encouraged trial courts to hold evidentiary hearings on postconviction motions.” Ragsdale v. State, 720 So.2d 203, 207 (Fla., 1998).

The lower court should not have denied Mr. Grossman an evidentiary hearing on his newly discovered evidence claim for the reasons stated below..

Newly discovered evidence demonstrates that Mr. Grossman's mental state was under that of an 18 year old adolescent.

Martin Grossman's date of birth is January 19, 1965. His age at the time of the offense, December 13, 1984, was about nineteen years and eleven months. On December 13, 1985, the Court imposed a death sentence on Martin Grossman. The Court instructed the jury regarding mitigation:

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider if established by the evidence are: One, the age of the Defendant at the time of the crime. And, Two, any other aspect of the Defendant's character or record and any other circumstance of the offense.

(ROA Vol. XV - p. 2709)

After the jury recommended that Mr. Grossman be sentenced to death, the Court sentenced Mr. Grossman to death saying:

THE COURT: Mr. McCoun, is there any legal cause why judgment and sentence of the law should not be pronounced at this time?

Mr. McCOUN: Judge, no legal cause other than those numerous constitutional actions that have previously been raised.

THE COURT: Yes, sir. You have adequately covered the record in that fashion.

The Court has considered the aggravating and mitigating circumstances presented in the evidence in this case and has considered the recommendation of the jury and the recommendation included in the presentencing investigative reports and determined that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

There being no legal cause why the judgment and sentence of the law should not be pronounced, the Court adjudicates you to be guilty of the crime of murder in the first degree. It is the sentence of this Court that you be taken into the custody of the Department of Corrections and thereafter, at an appointed place and time, be put to death. May God have mercy on your soul.

You have an automatic appeal to the Supreme Court of Florida from the judgment of guilt and sentence of this Court. If you do not have funds for a lawyer, one will be appointed for you.

(ROA Vol. XV - p. 2709)

The court, in Findings As To Aggravating And Mitigating Circumstances In Support Of The Death Penalty filed March 19, 1986, over three months after the court sentenced Mr. Grossman to death, gave age at the time of the offense no weight saying:

The only mitigating circumstance which could have been found as a result of the testimony presented in behalf of the Defendant and the Presentence Investigation, was that the Defendant was nineteen (19) years old at the time the crime was committed. However, this Court does not feel that this constituted a mitigating circumstance in the case.

The Court does not find any other aspect of the Defendant's character or record, or any other

circumstances of the offense as reflected in the testimony presented at trial and in the penalty phase to be a mitigating factor.

(ROA Vol. II - p. 290)

Newly discovered evidence establishes that Martin Grossman was under an extreme mental or emotional disturbance at the time of the offense. § 921.141 (6)(b) and (g). The newly discovered evidence demonstrates that Martin's mental age at the time of the offense was significantly below the age of 18.

There are two requirements needed for relief based on newly discovered evidence:

First, the asserted facts “must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.” Hallman, 371 So.2d at 485. Second, “the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial.” Jones v. State 591 So.2d 911, 915 (Fla. 1991). The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed. *Id.*

Scott v. Dugger, 604 So.2d 465 (Fla. 1992)

The newly discovered evidence is a study entitled “Dynamic mapping of human cortical development during childhood through early adulthood” authored by Gogtay and others. The study was led by NIH's Institute of Mental Health and UCLA's laboratory of Neuro Imaging and was released on May 17,

2004. The finding of the study is that the maturation of the temporal lobe of the brain - the area which controls judgment and impulse - is not fully formed until age 25. Nitin Gogtay et al., *Dynamic mapping of human cortical development during childhood through early adulthood*, 101 Proceedings of the National Academy of Sciences 21 (2004).

The age upon which a defendant may be executed by the state is the subject of considerable change. In Allen v. State, 636 So.2d 494, 497 (Fla. 1994), this Court held that the death penalty was either “cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by article I, section 17 of the Florida Constitution.” In Urbin v. State, 714 So.2d 411 (Fla. 1998), this Court held that the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes.” Urbin was seventeen years old at the time of his offense, and yet he was afforded relief from his death sentence based on statutory and nonstatutory mitigation related to age and maturity issues even though he was above the age of maturity at which execution was constitutionally barred.

The United States Supreme Court in Roper v. Simmons, 125 S.Ct. 1183 (2005) held that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth

Amendments. The Court explained the evolving standards leading to the ban on executing individuals under age 18 stating:

The prohibition against “cruel and unusual punishments” like other expansive language in the Constitution must be interpreted according to its text, by considering history, tradition, and precedent, and with regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be “cruel and unusual.” *Trop v. Dulles*, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)

In *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed2d 702 (1988), a plurality of the Court determined that our standards of decency did not permit the execution of any offender under age 16 at the time of the crime.

...

The next year, in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted that penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year olds offenders. These numbers, in the Court’s view, indicated there was no national consensus “sufficient to label a particular punishment cruel and unusual.” *Id.* at 370-371, 109 S.Ct. 2969. A plurality of the Court also “emphatically reject[ed]” the suggestion that the Court should bring its own judgment to bear on the

acceptability of the juvenile death penalty. *Id.* at 377-378, 109 S.Ct. 2969.

...

That same day the Court decided *Stanford* it held that the Eighth Amendment did not mandate a categorical exemption from the death penalty for mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In reaching this conclusion it stressed that only two States had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense.

...

Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency had evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted that objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. When *Atkins* was decided only a minority of States permitted the practice, and even in those States it was rare. 536 U.S., at 314-315, 122 S.Ct. 2242. On the basis of these indicia the Court determined that executing mentally retarded offenders "has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.* at 312, 122 S.Ct. 2242.

...

Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U.S., at 318, 122 S.Ct. 2242. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. *Id.*, at 319-320, 122 S.Ct. 2242. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth

Amendment “places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.” *Id.* at 321, 122 S.Ct. 2242. (Quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335(1986)).

...

Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*. The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.

...

(1) As in *Atkins*, the objective indicia of national consensus in this case— the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice— provide sufficient evidence that today society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal,” 536 U.S. at 316, 122 S.Ct. 2242.

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

The Supreme Court further explained why juveniles should be exempt

from the class of worst offenders saying:

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm,

“[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” *Johnson, supra*, at 367, 113 S.Ct. 2658, see also *Eddings, supra*, 115-116, 102 S.Ct. 869 (“Even the normal 16-year-old customarily lacks the maturity of an adult”). It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Review* 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, *infra*.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra*, at 115, 102 S.Ct. 869 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003) (hereinafter Steinberg & Scott) (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting”)

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, *Identity: Youth and Crisis* (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” *Thompson, supra*, at 835, 108 S.Ct. 2687 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 492 U.S., at 395, 109 S.Ct. 2969 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the feelings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will *1196 be reformed. Indeed, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Johnson, supra*, at 368, 113 S.Ct. 2658; see also *Steinberg & Scott* 1014 (“For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood”).

In *Thompson*, a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles below that age. 487 U.S., at 833-

838, 108 S.Ct. 2687. We conclude the same reasoning applies to all juvenile offenders under 18.

Although the Court settled on age 18 being the line for which eligibility for the death penalty ought to rest, it is apparent that the Court recognized that developmental immaturity could extend beyond the chronological age. The Court addressed this issue saying:

The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.

...

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. Text rev. 2000); see also Steinberg & Scott 1015. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from

assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own maturity.

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the ***1198** reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Fifteen years ago, when the United States Supreme Court first addressed the constitutionality of the death penalty for 16- and 17- year-old offenders, it concluded that there was not yet sufficient evidence that the practice contravened Eighth Amendment standards of decency. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (plurality); *id.* at 381-382 (O'Connor, J., concurring in part and in the judgment). On the same day in 1989, the Court determined that

then-current standards of decency did not prohibit execution of the mentally retarded. See Penry v. Lynaugh, 492 U.S. 302 (1989). But the Eighth Amendment’s prohibition on cruel and unusual punishments “is not static”; rather, it “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality).

Accordingly, in 2002, when the Court revisited Penry’s holding, it held that the evolution in our society’s standards of decency since 1989 required a different result. See Atkins v. Virginia, 536 U.S. 304, 321 (2002). The Court found that “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses,” the mentally retarded do not “act with the level of moral culpability that characterizes the most serious adult criminal conduct,” and that those same disabilities “can jeopardize the reliability and fairness of capital proceedings” against them. Id. at 306-307.

As Atkins demonstrates, stare decisis is no bar to reconsideration of the holding in Stanford. The standards of decency embodied in the Eighth Amendment evolve “as public opinion becomes enlightened by a humane justice.” Weems v. United States, 217 U.S. 349, 378 (1910). The very nature of the Eighth

Amendment accordingly requires that the principle of stare decisis yield - as it did in *Atkins* - to compelling evidence that society's values have changed.

The Eighth Amendment requires that the “punishment for crime ... be graduated and proportioned to the offense.” *Atkins*, 536 U.S. at 311 (quoting *Weems*, 217 U.S. at 367). When the punishment is death, that extreme sanction must fit not only the crime, but also the offender: a death sentence must be “directly related to the personal culpability of the criminal defendant.” *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in the judgment); see also *Tyson v. Arizona*, 481 U.S. 137, 149 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The death penalty thus may not be imposed on those whose “crimes cannot be said to have reflected a consciousness materiality more ‘depraved’ than that of any person guilty of murder,” *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980), but must be reserved for “a narrower category” of the most culpable offenders. *Atkins*, 536 U.S. at 319. Because certain classes of defendants cannot reliably be said to fall within that narrow category, they warrant a categorical exemption from the death penalty. See, e.g., *id.* at 321; *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality) (those under the age of 16); *Ford v. Wainright*, 477 U.S. 399, 409-410 (1986) (the insane).

The Supreme Court held in Atkins that, in light of the constitutional command that only “the most deserving” may be executed, the mentally retarded could not constitutionally be sentenced to death. 536 U.S. 319. Although the mentally retarded “frequently know the difference between right and wrong and are competent to stand trial,” they are less blameworthy because they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others”; they “act on impulse”; and they are likely to be influenced by others. Id. at 318. Moreover, due to those deficiencies, “mentally retarded defendants in the aggregate face a special risk of wrongful execution,” and case-by-case consideration of mental retardation as a mitigating factor cannot ensure that death sentences will be proportionate to their personal culpability. Id. at 321. As discussed below, the same factors that Atkins held require the mentally retarded to be exempt from the death penalty also apply to those with mental capabilities under the age of 18.

Experience and common sense tell us that compared to adults, adolescents have a significantly diminished capacity for reasoned judgment, for understanding and appreciating the consequences of their choices, and for managing their emotions and controlling their behavior. “Our history is replete

with laws and judicial recognition that minors ... generally are less mature and responsible than adults. Particularly ‘during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment’ expected of adults.” Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) (quoting Bellotti v. Baird, 443 U.S. 662, 635 (1979)). As to adolescents, research in developmental psychology and neurology over the last 15 years confirms that common-sense judgment.

Perhaps the most striking evidence of adolescents’ immature judgment and inadequate ability to control their impulses is their behavior. As any observer of teenagers would attest, adolescents “exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking” compared to adults¹. Indeed, “reckless behavior [is] virtually a normative characteristic of adolescent development.”² Adolescents’ risky behavior frequently includes criminal activity - so much so that “it is statistically aberrant to refrain from crime during

¹ L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *Neurosci. & Biobehav. Rev.* 417, 421 (2000)

² Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Dev. Rev.* 339, 344 (1992)

adolescence.”³ Both violent crimes and less serious offenses “peak sharply” in late adolescence and “drop precipitously in young adulthood.”⁴

Adolescents are reckless at least in part because they do not perceive and evaluate the costs and benefits of their actions in the same way that adults do.⁵

Adolescents may weigh risks and benefits differently than adults would and are likelier to discount risks. Compared to adults, adolescents focus more on opportunity for gains, and less on protection against losses, in making decisions.⁶

Adolescents’ more limited time horizons also impair their decision-making ability. By definition, adolescents have less life experience on which to draw.⁷ Moreover, adolescents are less able than adults to project themselves into the future; the ability to envision and plan for the future is still developing during

³ Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *Psych. Rev.* 674, 685-686 (1993)

⁴ *Id.* at 675.

⁵ See, e.g., Arnett, *supra* note 2, at 350-353.

⁶ See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1012 (2003).

⁷ See, e.g., Arnett, *supra* note 2, at 351-352 (noting that adolescents’ more limited life experience makes it less likely that they will fully apprehend possible negative consequences of their actions).

late adolescence.⁸ Adolescents' greater uncertainty about their futures may lead them to "discount the future more than adults do and to weigh more heavily short-term consequences of decisions," impairing their ability to assess risks and to make mature judgments about their behavior.⁹ Simply put, adolescents live for the present - and are less likely to appreciate the future consequences of their actions - because they are less able than adults to see beyond the present.

⁸ See, e.g., Jari-Erik Nurmi, *How Do Adolescents See Their Future?: A review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 28-29 (1991) (the ability to plan for the future continues to develop until the early twenties).

⁹ Steinberg & Scott, *supra* note 6, at 1012.

The ability to gauge risks and benefits accurately, the ability to envision the future, and the ability to resist impulses and control emotions are critical components of psychosocial maturity, necessary in order to make mature, fully reasoned decisions. Late adolescents have not fully developed these abilities and hence lack an adult's capacity for reasoned judgment.¹⁰ “[I]t is clear that important progress in the development of [psychosocial maturity] occurs some time during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions.”¹¹

Scientific advances in recent years, establishing that late adolescents' brains are still physically immature, provide new insight into their well documented psychosocial immaturity.

Research using magnetic resonance imaging (MRI) technology to examine the development of the brain over time has shown that the frontal lobes of the brain, which govern the higher-order cognitive functions, are not yet fully developed in adolescents.”As the seat of intentionality, foresight, and planning, the frontal lobes are the most uniquely ‘human’ of all the components of the human

¹⁰ See, Elizabeth Cauffman & Lawrence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 749 (2000)

¹¹ Id. at 758.

brain.”¹² The frontal lobes, and particularly the area of the frontal lobes known as the prefrontal cortex, are often referred to as the “CEO” of the brain, in charge of the brain’s “executive functions.”¹³ Fully developed and properly functioning frontal lobes play a critical role in a person’s capacity to be a rational moral actor, capable of mature decision-making. The frontal lobe is precisely the part of the brain that is not yet fully developed in late adolescence.

Based upon developments in research and understanding of the maturation process in the brains of adolescents - knowledge which was unavailable when Martin Grossman was tried - it is clear that at age 19, Martin Grossman’s ability for reasoned judgement and self control was deficient. Martin Grossman’s brain was not fully formed at age 19.

Martin Grossman did not possess the mental and emotional ability to not act as he did. In light of the research and the study by Gotag et al, which was released for publication on May 17, 2004, it is clear that Mr. Grossman, at age 19, did not have the capacities for self control and reflection that a fully developed adult would possess. An evidentiary hearing is necessary as retained experts are able to fully explain how the findings of recent research studies explain Martin

¹²Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23 (2001).

¹³ *Id.* at 23-26.

Grossman's behavior the day Parks was killed. The studies - which were not available at the time Mr. Grossman was tried - and the explanation by experts in the fields of psychiatry and psychology will elucidate for the Court how Mr. Grossman was under an extreme mental and emotional disturbance at the time of the offense.

Had the jury known about the newly discovered evidence, the jury would have found the age mitigating circumstance and Martin Grossman would not have been sentenced to the death penalty. Furthermore, the jury could have considered statutory mitigation that Mr. Grossman was under an extreme mental and emotional disturbance at the time of the offense.

CONCLUSION AND RELIEF SOUGHT

Martin Grossman requests that the Court remand this case to the circuit court for an evidentiary hearing. In the alternative, Mr. Grossman requests that the Court vacate the sentence of death in light of the newly discovered evidence and the decisions in the Simmons and Urbin cases.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 9th day of December, 2005.

RICHARD E. KILEY
Fla. Bar No. 0558893

STAFF ATTORNEY
JAMES VIGGIANO, JR.
Fla. Bar No. 0715336
CAPITAL COLLATERAL
REGIONAL COUNSEL
MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

Copies:
Honorable Robert Beach
Circuit Court Judge
1 Beach Drive SE
St. Petersburg, FL 33701

Carol M. Dittmar
Assistant Attorney General
Concourse Center 4
3507 E. Frontage Rd., Suite 200
Tampa, FL 33607

Doug Crow
Assistant State Attorney
14250 49th Street North
Clearwater, FL 33762-2800

Martin Grossman
DOC #089742; P3226S
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing INITIAL BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

RICHARD E. KILEY
Fla. Bar No. 0558893

STAFF ATTORNEY
JAMES VIGGIANO, JR.
Fla. Bar No. 0715336
CAPITALCOLLATERAL
REGIONAL COUNSEL
MIDDLE REGION
3801CorporexPark Drive, Suite
210
Tampa, Florida 33619
(813) 740-3544