# CAUSE NO.

**STATE OF TEXAS § IN THE DISTRICT COURT VS. OF**

**[Defendant] § COUNTY, TEXAS**

**MOTION TO PRECLUDE THE DEATH PENALTY AS A SENTENCING OPTION**

**Defendant’s Age and Reduced Mental Capacity Due to Low Intellectual Functioning Preclude the State from Seeking the Death Penalty**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, [insert Defendant’s name], the Defendant, by and through counsel and— pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article 1, Sections 3,10, 13, 19, and 29 of the Texas Constitution; and Articles

1.05, 1.051, 1.06, 1.09, 15.17, 16.01, 20.17, 26.04, and 26.052 of the Texas Code of Criminal Procedure—moves the Court to preclude the death penalty as a sentencing option and in support thereof would show the Court the following:

**STATEMENT OF FACTS**

[insert facts regarding Defendant’s age, history of low intellectual functioning, etc.]

[Defendant] has been indicted for the offense of \_ .

The State is seeking the death penalty.

**ARGUMENT AND AUTHORITIES**

# Introduction – The Contours of and Justifications Underlying Capital Punishment This Court should preclude death as a sentencing option because [Defendant] was only

**months past the minimum age and his low intellectual functioning places him barely over the minimum IQ required to be subject to the death penalty. Furthermore, scientific standards and currently prevailing standards of decency indicate that the minimum age requirement should be raised.**

* 1. **Basics in Capital Punishment Jurisprudence**

The Eighth Amendment to the U.S. Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The provision is applicable to the states through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam); *Robinson v. California*, 370 U.S. 660, 666–67 (1962). As the United States Supreme Court explained in *Atkins v. Virginia*, the Eighth Amendment guarantees to individuals certain rights that flow from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

The death penalty is the ultimate punishment, and as such is subject to particularly exacting constitutional constraints. Indeed, the United States Supreme Court in *Roper v. Simmons* found, “Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.” *Roper*, 543 U.S. at 568; *see also Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O’Connor, J., concurring in judgment) (discussing the

restrictions that necessarily accompany the imposition of the death penalty due to its unique nature). As such, the Eight Amendment requires a greater degree of accuracy and fact finding when the death penalty is a sentencing option than would be true in a noncapital case. *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme personal culpability makes them “the most deserving of execution.” *Atkins*, 536 U.S. at 319; *Roper*, 543 U.S. at 568.

The Texas Constitution provides even greater protection, barring the infliction of a “cruel *or* unusual punishment.” TEX. CONST. art. I, § 13 (emphasis added). In Texas, the ultimate penalty is reserved for those few incorrigibles that pose such a great threat to society that they cannot be incarcerated without fear of further violent outbursts towards others; it is that probability of future violent misconduct that a jury is called on to decide. *Nobles v. State*, 943 S.W.2d 503, 510 (Tex. Crim. App. 1992). This Court and the Court of Criminal Appeals are bound by the law to make certain that a sentence of death is not wantonly or freakishly imposed and that the purposes of Art. 37.071 are accomplished in a constitutional manner. *Ellason v. State*, 815 S.W.2d 6565 (Tex. Crim. App. 1991).

# The Evolving Nature of Capital Punishment Jurisprudence

The federal constitutional boundaries of the death penalty are determined by the Eighth Amendment’s expansive prohibition against “cruel and unusual punishments,” which must be interpreted according to its text by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. *Roper*, 543 U.S. at 560. To implement this framework, courts 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. *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)). Thus, a penalty or procedure that was permissible at one time in our nation’s history is not necessarily permissible today.

For example, the death penalty is no longer available as a punishment for the rape of an adult woman. *Furman,* 408 U.S. at 329. Similarly, the Court has struck down mandatory death sentences and the state sponsored killing of individuals with mental retardation. *See Atkins*, 536

U.S. at 304 (invalidating imposition of the death penalty against mentally retarded defendants); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (striking down mandatory death sentences for persons convicted of the first-degree murder of police officers); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding state legislation that mandated the death penalty for all convicted first- degree murderers unconstitutional).3 Furthermore, the Court has asserted that the use of the death penalty against juveniles constitutes impermissible cruel and unusual punishment. *Roper*, 543 U.S. at 570–71 (extending *Thompson* to all juvenile offenders under age 18); *Thompson*, 487

U.S. at 833–38 (holding that the Eighth Amendment prohibits the death penalty for juveniles under age 16). Clearly, the contours of the Eighth Amendment continue to mature in response to our society’s developing views on how best to achieve the purposes of this severe form of punishment.

3Defendant adopts all the arguments made *supra* with respect to a state constitutional claim. Although Defendant has primarily cited federal Eight Amendment authority herein, he intends that this Court should separately consider his claim under the Texas and U.S. Constitutions. Particularly noteworthy is the fact the Texas Constitution proscribes “Cruel or unusual punishments,” while the U.S. Constitution proscribes “Cruel and unusual punishments.” *Compare* U.S. Const. amend. VIII, *with* Texas Const. Art. 1, § 13. Obviously, despite apparent implicit claims to the contrary by courts and commentators, the Texas Constitution—based on its plain language—was intended to offer broader protections than the U.S. Constitution. *Cf. People v. Anderson*, 493 P.2d 880, 883–87 (Cal. 1972).

# The Dual Purposes of the Death Penalty: Retribution and Deterrence

The Supreme Court of the United States has articulated two main goals as justification for the continued imposition of capital punishment: retribution against past offenders and deterrence against future offenses. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Unless the imposition of the death penalty in a given case “measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.” *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). In order to truly support both of these goals, capital punishment must be limited to a narrow category of offenders whose “extreme culpability makes them ‘the most deserving of execution.’” *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

The severity of appropriate retribution, or “the interest in seeing that the offender gets his ‘just desserts’ . . . necessarily depends on the culpability of the offender.” *Atkins*, 536 U.S. at

319. That is, because some individuals, by reason of their personal circumstances, are less morally blameworthy for their actions than would otherwise be the case, such individuals do not merit the most severe forms of retribution. Indeed, the imposition of capital punishment is to be restricted to “a narrow category of the most serious crimes.” *Id.* Furthermore, the death penalty is not proper unless the offender’s crimes are particularly heinous, reflecting “a consciousness materially more ‘depraved’ than that of any person guilty of murder.” *Id.* (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

Similarly, the deterrent effect—that is, “the interest in preventing capital crimes by prospective offenders”—of any given punishment depends on a potential criminal’s ability to

comprehend the possibility of that punishment and control his criminal conduct based on that understanding. *Atkins*, 536 U.S. at 319. Thus, the likelihood that a particular offender or class of offenders has made some “cost–benefit analysis that attaches any weight to the possibility of execution” is relevant to the consideration of whether the death penalty is appropriate in that situation. *Roper*, 543 U.S. at 572 (quoting *Thompson*, 487 U.S. at 837). This is because the underlying theory of deterrence in death penalty jurisprudence is “predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.” *Atkins*, 536 U.S. at 320.

# This Court should preclude death as a sentencing option because scientific and sociological evidence indicates that the development of mature mental faculties continues well into a young adult’s mid-twenties and, therefore, an offender at age eighteen possesses the same characteristics that warrant precluding the death penalty for offenders under age eighteen. Thus, even eighteen-year-olds cannot reliably be “classified among the worst offenders” subject to capital punishment.

* 1. **Age and Capital Punishment: The Current State of the Law**

The United States Supreme Court in *Roper v. Simmons* held that the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders under 18 years old. *Roper v. Simmons*, 543 U.S. 551, 568 (2005). In so holding, the Court made the absolute finding that juveniles are “categorically less culpable than the average criminal.” *Roper v. Simmons*, 543

U.S. 551, 567 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (holding that it is unconstitutional to execute a mentally retarded person for conviction of a capital crime, based on the premise that retarded people are “categorically less culpable than the average criminal”)). This finding was based in part on a number of “objective indicia of consensus” regarding

society’s view on the death penalty: the fact that a majority of states have rejected the death penalty for juveniles; the infrequency of its use even where it remains a sentencing option; and the consistency in the trend toward abolishing the practice. *Id.* Similarly, these factors here weigh in favor of extending the *Roper* decision to include those in a position like [the Defendant]. [insert specific objective indicia of consensus among the states regarding Defendant’s circumstance]

The Court also relied largely on three general differences between juveniles and adults to demonstrate that juvenile offenders cannot, with reliability, be classified among the worst offenders deserving of retribution and subject to deterrence. First, and most significantly for our purposes, the Court considered scientific and sociological studies indicating that the underdevelopment of maturity and responsibility frequently encountered in juveniles results in faulty decisionmaking. *Id.* at 569. Thus, the Court reasoned, because youth are so susceptible to immature or reckless behavior to begin with, “their irresponsible conduct is not as morally reprehensible as that of an adult” would be. *Id.* at 570. The Court further noted the reflection of these characteristics in state legislation: “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.” *Id.*

Second**,** the Court recognized that youth is not merely a chronological fact. Rather, it is a time and condition of life during which a person may be most susceptible to influence and to psychological damage. This is explained in part by the fact that juveniles generally have less control or experience with control over their own environment. *See id.* (citing L. Steinberg &

E.S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished*

*Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.”)).

Third**,** the Court recognized the reality that juveniles still struggle to define their personal character and identity, and the attributes that will define their personality are therefore not yet fixed. Thus, it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. *Id.* Instead, there is a greater chance for deficiencies in the character of a juvenile offender to be reformed, such that he would not constitute a continuing threat to society.

Thus, the Court in *Roper* relied on three basic characteristics of youth to justify the preclusion of juveniles from capital punishment as a matter of law. *Roper*, 543 U.S. at 569–71. What was not known to the Court at the time was that the protection so rightfully afforded individuals *under* 18 years of age is just as necessary for young adults *at* 18 years of age.

# A Logical and Natural Extension of Current Law

The evolving standards of decency marking the progress of a maturing society now require that the protection afforded in *Roper v. Simmons* to those under 18 years of age be extended to young adults who are 18 years old at the time of the offense. This is because **the increasing body of respectable scientific and sociological evidence on the subject of brain development indicates that all the reasons discussed above remain persuasive in the case of young adults at age eighteen, and even well into their twenties.** That is, young adults well beyond their eighteenth birthday exhibit clear scientific signs of 1) underdeveloped levels of maturity and decisionmaking ability; 2) susceptibility to outside influence; and 3) evolving

personality and character traits. All of these elements undermine the basic goals of retribution and deterrence in applying the death penalty to eighteen-year-old offenders. Furthermore, the practical application of these factors can already be seen in many of our prevailing laws. Therefore, these young adults cannot with any modicum of reliability be said to have the extreme culpability that puts them within the category of the “worst offenders” who are “most deserving of execution.” *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005).

1. *Evidence of Neurological Development of Young Adults*

Although brain development during young adulthood has not long been the subject of extensive study, medical technology has advanced sufficiently in recent years such that a consensus has grown in the scientific community that the human brain does not reach a full level of maturity until at least age twenty-five.

* 1. The National Institute of Child Health and Development

In a recent study funded by a grant from the National Institute of Child Health and Development, Dartmouth College researchers sought to define when human maturity sets in.1 The study was aimed at identifying how and when a person’s brain reaches adulthood. They learned that, anatomically, *significant* changes in brain structure continue *after* age eighteen. “The brain of an 18-year-old . . . is still far from resembling the brain of someone in their mid- twenties. When do we reach adulthood? It might be much later than we traditionally think.”2 The changes found to take place in the brains of individuals well beyond the age of 18 were localized to regions of the brain known to integrate emotion and cognition. Specifically, these are areas that take information from our current body state and apply it for use in navigating the

1 Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUMAN BRAIN MAPPING 766 (2005).

2 *Id.*

world.3

For our purposes, these findings bear on all three of the vital differences between children and adults addressed by the *Roper* Court. That is, the fact that the brain structure develops significantly after age eighteen and into the mid-twenties indicates that individuals in this age range have underdeveloped physical capacities for maturity and decisionmaking. It further suggests that one’s personality traits continue to develop after his or her eighteenth birthday. Similarly, the finding that extensive changes took place in the areas of the brain responsible for emotion, cognition, and navigation shows that the thoughts and actions of individuals older than eighteen may still be susceptible to outside pressures because they are still not fully capable of processing information. This is only the beginning in the quest to fully understanding the transition into true adulthood and maturity, but already there is further evidence that supports the findings of this study.

* 1. The Young Adult Development Project

The Young Adult Development Project was created by the Massachusetts Institute of Technology (MIT) in 2005 to analyze, distil, and disseminate key findings about young adult development. Defining “young adulthood” as the years between 18 and 25, the project focused on identifying research conclusions about which there is **widespread agreement across disciplines and researchers**. Their findings, therefore, can truly be seen as representing respected, prevalent views within the scientific community.

Information made public by MIT indicates that the brain is not fully developed until an individual reaches 25 years old:

3 *Id.*

According to recent findings, the human brain does not reach full maturity until *at least* the mid-20s. The specific changes that

follow young adulthood are not yet well studied, but it is known that they involve increased myelination and continued adding and pruning of neurons. As a number of researchers have put it, “the rental car companies have it right.” The brain isn’t *fully* mature at 16 when we are allowed to drive, or at 18 when we are allowed to vote, or at 21 when we are allowed to drink, but closer to 25 when we are allowed to rent a car.4

Vitally, according to the research findings, “Consensus is emerging that an 18-year-old is not the same person she or he will be at 25, just as an 11-year-old is not the same as he or she will be at

1. They don’t look the same, feel the same, think the same, or act the same.”

Naturally, this recent information sheds new light on the law as applied in *Roper v. Simmons*. The scientific data shows the lack of maturity that the Court found in persons under age 18 extends much further than was previously thought. The consensus also indicates that the personal identity and character of young adults continues to change substantially between the ages eighteen and twenty-five. These facts require that the law be extended so as to prevent an arbitrary distinction from being drawn between two groups of people, neither of which is less deserving of protection from unduly harsh punishment than the other. At a minimum, the science evidences the Court’s error in drawing a rigid cutoff line at an individual’s eighteenth birthday.

* 1. The MacArthur Juvenile Capacity Study

Recently, members of the MacArthur Foundation Research Network on Adolescent

4 This information is available at the official website of the Massachusetts Institute of Technology, Young Adult Development Project, <http://hrweb.mit.edu/worklife/youngadult/youngadult.pdf>(last visited Aug. 24, 2009) (emphasis added).

Furthermore, rental car companies’ rates are based on statistical evidence: “The reason that car rental rates are so much lower for people age 25 and over is that this is the age, statistically speaking, when drivers become much safer.” <http://www.carinsurancerates.com/news/25-will-my-auto-insurance-> rates-go-down-when-i-turn-25.html. Moreover, car insurance rates drop when one reaches 25: “Since drivers 25 and over are responsible for far fewer accidents and claims, most people see their insurance premiums drop when they turn 25.” *Id.*

Development and Juvenile Justice conducted a study designed to examine the effect of age differences on a variety of both cognitive and psychosocial capabilities. Specifically for current purposes, they sought to investigate the relative maturity of adolescents compared to adults in order to assess attendant notions of criminal blameworthiness.5 In so doing, they first acknowledged the abundant literature indicating that characteristics such as “impulsivity, sensation seeking, future orientation, and susceptibility to peer pressure” continue developing well beyond adolescence and into young adulthood.6

Next, the researchers distinguished cognitive functioning, or the brain systems that facilitate basic information processing and day-to-day reasoning, from psychosocial functioning, or the systems underlying more advanced executive functions such as those prevalent in a criminal setting. The study found that the former are essentially developed by age 16. However, they determined that juveniles’ capacity for the mental functioning responsible for criminal activity, “even at the age of 18, is significantly less mature than that of individuals in their mid- 20s.”7 Furthermore, they found **no significant difference in psychosocial maturity between**

5 Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham & Marie Banich, *Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 AM. PSYCHOLOGIST 583 (2009). The study was conducted largely in response to allegations that the American Psychological Association (APA) had set forth inconsistent opinions on youth development, claiming on the one hand that adolescents were mature enough to make their own decisions regarding abortion, while asserting on the other that juveniles were insufficiently developed to possess the personal culpability required to merit capital punishment. *Id.* at 583–85. As evidenced by the study, these claims are in fact consistent, as the cognitive maturity required for medical decisionmaking is reached several years before the psychosocial maturity required for criminal culpability. *Id.* at 593.

6 *Id.* at 587 (citing Elizabeth S. Scott, Dickon Reppucci & Jennifer Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995); Laurence Steinberg &

Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision- Making*, 20 LAW & HUM. BEHAV. 249 (1996)).

7 *Id.* at 592.

**individuals ages 16–17 and those ages 18–21**.8 Ultimately, the study concluded that, “whereas adolescents and adults perform comparably on cognitive tests measuring the sorts of cognitive abilities . . . that permit logical reasoning about moral, social, and interpersonal matters[,] adolescents and adults are not of equal maturity with respect to the psychosocial capacities listed by Justice Kennedy in the majority opinion in *Roper*—such as impulse control and resistance to peer influence.”9

These findings are clearly significant as they go directly to the issues discussed by the *Roper* Court as distinguishing adults from juveniles for purposes of criminal culpability. Indeed, as the MacArthur researchers noted, psychosocial abilities such as “[r]esisting peer influence, thinking before making a decision, and considering the future consequences of one’s actions are clearly more important in criminal decision making.”10 Thus, these mental processes, which the study found juveniles less capable of performing, are directly parallel to the character traits recognized by the Court as absolving individuals under age 18 from criminal liability. *See Roper*

1. *Simmons*, 543 U.S. 551, 569–71 (2005). In order to keep the legal treatment of juveniles in line with the most accurate and current scientific evidence of psychological development, then, these protections should be afforded to individuals beyond their eighteenth birthday as well.
   1. *Neurological Changes in More Detail*

Researchers have made great strides in developmental brain studies, and are now able to describe with greater precision the specific changes taking place in the minds of young adults. These changes affect the mental processes involved in committing capital offenses and are thus

8 *Id.* at 590–91.

9 *Id.* at 586. This comports with other studies indicating that juveniles may be capable of conceptualizing moral principles in the abstract but simply incapable of acting in accordance with them. *See infra* Part II.B.3.

10 Steinberg et al., *supra* note 5, at 586.

highly relevant in determining whether such individuals can constitutionally be put to death. The research indicates that, while young adults are experiencing new levels of sophistication in their thinking and emotional regulation, their brains are simultaneously undergoing physical changes in the very areas associated with these functions. While it is not possible to establish a causal effect, it is clear that brain activity and behavioral patterns are changing in parallel:

* + **Prefrontal cortex:** The most widely studied changes in young adulthood are in the prefrontal cortex, the area behind the forehead associated with planning, problem- solving, and related tasks. At least two things affect the efficiency in its functioning:
    1. *myelination:* the nerve fibers are more extensively covered with myelin, a substance that insulates them so signals can be transmitted more efficiently, and
    2. *synaptic pruning:* the “briar patch” of connections resulting from nerve growth are pruned back, allowing the remaining ones to transmit signals more efficiently.
  + **Connections among regions:** At the same time, the prefrontal cortex communicates more fully and effectively with other parts of the brain, including those that are particularly associated with emotion and impulses, so that all areas of the brain can be better involved in planning and problem-solving.
  + **“Executive suite”:** The cluster of functions that center in the prefrontal cortex is sometimes called the “executive suite,” including calibration of risk and reward, problem-solving, prioritizing, thinking ahead, self-evaluation, long-term planning, and regulation of emotion. It is not that these tasks cannot be done before young adulthood, but rather that it takes less effort, and hence is more likely to happen.11

The brain changes in these areas that occur through childhood and young adulthood ultimately enable a person not only to engage their survival instincts, but also to rationalize them, due to the limiting effect that signals from the prefrontal cortex have on the amygdale, which is “the key element of the neural basis of the fear behavior defense system.”12 That is, brain development allows one to understand and make an informed choice about the situations they are presented with and thereby influences how they will—and indeed, should—react to them: “This area of the brain is thought to be involved in planning complex cognitive behaviours and in the

11Young Adult Development Project, <http://hrweb.mit.edu/worklife/youngadult/youngadult.pdf> (citation omitted).

12 René Misslin, The Defense System of Fear: Behavior and Neurocircuitry, 33 CLINICAL NEUROPHYSIOLOGY 55, 60 (2003).

expression of personality and *appropriate social behaviour*.”13 Furthermore, “[A] consensus exists that a mature, well-functioning prefrontal cortex is essential for judgment, for the modulation of strong internal stimuli, and for measured reactions to internal and external stressors.”14 Therefore, when an individual’s prefrontal cortex is immature or dysfunctional, his capacity for thinking ahead, planning, controlling the expression of emotions, and learning from the consequences of his behavior are compromised. This is important because scientists know that these particular areas of the brain, “essential for mature reasoning and self-control,” are not fully developed during late adolescence.15

The developmental science thus shows that young adults are improperly equipped to make mature decisions independently of outside influences regarding their personal identity as well as how they interact with others socially. This physical incapacity of young adults without fully developed brains to rationally process and react to information in turn reinforces the notion that such individuals are not as morally culpable as their adult counterparts and, therefore, not as deserving of retribution or susceptible to deterrence. Here, [insert specific facts about Defendant]

Indeed, since the links between the development of the brain and the development of personality were first identified over a century and a half ago, more evidence has accumulated showing that the prefrontal cortex is important for moral behavior, proper decisionmaking, and appropriate action in social situations. For example, scientists at the University of Iowa

13 Brain Explorer – Prefrontal Cortex, <http://www.brainexplorer.org/glossary/prefrontal_cortex.shtml>(last visited Aug. 24, 2009) (emphasis added).

14 Dorothy Otnow Lewis, Catherine A. Yeager, Pamela Blake, Barbara Bard & Maren Strenziok, *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family*

*Characteristics of 18 Juveniles Awaiting Execution in Texas*, 32 J. AM. ACAD. PSYCHIATRY & L. 408, 409 (2004).

15 *Id.*

published a report about two adults who suffered prefrontal cortex damage when they were children. As a result of their injuries, these two adults had severe behavioral problems, including impaired decisionmaking ability and “defective social and moral reasoning.”16 Other studies show that “actual physical damage to the brain by virtue of trauma at birth, accidents, injuries, and illnesses can derail normal brain development and impair cognition, intelligence, judgment, emotional stability, and impulse control.”17 One 2004 biopsychosocial study of juveniles awaiting execution in Texas found that, of the individuals analyzed, “*every* subject demonstrated signs of prefrontal cortical dysfunction.”18 This reveals that the prefrontal cortex plays a major role in the development of appropriate moral behavior. Therefore, an incompletely developed prefrontal cortex, as is present in young adults well beyond age eighteen, may be insufficiently capable of making proper moral decisions. As such, these young adults are less morally culpable for their actions, so extreme retribution against them is not warranted.

* + 1. *The Convergence of Youth and Mental Disability*

Mental disabilities are known to have particularly harmful effects on juveniles. Anything from attention deficit-hyperactivity disorder and poor school performance to schizophrenia and bipolar disorders can manifest itself in violent outbursts, and this proclivity is especially strong in juveniles. Indeed, “almost every kind of psychiatric illness in children and adolescents can manifest itself in antisocial, even violent, behavior.”19 A major problem arises when, as is too often the case, such adolescents are simply dismissed as conduct disordered rather than being given the treatment they need.

16 Steven W. Anderson, Antoine Bechara, Hanna Demasio, Daniel Tranel & Antonio R. Demasio, *Impairment of Social and Moral Behavior Related to Early Damange in Human Prefrontal Cortex*, 2 NATURE NEUROSCIENCE 1032 (1999).

17 Lewis et al., *supra* note 14, at 414.

18 *Id.* at 415 (emphasis added).

19 *Id.* at 425.

As discussed above, researchers have proven that, “[b]ecause of frontal lobe immaturity, all adolescents have some difficulty making sound judgments and reining in impulses and emotions.”20 In other situations, juveniles have been shown to be capable of conceptualizing moral principles but simply unable to act in accordance with them. Furthermore, it is clear that “not all brains have the same capacity to judge consequences and monitor and control behavior.”21 This creates a serious dilemma. Juveniles are incapable of carrying out the level of decisionmaking required of adults (and inherent in a capital situation where a young man or woman is tried as an adult), and psychological, neurological, and intellectual impairments compound this inability to control one’s behavior. Therefore, when frontal lobe immaturity is complicated by mental disability, it is exceedingly difficult to justify attributing the level of personal culpability required to sentence an individual to death.22 In other words, when one does not have the mental capacity to both identify and reflect upon basic morals and to control the impulses associated therewith because of his age and diminished mental capacity, he cannot be included in the category of the “worst offenders” who are “most deserving of execution.” *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005).

* + 1. *Existing Recognition of the Continued Development in Young Adults*

The Court in *Roper* recognized that various state laws suggest the immaturity of juveniles under age 18, for example by prohibiting such individuals from voting, serving on juries, or marrying without parental consent. *Roper v. Simmons*, 543 U.S. 551, 569 (2005). However, many state and federal laws recognize the progression into true adulthood by setting minimum age requirements much higher. This is relevant because “[t]he reasons why juveniles are not

20 *Id.* at 426.

21 *Id.* at 427.

22 For more on mental disability based on low intellectual functioning, see *infra* Part III.

trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.” *Roper*, 543 U.S. at 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). Clearly, an individual’s level of responsibility and maturity does not peak on one’s eighteenth birthday, but extends well beyond that date. Abundant examples demonstrate society’s recognition of young adults into their mid- twenties and beyond as less culpable than their older counterparts, and therefore less deserving of retribution:

* + Our history dating back to the time of the founding fathers represents that age is consistent with increased responsibility. The U.S. Constitution asserts, “No Person shall be a Representative who shall not have attained to the Age of twenty five Years ”

U.S. CONST. art. I, § 2, cl. 2. Furthermore, it states, “No person shall be a Senator who shall not have attained to the Age of thirty Years . . . .” U.S. CONST. art. I, § 3, cl. 3. Finally, the presidency requires that one attain the “Age of thirty-five Years.” U.S. CONST. art. 2, § 1, cl. 5.

* + Even the selective service still recognizes the distinction between teenagers and twenty- year old adults, as evidenced by its age characterizations in draft priority determinations:

The lottery would establish the priority of call based on the birth dates of registrants. The first men drafted would be those turning age 20 during the calendar year of the lottery. For example, if a draft were held in 1998, those men born in 1978 would be considered first. If a young man turns 21 in the year of the draft, he would be in the second priority, in turning 22 he would be in the third priority, and so forth until the year in which he turns 26 at which time he is over the age of liability. Younger men would not be called in that year until men in the 20-25 age group are called.23

* + The National Minimum Drinking Age restricts funding for states that allow the sale of

23 Office of Public and Intergovernmental Affairs, Selective Service System, Fast Facts 1 (2009),

*available at* [http://www.sss.gov/FactSheets/FSlottery.pdf.](http://www.sss.gov/FactSheets/FSlottery.pdf)

alcohol to persons under the age of twenty-one. 23 U.S.C. § 158 (2008).

* + Federal firearm laws prohibit any licensed importer, manufacturer, dealer, or collector to sell handguns to any individual who is less than twenty-one years of age. 18 USCS

§ 922(b)(1) (2008).

* + Federal courts may expunge crimes for simple possession of a controlled substance if, upon the discharge of such person and dismissal of the proceedings against him, he was not over twenty-one years of age. 21 U.S.C. § 844 (2008). At the same time, we protect young adults by increasing penalties for those convicted of distributing controlled substances to people under the age of twenty-one. 21 U.S.C. § 859 (2008). Thus, there is simultaneously a level of forgiveness permitted for individuals under twenty-one who succumb to poor youthful decisionmaking by possessing drugs (decreased retribution), as well as a heightened level of harshness in punishing individuals who take advantage of the immaturity of youth by distributing drugs to persons under twenty-one (increased retribution).

The State of Texas has exhibited through its legislation that it agrees with many of these age restrictions and, furthermore, has created many of its own restrictions:

* + State law allows rental car companies to set minimum age requirements for authorized drivers. TEX. BUS. & COM. CODE § 91.001 (2007). Many car rental companies rent only to drivers of 25 or older, or charge additional fees if they rent to younger drivers.
  + The bailiffs for certain courts in the state of Texas must be at least twenty-one years of age. TEX. GOV’T CODE § 53.004 (2007).
  + Operators and passengers on motorcycles under the age of twenty-one are required to

wear protective headgear. TEX. TRANSP. CODE § 661.003 (2007).

* + A person under the age of twenty-one may not purchase an alcoholic beverage. TEX. ALCO. BEV. CODE § 106.02 (2007). Furthermore, the law allows for the expungement of any convictions for alcohol offenses dating from when the Defendant was under twenty- one. TEX. ALCO. BEV. CODE § 106.12 (2007).
  + The eligibility to carry a concealed hand-gun requires that a person be at least twenty-one years of age. TEX. GOV’T CODE § 411.172 (2007).
  + A person who is younger than 21 years of age may not be issued a public fireworks display permit. TEX. OCC. CODE § 2154.201 (2007).
  + Twenty-one is the minimum age for obtaining a license as a law enforcement officer.

TEX. OCC. CODE § 1701.309 (2007). Several district director positions similarly require candidates to be twenty-one years of age. TEX. LOC. GOV’T CODE § 383.042, 386.062 (2007); TEX. SPEC. DISTS. CODE §§ 1010.052, 1060.053, 4501.052, 6601.053, 9003.052

(2007). Applicants for licenses to practice dentistry or for Personal Protection Officer Authorization must also meet such age requirements. TEX. OCC. CODE §§ 256.002, 1702.204 (2007).

* + The Insurance Code relegates its definition of dependency to “child[ren] younger than 25 years of age.” TEX. INS. CODE § 1251.152 (2007).

# By all means, this list is not exhaustive.

It is also worth noting that the United States Department of Justice (Bureau of Justice Statistics) reports that as of December 31, 2007, there was only one prisoner 19 years of age or younger under sentence of death, and only 1.3% of prisoners under sentence of death were

between the ages of 20 and 24. In other words, as of December 31, 2007, 98.7% of all prisoners under sentence of death were 25 years of age or older. Furthermore, only 10.7% of prisoners under sentence of death at that time were 19 years old or younger at the time of their arrest.24

This shows that the scientific evidence discussed above is already reflected in the Justice System. As such, the “evolving standards of decency that mark the progress of a maturing society” already suggest extending the rule in *Roper v. Simmons* to protect offenders who are 18 years old at the time of their offense. Furthermore, it means that such an extension would *not* significantly undermine capital punishment as we know it. Rather, it would simply render the rule more consistent with the underlying science and practice and, as such, more constitutionally sound.

* + 1. *Consequences of the Scientific and Sociological Data*

Clearly, great strides in the scientific research, including neurological studies, have taken place in the intervening years since landmark death penalty cases such as *Roper* and *Atkins* were decided. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). Based on this research, it is now evident that the proper point at which to distinguish between a juvenile and an adult for purposes of the death penalty lies well after an individual’s eighteenth birthday. The research places the age of adult maturity much higher than had previously been considered, and it is due to this that **pursuant to *Atkins*, *Thompson*, and *Roper*, the death penalty is a disproportionate punishment for young adults who were 18 years old at the time of the offense.** This is a logical, consistent, and imperative extension of the decision in *Roper* not to exact such extreme punishment on those who are not considered to be *fully* mature, and thus fully morally responsible for their actions.

24 Bureau of Justice Statistic, Capital Punishment, 2007, <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/> tables/cp07st07.htm (last visited Aug. 25, 2009).

Not only is the scientific evidence on this point persuasive, but it is also clear that there are many areas where our own society has already come to rely on experience to reach the conclusion that 18 is not the age at which we can presume individuals are fully mature. Even the Court in *Roper* acknowledged that the “qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Roper v. Simmons*, 543 U.S. 551, 574 (2005). Despite recognizing this inherent inability to classify an individual’s maturity level based solely on his or her physical age, however, the Court asserted that a line had to be drawn. The Court decided that this line should fall on an individual’s eighteenth birthday because that “is the point where society draws the line for many purposes between childhood and adulthood.” *Id.* However, social forces have recognized the immaturity of youth well into their twenties, as evidenced by numerous state and federal laws.

In sum, national and state legislatures have already recognized that individuals older than eighteen face the same concerns that the Court decided prohibited the state from seeking the death penalty against those under eighteen. Taken together with the new scientific information becoming available to us, it is imperative that the rule in *Roper v. Simmons* be extended to protect anyone whose neurological development is incomplete. This holds true even if it involves extending the protection of the law beyond the age to which scientific understanding of human development initially led the Court to offer this protection.

# Individuals’ circumstances [this section only to be included in cases where the client has suffered abuse/ been addicted to drugs / any other specific factors mentioned below apply to him]

Defendants in capital cases are given wide latitude to raise “any aspect of [their] character or record and any of the circumstances of the offense” as mitigating factors suggesting

that a sentence less than death is appropriate. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Here, [Defendant’s] personal circumstances strengthen an already solid body of evidence that his age should prevent the state from ordering his execution. This is due to the fact that he [personal circumstances] . The research shows that this is likely to have substantially hindered or even halted his brain development. The following are more findings by the Massachusetts Institute of Technology, available on their website.

* + Race, ethnicity, and sexual identity: When an individual is discriminated against as a result of any aspect of their identity, this can also make the developmental tasks of young adulthood more difficult, including challenges associated with belonging to an oppressed, victimized, or stigmatized group within society.
  + Illness: Any serious illness, especially mental illness, can create delays in healthy development. The high rates of depression and other mental illnesses among young adults in the U.S. are of particular concern.
  + Disabilities: Learning disabilities are a factor in development, as are differences between the learning style of the young adult and the educational approach of her or his learning environment. Here, Defendant was diagnosed as having Attention Deficit Hyperactivity Disorder and possible learning disabilities when he was seven years old. He was further diagnosed as learning disabled and placed in a special education environment less than three years later. Thus, \_
  + Substance abuse: Growing evidence points to the serious impact of chronic substance abuse on young adult development. Recent research is demonstrating ways in which

alcohol and other drugs affect the growing brain, causing damage that may or may not be possible to repair.

# [NOTE: COUNSEL SHOULD NOW INTERGRATE THE RESEARCH AND PREMISES SET OUT ABOVE AND RELATE THEM TO THE CLIENT’S CASE, WITH EXTENSIVE REFERENCE TO THE CLIENT’S INVOLVMENT IN THE CRIME THAT CAN BE RELATED TO DELAYED BRAIN DEVELOPMENT]

1. **This Court should preclude death as a sentencing option because currently prevailing standards of decency oppose the imposition of the death penalty on individuals with severely low intellectual functioning.**

The State of Texas has charged that it was the **conscious** objective or desire of [Defendant] to cause the death of and/or that he was **aware** that his conduct was reasonably certain to cause the death of .

The capacity of [Defendant] to form a conscious objective or desire is reduced by impairments in his cognitive ability. His cognitive ability has been reduced by his mental illness, which has been diagnosed as learning disabilities and low intellectual functioning .

This mental illness impairs the cognitive ability of [Defendant] in the following areas: (a)

# Mental Capacity and Capital Punishment: The Current State of the Law

1. *Mental Retardation: The Rationale of* Atkins

Execution of the mentally retarded violates the Eighth Amendment’s prohibition on the infliction of cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304 (2002). Offenders with mental retardation suffer from both subaverage intellectual functioning and significant limitations in adaptive skills. They frequently know the difference between right and wrong, and are competent to stand trial; however, “by definition” they have diminished capacity 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 others’ reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but instead diminish their personal responsibility for their actions. *Id.* at 317–18. Under this definition of mental retardation, the Supreme Court found that a categorical exclusion from capital punishment should be applied. In so holding, the Court reasoned that, first, the dual purposes of retribution and deterrence did not apply in this situation and, second, that mentally retarded persons’ reduced cognitive capacity justifies categorically exempting them from the death penalty. *Id.* at 318–20.

As discussed above, in upholding the death penalty as generally permissible under the Eighth Amendment, the Supreme Court found that it serves the dual social purposes of retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *see also supra* Part I.C. Regarding retribution, the degree of corresponding punishment “necessarily depends on the culpability of the offender.” *Atkins*, 536 U.S. at 319. Offenders whose reasoning capacities render them less than fully culpable for their crimes are not eligible for the death penalty25 because “they do not act with the level of moral culpability that characterizes the most serious

25 *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (finding that “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity”); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (prohibiting imposition of the death penalty against juveniles under age sixteen).

adult conduct.” *Atkins*, 536 U.S. at 306. As a result of this reduced personal responsibility, such actions do not merit the death penalty as appropriate retribution. This rationale applies with particular force to mentally retarded individuals because of their diminished mental capacity, including their disabilities in “areas of reasoning, judgment, and control of impulses.” *Id.* Thus, because the mentally retarded do not have the mental faculties necessary to appreciate the severity of their actions, the death penalty is not a suitable consequence.

Additionally, the social purpose of deterrence is not served by executing the mentally retarded. The mentally retarded suffer from impairments in their cognitive functioning such as “the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses.” *Id.* at 320. Thus, they are less likely to be able to process the information that the death penalty is a possible punishment. As a result, people with mental retardation cannot examine their behavior, evaluate the possible punishments, and “control their conduct based upon that information” in the same manner as other adults. *Id.* This inability to conform conduct to societal standards undermines the identified purpose of deterrence and makes the execution of persons with mental retardation nothing more than “the purposeless and needless imposition of pain and suffering.” *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

The second major rationale discussed by the Court was that the reduced mental capacity of the mentally retarded renders them inappropriate candidates for the ultimate punishment. Apart from the effect that mental retardation has on an individual’s level of personal culpability and ability to be deterred from murderous conduct, it also hinders various practical and procedural aspects of their prosecution. For example, mentally retarded defendants may be more

likely to give false confessions or appear unremorseful, and less able to give meaningful assistance to their counsel or provide compelling testimony on the witness stand. Moreover, evidence of mental retardation may be a “two-edged sword,” possibly being construed by a jury not as a mitigating factor but instead as an aggravating factor of future dangerousness. *Atkins*, 536 U.S. at 321. Thus, according to the Court, mentally retarded defendants are subject to “a special risk of wrongful execution.” *Id.*

As evidenced by basic logic, and with support from subsequent Supreme Court precedent, many of these factors also apply to individuals who are not quite mentally retarded but nevertheless suffer from impaired intellectual functioning.

1. *Low Intellectual Functioning: The Impact of* Tennard

In *Tennard v. Dretke*, the United States Supreme Court expanded upon its ruling in *Atkins*, holding that evidence of “impaired intellectual functioning is inherently mitigating.” *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). The Court further maintained that this held true regardless of whether such impairment was a severe and permanent condition or whether the offender could establish a nexus between his mental capacity and his crime. Thus, the Court asserted, “[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime.” *Id.* This was based in large part on the Court’s earlier finding in *Atkins* that the mentally retarded are “categorically less culpable than the average criminal,” irrespective of the relationship between their mental retardation and their crime. *Atkins*, 536 U.S. at 316.

The underlying situation in *Tennard* dealt with the special issues presented to Texas sentencing juries at the time to help them establish whether to impose life imprisonment or death.

Under that system, Texas courts instructed juries to consider both the deliberateness of the offender’s conduct and the future dangerousness he posed. *Tennard*, 542 U.S. at 277. The Court, however, found these special issues insufficient to allow the factfinder to give full effect to evidence of low intellectual functioning. For one thing, evidence of low IQ might actually have an aggravating effect regarding future dangerousness. *Id.* at 288–89. Even more importantly for the present discussion, however, the Court found that “[i]mpaired intellectual functioning has mitigating dimension beyond the impact it has on the individual’s ability to act deliberately.” *Id.* at 288.

This is extremely important because the level of appropriate retribution in a given case is a function of the offender’s personal culpability and, according to the Supreme Court, “[p]ersonal culpability is not solely a function of a defendant’s capacity to act ‘deliberately.’” *Id.* at 279 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)). Rather, evidence of low intellectual functioning is itself directly related to personal culpability. *Id.* at 288. Thus, impaired intellectual functioning—even of the sort that does not rise to the level of mental retardation—must be given meaningful mitigating effect. Furthermore, because such evidence is “inherently mitigating,” it must be taken into account and is no less relevant for consideration by this Court at the pretrial stage than by a jury during sentencing.

# A Logical and Natural Extension of Current Law

As discussed above, the constitutional parameters of capital punishment are defined in large part by the “evolving standards of decency that mark the progress of a maturing society.” *Roper v. Simmons*, 543 U.S. 551, 561 (2005), *see also supra* Part I.B. These evolving standards

of decency now require that the protection afforded in *Atkins v. Virginia* to the mentally retarded be extended to individuals with low intellectual functioning at the time of the offense. There are definite correlations between the impairments suffered by the mentally retarded and those suffered by individuals with low intellectual functioning. Both have diminished personal responsibility for their actions due to their mental impairments. Thus, both merit punishment, but not the extreme penalty. Individuals with low intellectual functioning often suffer from impairments in judgment, rationality, and the ability to foresee consequences or control behavior comparable to those suffered by the mentally retarded or juveniles. Therefore, the primary justifications for the death penalty—retribution for past crimes and deterrence of future ones— are similarly inapplicable to individuals with this level of mental functioning.

All offenders are culpable, but there are varying degrees of culpability. Our legal system, and our society, deal with these differences in culpability by meting out different punishments for different individuals, ensuring that “only the most deserving of execution are put to death.” *Atkins*, 536 U.S. at 319. As a result, the societal value of retribution “necessarily depends on the culpability of the offender.” *Id.* The diminished intellectual functioning of [the Defendant] has reduced his mental capacity in a way that is as profound as one who is impaired by retardation, and therefore, the rationale in *Atkins* is equally applicable to his situation.

1. *Extending the Caselaw Rationale from Mental Retardation to Low Intellectual Functioning*

In *Atkins*, the Supreme Court concluded that mentally retarded offenders are categorically lacking in moral blameworthiness because of their cognitive limitations and inability to control impulses. Furthermore, according to the Court’s analysis in *Atkins,* the mental culpability of an “average murderer” is insufficient to impose the death penalty. It follows that such a punishment

imposed on a less mentally culpable person is not merited, particularly when that person suffers from the same or similar disabilities as the categorically excluded mentally retarded offenders. *Atkins*, 536 U.S. at 319.

Likewise, the execution of individuals with low intellectual functioning does not serve the societal goal of deterrence. Much like juveniles, who are categorically exempt from the death penalty, persons with low intellectual functioning are not likely to make the “kind of cost– benefit analysis that attaches any weight to the possibility of execution.” *Thompson v. Okalahoma*, 487 U.S.815, 837 (1988). Furthermore, “just as it is for mentally retarded offenders, the ‘cold calculus’ of cost and benefit is ‘at the opposite end of the spectrum from behavior’” for offenders with extremely low IQ’s. *Atkins*, 536 U.S. at 319–20 (quoting *Gregg*, 428 U.S. at 186). Thus, both logic and Supreme Court precedent dictate the conclusion that the death penalty cannot serve a deterrent purpose when applied to offenders with low intellectual functioning.

1. *Low Intellectual Functioning as a Mitigating Factor*

In *Lockett v. Ohio*, the Supreme Court acknowledged the impossibility of creating a perfect procedure for imposing the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Nevertheless, the Court determined that mitigating circumstances, which may necessitate a less severe punishment, must be considered by the factfinder in order to satisfy the requirements of the Eighth and Fourteenth Amendments. In *Atkins*, the Court considered the fact that “mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Atkins,* 536 U.S. at 320–21. Thus, the fact that typical mitigating

factors are generally less available to mentally retarded defendants further supported the Court’s conclusion that the death penalty should be barred outright as a sentencing option for such defendants.

Offenders with low intellectual functioning face similar obstacles. Here, [the Defendant]

[insert specific facts about how the individual’s cooperation, countenance, demeanor affected or could have affected his pretrial preparation and trial performance] .

1. *Low Intellectual Functioning as an Aggravating Factor*

This phenomenon is reflected in *Atkins*, which illustrates that mental retardation may actually be used as an aggravating factor of future dangerousness, thereby making the defendant more likely to receive a death sentence. Defendants with low intellectual functioning face the exact same risks. This is because “impaired intellectual functioning” is inherently mitigating and, therefore, meets the definition of constitutionally relevant mitigating evidence. *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004) (Scalia, J., concurring) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282–288 (2004)).

However, similarly to mental retardation, low intellectual functioning may actually be used as an aggravating fact in order to show future dangerousness. For example, jurors may unfairly equate low IQ with future dangerousness. In this way, low intellectual functioning can be a “two-edged sword,” inappropriately engendering greater fear of future violence. *Atkins*, 536

U.S. at 321. Indeed, there is great potential for juror confusion relating to IQ issues. This unfairly biases the jury during the penalty phase of a capital trial against a defendant with low intellectual functioning, making him more susceptible to receive the death penalty. This would directly contradict Eighth Amendment values against awarding punishments disproportionate to

crimes committed. Consequently, because the Supreme Court has deemed this risk too great for the mentally retarded, and because individuals with low intellectual functioning share so many characteristics with the mentally retarded, the protection afforded to mentally retarded offenders must be extended to those with low intellectual functioning.

1. *Objective Factors Indicating Extension of* Atkins *and* Roper *is Proper*

A punishment is excessive and therefore prohibited by the Eighth Amendment if it is not graduated and proportioned to the offense. *Weems v. United States*, 217 U.S. 349, 367 (1910). A claim that punishment is excessive is judged by currently prevailing standards of decency. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). This proportionality review should be informed by objective factors to the maximum extent possible. *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991). Objective factors that were considered by the Supreme Court in *Atkins* include the “broader social and professional consensus,” as indicated by briefs and positions of the American Psychological Association and of religious communities of all faiths. *Atkins*, 536 U.S. at 316

n.21. Also to be considered are the views of “respected professional organizations and other nations that share our Anglo–American heritage and by leading members of the Western European Community. *Id.* (citing *Thompson v. Oklahoma*, 487 U.S. at 830–31). The positions of those groups whom the United States Supreme Court has mandated this Court to consider are:

1. The American Psychological Association: The APA has asked each jurisdiction that imposes the death penalty to stop until current deficiencies such as juror misunderstanding of mitigating factors and death penalty prosecutions involving persons

with serious mental illnesses are ameliorated. *See* Resolution on the Death Penalty in the United States (Aug. 2001), [http://www.apa.org/pi/deathpenalty.html.](http://www.apa.org/pi/deathpenalty.html)

1. The American Bar Association: The ABA has called for a temporary moratorium of the death penalty “unless and until [states] could ensure the fair and impartial administration of the death penalty.” The ABA also opposes the execution of the mentally retarded and of juveniles in all circumstances. *See* American Bar Association Q & A on the Death Penalty (Oct. 2000), [http://www.abanet.org/media/deathpenaltyqa.html.](http://www.abanet.org/media/deathpenaltyqa.html)
2. The American Psychiatric Association: Opposes the imposition of the death penalty “if at the time of the offense, [defendants] had a severe mental disorder or disability that specifically impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law.” *See* Position Statement, Diminished Responsibility in Capital Sentencing (Dec. 2004),<http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/Pos> itionStatements/200406.aspx.
3. The Western European Community and other members of the International Community: For example, The European Union consistently and universally opposes the death penalty in all circumstances. *See* <http://www.eurunion.org/legislat/DeathPenalty/> deathpenhome.htm. It has been stated that “international human rights norms condemn

the death penalty for defendants with severe mental illness.”26 According to a Resolution adopted by the United Nations Commission on Human Rights, all countries that still maintain capital punishment are urged “[n]ot to impose the death penalty on a person suffering from any form of mental disorder . . . .”27 This is especially pertinent, as the Court in both *Atkins* and *Roper* considered “as further evidence of contemporary standards ***the general consensus in the law of other countries and in international human rights law*** that rejected imposition of capital punishment for those with mental retardation and who were juveniles at the time of the offense.”28

1. and others [counsel should include other organizations that have taken stands on execution of the mentally disabled or individuals with low intellectual functioning]

The determination of what is “excessive” is made by viewing the standards of today, “not those at the time of the Bloody Assizes or when the Bill of Rights was adopted. The basic concept underlying the 8th Amendment is nothing less than the dignity of man—The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Atkins*, 536 U.S. at 311. Here, the evolving standards of decency as evidenced by the positions taken by so many national and international associations of experts suggest extending the limitations on the death penalty already recognized by the United States Supreme Court.

26 Winick, *supra* note **Error! Bookmark not defined.**, at 35.

27 U.N. Comm’n on Human Rights, *The Question of the Death Penalty*, ¶ 4(e), U.N. Doc. E/CN.4/RES/2001/68 (April 25, 2001).

28 Winick, *supra* note **Error! Bookmark not defined.**, at 34 (emphasis added).

# Conclusion –

The execution of one whose brain is insufficiently developed to merit personal culpability violates the dignity of man generally and this Court, specifically. Similarly, the execution of one whose culpability is diminished by low intellectual functioning is just as excessive and offensive as executing one whose capacities are impaired by mental retardation.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that this Court preclude the death penalty as a sentencing option in this case.

Respectfully submitted on this the day of ,

200 .

By:

COUNSEL FOR THE ACCUSED

State Bar No.

Address:

Telephone: ( ) -

CO-COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been furnished to counsel for the State by hand-delivery of a copy of same this the day of , 200 .