Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAMON L. CALDWELL,

Petitioner,

vs.

STANLEY PAYNE, Superintendent,
Eastern Reception, Diagnostic, and Correctional Center

Respondent.

On Petition For A Writ Of Certiorari
From The Supreme Court of Missouri

VOLUME I

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of Missouri

May Session, 2018

State ex rel. Damon L. Caldwell,

Petitioner,

No. SC96995 HABEAS CORPUS
St. Francois County Circuit Court No. 17SF-CC00153
Eastern District Court of Appeals No. ED106416

Troy Steele,

Respondent.

Now at this day, on consideration of the petition for a writ of habeas corpus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, BETSY AUBUCHON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2018, and on the 3rd day of July, 2018, in the above-entitled cause.

WITNESS my hand and the Seal of the Supreme Court of Missouri, at my office in the City of Jefferson, this 3rd day of July, 2018.

Betsy AuBuchon, Clerk

Lori S. Knaebel, Deputy Clerk

IN THE
SUPREME COURT OF MISSOURI

DAMON L. CALDWELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. _____**
	)	
TROY STEELE,	)	
	)	
Respondent.	)	

PETITION FOR A WRIT OF HABEAS CORPUS

COMES NOW petitioner, Damon Caldwell, a Missouri prisoner in respondent's custody, and petitions this Court, pursuant to Rule 91, for a writ of habeas corpus vacating his conviction for the offense of first degree murder and his sentence of life without parole. In support of this petition, Mr. Caldwell states as follows:

I.

INTRODUCTION AND FACTUAL BACKGROUND

Petitioner Damon Caldwell is currently serving a sentence of life without parole, after being found guilty for his participation in a shooting which occurred on January 28, 1995 when petitioner was only seventeen years old. (See Exh. 7). Petitioner was indicted by a Saint Louis County grand jury for one count of first degree murder in violation of § 565.020 R.S.Mo. (1994), two counts of armed

criminal action in violation of § 571.015 R.S.Mo. (1994), and one count of first degree assault in violation of § 565.050 R.S.Mo. (1994). Petitioner was appointed Gregory Oliphant, public defender, to represent him.

The case proceeded to jury trial, Judge Robert Cohen presiding, on March 04, 1996 in the Circuit Court of Saint Louis County, where petitioner was found guilty as charged on March 08, 1996. (See Exh. 7). Petitioner was sentenced to concurrent terms of life without parole for the first degree murder charge, thirty years for the first degree assault charge, and thirty years for the armed criminal action charges on May 13, 1996. (*Id.*)

Petitioner, thereafter, filed a timely notice of appeal on May 23, 1996. The Court of Appeals affirmed his convictions and sentences on direct appeal. *State v. Caldwell,* 956 S.W.2d 265 (Mo. banc 1997). Petitioner filed a timely motion for post-conviction relief, pursuant to Rule 29.15, on February 23, 1998. Post-conviction relief was denied on March 08, 1999. The denial of the post-conviction relief was affirmed after appeal on December 21, 1999.

After the Supreme Court issued its opinion in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), petitioner filed a writ of habeas corpus, pursuant to Mo. S. Ct. Rule 91, in this Court on December 06, 2012. Petitioner's state habeas corpus petition challenged his mandatory sentence of life without parole arguing that the Missouri

law imposing his first degree murder conviction violated the Eighth Amendment under *Miller* and thus required that he receive a new sentencing hearing. *Id.*

In 2013, this Court issued opinions in *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013) and *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013), both involving juveniles who were sentenced to mandatory sentences of life without parole and advancing *Miller* violations in their direct appeals. The court ordered that both men be resentenced and then provided a procedural framework for trial courts to follow in light of the fact that the Missouri legislature had not acted to amend Missouri's first degree murder statute to comport with *Miller*'s requirement of individualized sentencing.

Petitioner's state habeas corpus petition and similar petitions filed by approximately eighty other Missouri juvenile prisoners who had unconstitutional life without parole sentences languished before this Court until the United States Supreme Court issued its decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In *Montgomery*, the Supreme Court held that its decision in *Miller* is retroactive. On March 15, 2016, this Court issued blanket orders in this case and in the eighty other pending cases involving juveniles who received life without parole for first degree murder, granting habeas relief in part. Relying on a passage from the majority opinion in *Montgomery*, the Supreme Court held that a resentencing proceeding was not constitutionally required and that the proper remedy that

Missouri prisoners could seek under *Miller* would be to petition for parole after serving twenty-five years unless either the Governor of Missouri or the legislature took action to bring Missouri law in conformity with *Miller* and *Montgomery*.

Shortly thereafter, the Missouri General Assembly, on the last day of its 2016 session on May 13, 2016, passed S.B. 590. (See Exh. 6). The legislature adopted the same remedy judicially crafted by this Court in its March 15 order in this case that allowed juveniles who previously received life without parole for first degree murder to petition the parole board for a parole hearing after serving twenty-five years of their sentence. The legislation was signed into law by Governor Jay Nixon on July 13, 2016 and immediately went into effect due to an emergency clause contained within the law. On July 19, 2016, this Court issued a superseding order in petitioner's state habeas proceeding vacating its previous order of March 15, 2016. The order, citing S.B. 590, summarily denied the habeas petition.

On April 21, 2016, petitioner sought leave to file a second petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri, pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his sentence of life without parole. The Court of Appeals denied the motion on February 06, 2017.

Petitioner filed the present Rule 91 for a writ of habeas corpus in the Circuit Court of St. Francois County on August 04, 2017. The circuit court below denied the petition on February 22, 2018. (See Exh. 8). The petition was filed in the Court

of Appeals, Eastern District on February 27, 2018. The petition was summarily denied less than one day later. (See Exh. 9). The present petition is now before this Court for its consideration.

Since the enactment of S.B. 590, approximately twenty juveniles who were unconstitutionally sentenced to life without parole have petitioned the board for a parole hearing. Only three of these approximately twenty men received parole dates. Edward Ramsey received a parole date in 2021, Bradley Houston received a parole date in 2020, and Michael McRoberts received a parole date of 2022. (See Exh. 5). In every other case, the board denied parole and gave the individual inmate a four or five year setback. (See Exh. 4).

In the *James Hardy* case, Mr. Hardy was denied parole despite an exemplary prison record and the extraordinary efforts he made at rehabilitation. (See Exh.'s 1, 2, 3). As the documents attached to this petition regarding the *Hardy* case illustrate, the board has not departed from its usual practice in all cases of holding short hearings that focus almost solely on the circumstances of the crime and whether there is any opposition from the victim's family or the community. (See Exh.'s 1, 2). Thereafter, these parole denials in *Hardy* and several other cases primarily rely on the seriousness of the offense to deny parole. The board has not made changes in its modus operandi to follow the provisions of S.B. 590. (See Exh.'s 2, 4).

In the *Hardy* case and in the other cases where parole was denied to juvenile offenders under S.B. 590, the parole board clearly did not address or weigh any of the *Miller* factors nor the criteria set forth in S.B. 590 in reaching its decision. (*Id.*) In reviewing a juvenile's sentence of life without parole in order to determine whether the offender should be released, S.B. 590 requires the parole board to consider the following factors: "(1) the nature and circumstances of the offense committed by the defendant; (2) the degree of the defendant's culpability in light of his or her age and role in the offense; (3) the defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense; (4) the defendant's background, including his or her family, home, and community environment; (5) the likelihood for rehabilitation of the defendant; (6) the extent of the defendant's participation in the offense; (7) the effect of familial pressure or peer pressure on the defendant's actions; (8) the nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions; (9) the effect of characteristics attributable to defendant's youth on the defendant's judgment; and (10) a statement by the victim or the victim's family member…" S.B. 590, codified at § 563.033.2. In addition to these youth-related mitigating factors, the parole board must consider

other factors that relate not to the person's youth at the time of the offense, but have to do with circumstances during the person's incarceration.

It is clear that the board did not consider any of these statutory mitigating factors in reaching its parole decision in the *Hardy* case. (See Exh. 2). The only reasons listed for denying Mr. Hardy parole were circumstances relating to the crime itself and "community opposition." (*Id.*) By failing to follow the clear letter of the law regarding the appropriate procedures and criteria to be employed in considering juveniles such as petitioner for parole, the board's actions violated due process by depriving petitioner of his rights set forth under S.B. 590. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Based on the foregoing facts and Missouri's legislative and legal response to the *Miller* decision, Claim I of this petition will raise several interrelated Constitutional issues under the Sixth, Eighth, and Fourteenth Amendments challenging petitioner's unconstitutional conviction and unconstitutional and undisturbed mandatory sentence of life without parole. Claim II will raise a claim that S.B. 590 violates the separation of powers clause of the Missouri Constitution and § 1.160 R.S.Mo. Petitioner is confident that the Court, after fully reviewing the facts and applicable law, will conclude that habeas relief is warranted.

II.

GROUNDS FOR RELIEF

CLAIM I

PETITIONER'S FIRST DEGREE MURDER CONVICTION AND HIS MANDATORY SENTENCE OF LIFE WITHOUT PAROLE VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE PROVISIONS OF S.B. 590 AND THIS COURT'S JULY 19, 2016 ORDER WERE CONSTITUTIONALLY INSUFFICIENT TO REMEDY PETITIONER'S RIGHT TO AN ADVERSARIAL RESENTENCING PROCEEDING AND A MEANINGFUL OPPORTUNITY FOR RELEASE.

The Supreme Court, in a series of recent decisions, has held as unconstitutional sentences of life without parole ("LWOP") for all juveniles, except in rare cases in which the crime reflects irreparable corruption. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), quoting *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012); *see also Graham v. Florida*, 560 U.S. 48, 82 (2010). The court has further held that this substantive Eighth Amendment rule is retroactive. *Id.* The court found that juveniles are constitutionally different from adults for the purpose of sentencing due to three distinctive attributes that mitigate their culpability: transient immaturity, vulnerability to external forces, and character traits that are still being formed. *Montgomery*, 136 S. Ct. at 734.

The *Montgomery* decision also held that the "penological justifications for life without parole collapse in light of the distinctive attributes of youth, rendering life without parole an unconstitutionally disproportionate punishment as to all but the rarest of juvenile offenders, whose crimes reflect permanent incorrigibility." *Id.* at 734-735. In *Graham*, the court categorically forbid, under the Eighth Amendment, LWOP sentences for youth who have committed non-homicide offenses and LWOP sentences for any youth whose homicide crime reflects "unfortunate yet transient immaturity." *Id.* at 734, quoting *Miller*, 132 S. Ct. at 2465.

These cases establish that only in a "rare case" of "irreparable corruption" will a LWOP sentence be constitutionally permissible for a juvenile. This series of Eighth Amendment cases defines LWOP as a sentence of life imprisonment that denies a juvenile a meaningful and realistic opportunity for release based upon demonstrated maturity and rehabilitation. *Miller*, 132 S. Ct. at 2469. These decisions establish that the Eighth Amendment forbids a statutory scheme that imposes life sentences upon minors without appropriate consideration of their distinctive attributes based upon their youth and fails to provide them with a meaningful and realistic opportunity for release. Missouri law, as modified by S.B. 590 in response to the *Miller* decision, which was explicitly and implicitly endorsed as a constitutionally adequate remedy by the decisions of this Court, fails this constitutional test in both respects.

The decision in *Miller* made it clear that the Eighth Amendment requires resentencings to follow a certain process, considering an offender's youth and attendant characteristics in assessing the appropriate penalty. In *Montgomery*, the court clarified the substantive factors that *Miller* would require before a sentence of LWOP could be constitutionally imposed upon a juvenile convicted of murder. *Montgomery* made it clear that the Eighth Amendment precludes LWOP for juvenile offenders whose crimes reflect the transient immaturity of youth. *Montgomery*, 136 S. Ct. at 734. In addition, the court in *Montgomery* also clarified the fact that a LWOP sentence would be unconstitutional except in a very rare case where the circumstances of the crime indicate "irreparable corruption." *Id.* at 734-735.

Both *Miller* and *Montgomery* clearly require that all juveniles in this country who are currently serving mandatory sentences of LWOP, like petitioner and the approximately eighty other men and women serving such sentences in the State of Missouri, receive an adversarial resentencing procedure with the assistance of counsel and the attendant constitutional rights that a trial requires, so that the sentencer can impose a constitutional sentence that provides the juvenile with a meaningful opportunity for future release in all but the most extraordinary and aggravated homicide cases. *Miller*, 132 S. Ct. at 2469-2470, 2475.

This interpretation of *Miller*'s and *Montgomery*'s substantive Eighth Amendment requirements is further bolstered by the Supreme Court's *per curium*

opinion in *Adams v. Alabama*, 136 S. Ct. 1796 (2016). After remanding the case for a new sentencing hearing for an Alabama juvenile sentenced to LWOP, two separate concurring opinions were issued in *Adams* that clarifies the scope of the substantive constitutional requirements of *Miller* and *Montgomery*.

Justice Alito, joined by Justice Thomas noted that: "As a result of *Montgomery* and *Miller*, states must now ensure that prisoners serving sentences of life without parole for offenses committed before the age of eighteen have the benefit of an individualized sentencing procedure that considers their youth and immaturity at the time of the offense." *Id.* at 1797 (Alito, J., concurring). Justice Sotomayor's opinion, joined by Justice Ginsburg, noted that *Miller*, in addition to imposing an individualized sentencing requirement, also imposed a substantive rule that LWOP is only appropriate in the rare case where the juvenile defendant's crime reflects irreparable corruption. Justice Sotomayor also noted that such a sentence would violate the Eighth Amendment for a minor whose crime reflects "unfortunate yet transient immaturity." *Id.* at 1799-1800. As a result, Justice Sotomayor noted that *Miller* and *Montgomery* require sentencers to determine whether the petitioner's crimes reflected transient immaturity or irreparable corruption. *Id.* at 1800.

This interpretation of *Miller* and *Montgomery* is further bolstered by the Supreme Court's decision in *Tatum v. Arizona*, 137 S. Ct. 11 (2016). In *Tatum*, the court granted, vacated, and remanded a handful of Arizona juvenile LWOP cases for

resentencing in light of *Montgomery*. *Id.* The court took this course of action despite the fact that, in the aftermath of the *Miller* decision, resentencing proceedings were conducted in each of these cases in which the sentencing courts considered the juvenile's age and other attributes as mitigating factors. *Id.* at 12.

Despite this fact, Justice Sotomayor reiterated that resentencing was necessary because *Montgomery* and *Miller* require sentencing courts to consider whether the juvenile in question is a rare offender whose crimes reflect "permanent incorrigibility" or "irretrievable depravity" such that rehabilitation is impossible and LWOP is justified. *Id.* (Sotomayor, J., concurring). As a result, the court held that the Eighth Amendment requires a sentencer to determine whether "the juvenile offender before it is a child whose crimes reflect transient immaturity or is one of those rare children whose crimes reflect irreparable corruption for whom a life without parole sentence may be appropriate." *Id.* at 13. Missouri's judicial and legislative response to *Miller* and *Montgomery* does not come close to fulfilling this constitutional requirement.

In initially crafting and later ratifying the same legislative remedy embodied in S.B. 590 in response to *Miller*, this Court improperly took a single passage of *dicta* from *Montgomery* out of context and also clearly misinterpreted the State of Wyoming's statutory response to *Miller* to support its view that a resentencing proceeding is not constitutionally required by *Miller*. The Wyoming statute, cited

by the court in *Montgomery*, unlike the current Missouri law, did not eliminate resentencing of juveniles sentenced to LWOP in that state. After this statutory amendment passed, the Wyoming Supreme Court held that remands for individualized resentencing proceedings were still constitutionally required by *Miller*. *Sen v. State*, 301 P.3d 106, 125-127 & n.4 (Wyo. 2014).

It appears that Missouri is the only state that does not require its juveniles, who previously received and continue to serve unconstitutional mandatory LWOP sentences, receive resentencing hearings before the trial court. Thus, the fact that petitioner's mandatory sentence of LWOP remains undisturbed establishes that he is still serving an unconstitutional sentence. In the aftermath of *Miller* and *Montgomery*, other states have recognized that the Eighth Amendment requires a resentencing proceeding be held at which the sentencer is precluded from imposing a LWOP sentence unless a finding is made that the juvenile defendant is irreparably corrupt or permanently incorrigible. *Veal v. State*, 784 S.E.2d 403, 411-412 (Ga. 2016).

In addressing a similar issue regarding Pennsylvania's sentencing and parole laws involving juveniles who had received sentences of LWOP, a federal district court in Pennsylvania, in two decisions issued on the same day, held that Pennsylvania's refusal to order individualized resentencing proceedings by "passing the buck" to the parole board does not comport with the *Miller* and *Montgomery*

decisions. *Garnett v. Wetzel*, 2016 U.S. Dist. LEXIS 108936 (E.D. Pa. August 17, 2016); *Songster v. Beard*, 2016 U.S. Dist. LEXIS 108937 (E.D. Pa. August 17, 2016). The following passage from Judge Savage's opinion in *Songster* aptly describes the similar situation confronting this Court in this case.

> A sentencing practice that results in every juvenile's sentence with a maximum term of life...does not reflect individualized sentencing. Placing the decision with the parole board, with its limited resources and lack of sentencing expertise, is not a substitute for a judicially imposed sentence. Passing off the ultimate decision to the parole board in every case reflects an abdication of judicial responsibility and ignores the *Miller* mandate...Fixing the maximum sentence at life permits the parole board to deny parole, effectively working to imprison the defendant for the duration of his life. As long as the parole board has the authority to refuse to grant parole, life without parole remains a possibility regardless of the individual's peculiar situation.

Id. at *7.

Based on the foregoing requirements of *Miller* and *Montgomery*, this Court's ruling that the procedures and provisions of S.B. 590, which give Missouri juvenile offenders the chance to petition for parole from their mandatory LWOP sentences after twenty-five years, does not comport with Eighth Amendment standards which

require individualized resentencing procedures. Although S.B. 590 requires the Board of Probation and Parole to consider youth and the circumstances of the crime in considering whether juveniles serving LWOP sentences can be paroled, it does not impose any substantive requirements that these offenders must receive a path to freedom if the crime was based upon transient immaturity or where the defendant is not irreparably incorrigible.

Apart from guaranteeing individualized sentencing and resentencing procedures for juveniles, the *Miller* line of cases also hold that the Eighth Amendment requires that juveniles sentenced to LWOP must be afforded a meaningful opportunity to obtain release. *Miller*, 132 S. Ct. at 2475. The court did not fully provide a definition of "meaningful opportunity" in this context and instead left it to the states to comply with this constitutional requirement. *Graham*, 560 U.S. at 75. However, the Supreme Court has made it clear that for a juvenile to receive a meaningful opportunity for release, the opportunity must also be realistic. *Id.* at 82. Although S.B. 590 modified Missouri law to require the parole board to consider several factors mentioned by the court in the *Miller* line of cases in considering juveniles sentenced to LWOP for release, it is clear that Missouri's current parole laws, regulations, and procedures do not provide petitioner and those similarly-situated with any meaningful or realistic opportunity to be released from prison.

The requirement that juvenile offenders be given a meaningful opportunity for release based upon a demonstration of maturity and rehabilitation has been recognized by numerous courts around the country. *See Greiman v. Hodges*, 79 F. Supp. 3d 933, 943-44 (S.D. Iowa 2015) (denying motion to dismiss claim that parole review procedures were not compliant with *Graham* where plaintiff alleged that the parole board "failed to take account of plaintiff's youth and demonstrated maturity and rehabilitation" and relied solely on the "seriousness of the offense in denying parole"); *Maryland Restorative Justice Initiative v. Hogan*, No. 16-1021, 2017 WL 467731, at *27 (D. Md. Feb. 3, 2017) (denying motion to dismiss because plaintiffs sufficiently alleged that Maryland's parole system provided only "remote," rather than "meaningful" and "realistic," opportunities for release, including by "den[ying] parole due to the nature of their offense or their status as lifers"); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D. N.C. 2015) (denying defendants' motion for summary judgment and granting plaintiff's motion for summary judgment in part after finding that the North Carolina parole system failed to provide a meaningful opportunity for parole because the commissioners and case analysts did not "distinguish parole reviews for juvenile offenders from adult offenders, and thus fail[ed] to consider 'children's diminished culpability and heightened capacity for change'") (citing *Miller*, 567 U.S. 479); *Wershe v. Combs*, No. 12-1375, 2016 WL 1253036, at **3-4 (W.D. Mich. Mar. 31, 2016) (finding the reasoning in *Greiman*,

Maryland Restorative Justice, and *Hayden* "persuasive," and noting that the Supreme "Court's discussion of a meaningful opportunity to obtain release...suggests that the decision imposes some requirements after sentencing as well," but concluding that the evidence in that case indicated that the parole board did not consider the plaintiff's maturity and rehabilitation.).

Further, S.B. 590 did not amend or alter any of the other Missouri parole laws, under which the parole board is never required to grant any prisoner parole regardless of the circumstances, which makes a Missouri prisoner's parole entitlement, like the commutation procedure, purely an act of grace. (See Exh. 6). The current Missouri parole statutes and guidelines gives the board unlimited discretion whether or not to grant an offender parole. *See* § 217.690.1 R.S.Mo. (2010). Based on the language of this statute, Missouri courts have repeatedly held that, because it creates no justifiable expectation of release, a prisoner has no constitutional right or protected liberty interest in parole release. *See, e.g.*, *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995).

Section 217.690.1.2 does not comport with *Miller* because parole decisions are ultimately based solely upon "whether an offender can be released without detriment to the community or himself...and if release is in the best interest of society." Even the additional factors set forth in S.B. 590 do not require the board to grant parole even in cases where the circumstances of the crime are not

particularly aggravating and the defendant's rehabilitative efforts both weigh heavily in favor of release. (See Exh. 6). Because the parole board has unlimited discretion to deny release to juveniles sentenced to life imprisonment without parole and there is no meaningful judicial review permitted of such decisions, resentencing is the only mechanism to provide petitioner a meaningful opportunity for release. *Lute v. Mo. Board of Probation and Parole*, 218 S.W.3d 431 (Mo. banc 2007).

S.B. 590 also did not alter any of Missouri's parole regulations concerning the manner in which parole hearings are conducted. Under Missouri's current parole regulations, there is nothing to suggest that the current practice of giving a prisoner a short hearing of approximately thirty to forty-five minutes in duration before a single member of the board and two hearing officers will be changed in any manner in the foreseeable future. *See* 14 CSR 80-2.010(5)(A)(1). Petitioner has no right to counsel at his parole hearing or any ability to call or present witnesses on his behalf. *Id.* Instead, Missouri's parole regulations only allow a prisoner to have one representative at the parole hearing who can give a statement on his behalf. *Id.*

Parole hearings, although recorded, are considered closed records and prisoners are denied access to any record of the proceedings, thus preventing them from seeking any meaningful judicial review of the constitutional adequacy of a parole hearing in this context. *See* 14 CSR 80-2.010(5)(F).

In addition, the decisions of the parole board are often arbitrary. A report by the American Civil Liberties Union found that "one parole board staff member in Missouri explained to a reporter that some members never read the files at all and instead based their decision on how the reviewing board member before them voted." *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences,* AMERICAN CIVIL LIBERTIES UNION (Nov. 2016). Since parole hearings are not before all seven board members, but rather one board member and two corrections staff members, the individual responsible for deciding whether a prisoner will receive parole may not even be present at the parole hearing.

In denying parole to offenders, adult and juvenile alike, the board almost always cites to the "circumstances surrounding the offense." In this way, the parole determinations for juvenile offenders do not differ from the board's standard procedures and customs. In fact, it appears that every single parole denial under S.B. 590 has focused on the circumstances of the present offense as a reason for denial. (See Exh. 4). Further, Janet Barton, who worked as an operations manager for the Missouri Board of Probation and Parole for thirty years, has admitted that:

> Their forms would always say the same thing: 'Release at this time would depreciate the seriousness of the present offense.' But that was 'not always the truth. Sometimes I'd make that crap up. The real reason [was] we don't believe in parole for people like you.'

Life Without Parole, THE MARSHALL PROJECT (July 10, 2015).

Yet the circumstances of the offense are not to foreclose a juvenile offender's entitlement to release from prison. See *Montgomery*, 136 S. Ct. at 736 ("The opportunity for release [on parole] will be afforded to those who demonstrate the truth of *Miller*'s central intuition – that children who commit even heinous crimes are capable of change.").

As indicated above, a petitioner being reviewed by the Missouri Board of Probation and Parole is only able to have one representative present at the meeting and there is no record of the proceeding available for review. As a result, the review process is shrouded in secrecy and review is nearly impossible. The problem with this approach is evident in the recent investigation of the conduct of a board member and a parole analyst. An investigation by the Roderick & Solange MacArthur Justice Center, and subsequently by the Missouri Department of Corrections, uncovered several witnesses who recounted incidents of misconduct by board members, including board members having contests to name song titles during parole hearings and contests to earn points by saying unusual words and getting the prisoner to say the word. In response to the investigation, as well as the advocacy of Mae Quinn of the MacArthur Justice Center, Board Member Donald Ruzicka resigned from the board. The other individual implicated in the misconduct remains employed as a parole analyst.

Upon a review of case precedent in juvenile LWOP cases as well as concerns regarding the Missouri parole board similar to those described above, the United States District Court for the Western District of Missouri, in a pending § 1983 action against the parole board, found that the plaintiffs raised colorable claims of due process and Eighth Amendment violations and denied the defendants' motion to dismiss. *Brown v. Precythe*, 2017 WL 4980872 (10-31-2017). Further, in light of the "serious constitutional issues at stake", the court ordered the defendants to produce "(1) recordings of Plaintiffs' parole hearings, (2) Plaintiffs' parole files, including notes and memoranda created by the Board or parole staff; and (3) information regarding who participated in Plaintiffs' parole hearings and parole-related decisions, and in what capacity." *Id.* at *15. In doing so, the court held that "[i]nformation concerning the parole hearings, parole files, and board members involved in parole hearings and decisions for each of the named plaintiffs is relevant to the question of whether the plaintiffs were afforded a meaningful opportunity to secure release upon demonstrated maturity and rehabilitation." *Id.* at *14.

While this misconduct is troubling for all prisoners facing the board, it has even more dire consequences for juvenile offenders who were first denied their right to have a jury determination of irreparable incorrigibility and then denied their right to any opportunity for release for twenty-five years. The conduct of the board

provides further evidence that even after serving twenty-five years parole hearings fail to provide juvenile offenders with a meaningful opportunity for release.

A state's parole process, like Missouri's, that does no more than give a juvenile offender serving a LWOP sentence the possibility of parole or a hope for parole violates due process because the decisions in *Graham*, *Miller*, and *Montgomery* created a liberty interest in a meaningful and realistic opportunity for release. *See Greiman v. Hodges*, 79 F.Supp.3d 933, 944-945 (S.D. Iowa 2015). When viewed in conjunction with the fact that petitioner and those similarly situated have also been denied an individualized and adversarial resentencing procedure before the trial court, Missouri's current parole system does not comport with the fundamental requirement of due process, the right to be heard at a meaningful time and in a meaningful manner. *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

In addressing a similar problem, the Massachusetts Supreme Court ruled that the Massachusetts' parole system for considering juvenile defendants for parole was inadequate to give them a meaningful opportunity for release because the prisoners had no access to counsel, funds for counsel or expert witnesses, or the opportunity for judicial review of the parole board's ruling on their applications for parole. *Diatchenko v. District Attorney*, 27 N.E.3d 349, 357-359 (Mass. 2015). The court held that these additional procedural protections were required to ensure that a

juvenile receives his procedural due process right to a meaningful opportunity to obtain release required by *Graham*. *Id.*

S.B. 590's revisions to Missouri's parole laws, because this law was so hastily and poorly written, are also not clear as to whether a juvenile can petition for release a second time or whether he will ever be considered for parole again if he is initially denied parole after serving twenty-five years of imprisonment. (See Exh. 6). S.B. 590, however, makes it clear that juveniles receiving LWOP in the future would not be eligible to petition for parole a second time, if parole is denied after twenty-five years have been served, until the juvenile has served thirty-five years. (*Id.*) Although a challenge to this aspect of S.B. 590 is not before the Court in this case, this provision adds further support to petitioner's argument that this legislation is inadequate to provide Missouri juvenile offenders a meaningful and realistic opportunity for release that the Eighth Amendment requires.

The constitutional infirmities and flaws in Missouri's legislative response to *Miller* and *Montgomery* are apparent when examining a recent parole hearing of one of the eighty other Missouri juvenile prisoners who had been given an

unconstitutional LWOP sentence. In the *James Hardy* case,[1] the board denied Mr. Hardy parole despite his extraordinary efforts at rehabilitation and the fact that he met all of the *Miller* and statutory criteria for release. (See Exh.'s 1, 2, 3). The board denied parole citing only the circumstances surrounding the offense and community opposition. (See Exh. 2). The board failed to follow the statutory criteria that it was required to employ in considering Mr. Hardy and others for parole, thus violating the due process clause of the Fourteenth Amendment. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). As in the *Hardy* case, a due process violation under *Hicks* occurs when a state "arbitrarily deprives the defendant of a state law entitlement." *See Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2000). Furthermore, the result in *Hardy* was not an aberration. In the last few months, the board has conducted approximately twenty parole hearings under S.B. 590. It has granted parole in only three of these cases. (See Exh.'s 4, 5). Therefore, juvenile offenders with unconstitutional LWOP sentences face a board with a denial rate of 90%.

As noted above, the *Montgomery* and *Miller* decisions set an Eighth Amendment ceiling on the punishment that may be imposed in the vast majority of

[1] The undersigned also represents Mr. Hardy, who has a pending federal habeas petition in the Western District of Missouri. *See Hardy v. Bowersox*, No. 2:16-CV-4248.

juvenile murder cases. Absent a finding by the sentencer of irreparable corruption, a juvenile convicted of murder may not be exposed to a LWOP sentence. *Miller* and *Montgomery* also preclude a juvenile from receiving a LWOP sentence unless the sentencer finds that the murders were not the result of transient immaturity. Unless both of these threshold findings are made adversely to the youthful offender, the maximum possible sentence that a juvenile could receive would be a parole eligible sentence that provides him with a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

Under the Supreme Court's Sixth Amendment cases, a judge may not make a factual finding, such as the "irreparable incorrigibility" finding required by *Montgomery* to enhance a juvenile defendant's sentence to LWOP. *See*, *e.g.*, *Ring v. Arizona*, 536 U.S. 584, 605 (2002); *Alleyne v. United States*, 570 U.S. 99 (2013); *Williams v. Florida*, 2018 WL 1007810 (02-22-2018). Thus, a juvenile sentenced to LWOP has a Sixth Amendment right to have a jury determine the irreparable corrigibility factor required by *Montgomery* to justify the imposition of a LWOP sentence. *See* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C.L. Rev. 553 (2015).

At first blush, petitioner's argument, that the Sixth Amendment requires jury findings to support a sentence of LWOP, appears at odds with the decision issued thirty years ago in *Cabana v. Bullock*, 474 U.S. 376 (1986). *Cabana* rejected the

prisoner's argument that a jury must make a culpability finding regarding whether a capital defendant convicted as an accomplice is eligible for a death sentence under the court's prior decision in *Enmund v. Florida*, 458 U.S. 782 (1982). In reaching this result in *Cabana*, the court concluded that Eighth Amendment limits differ from statutory provisions for Sixth Amendment purposes and that the *Enmund* requirements establish no new elements of the crime of murder that must be found by a jury. *Enmund*, 474 U.S at 384-386. Instead of an enhancement provision, the court characterized the *Enmund* rule as a substantive limitation on sentencing that need not be found by the jury. *Id.* at 386.

However, the decision in *Cabana* did not survive the Supreme Court's recent Sixth Amendment jurisprudence. *Cabana's* holding has been supplanted by the holding in *Ring* that whether a fact finding is labeled as a sentencing factor rather than an element of the offense is irrelevant for Sixth Amendment purposes. *Ring*, 536 U.S. at 605. Instead, the relevant Sixth Amendment inquiry requires the court to determine whether the law makes a fact essential to allow the imposition of an enhanced punishment. In light of the *Ring* line of cases, it is no longer accurate to say that a substantive limitation on sentencing need not be found by a jury because *Miller* and *Montgomery* make factual findings of irreparable corruption and the absence of transient immaturity essential elements to imposition of LWOP upon a

juvenile defendant. *Ring* and the Supreme Court's other Sixth Amendment decisions would trigger the right to jury findings on these issues.

Finally, three other constitutional infirmities in petitioner's conviction and sentence exist. At the time of petitioner's offense, § 565.020 R.S.Mo. authorized only two forms of punishment; death or mandatory life without probation and parole. It is clear that both of these sentences, as applied to juveniles, violate the Eighth Amendment. Because this Court and the legislature have refused to grant petitioner a new sentencing hearing, petitioner's conviction is therefore void. It is clear that, absent a constitutionally valid punishment, a criminal conviction cannot stand. *See Weems v. United States*, 217 U.S. 349 (1910). In *Weems*, the court held that where the only statutory punishments permitted for a crime violate the Eighth Amendment, the underlying conviction is void. *Id.* at 381. *Montgomery* also found that a conviction under an unconstitutional law is not merely erroneous, but is illegal and void. *Montgomery*, 136 S. Ct. at 730.

S.B. 590 is also unconstitutional on its face because it is a bill of attainder. Article I, Section 10 of the United States Constitution states that "No state shall pass any bill of attainder." A bill of attainder is defined as a legislative act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315-316 (1946). By singling out juveniles convicted of first degree murder for special treatment and by

inflicting an unconstitutional punishment on this group without a trial or judicial action, S.B. 590 is unconstitutional.

Finally, S.B. 590 is unconstitutional because it violates the Fourteenth Amendment in that it fails to provide equal protection of the law to juvenile defendants. The Fourteenth Amendment imposes upon a state the requirement that all similarly situated persons be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Generally, legislation or a court decision will be presumed to be valid if the disparate treatment of a class of citizens is rationally related to a legitimate state interest. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, strict scrutiny is required if a suspect class is involved or "when state laws impinge on personal rights protected by the Constitution." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Under either of these standards of review, Missouri's legal and legislative response to *Miller* does not pass constitutional muster and is, therefore, contrary to clearly established equal protection principles.

Under S.B. 590, juvenile defendants convicted of first degree murder after August 28, 2016 will receive a full and fair adversarial sentencing. Following the sentencing, juveniles could be sentenced to as little as thirty years of imprisonment. Since § 558.019 R.S.Mo. was not amended in conjunction with S.B. 590, juveniles who receive a sentence of less that LWOP on a first degree murder conviction will be eligible for release after fifteen years. In contrast, as detailed above, juveniles

sentenced to LWOP prior to August 28, 2016 are denied their constitutional right to a full and fair adversarial sentencing and are not eligible for a parole hearing until they have served twenty-five years of their sentence. The differential treatment of juvenile offenders convicted prior to and after August 28, 2016 results in a violation of equal protection under the Fourteenth Amendment.

There is also unjustified disparate treatment of juveniles sentenced to LWOP compared to juveniles sentenced to LWOP for fifty years under the old capital murder statute which was in place until 1984, in light of *State ex rel. Carr v. Wallace*, 2017 WL 2952314 (07-11-2017). In *Carr*, this Court held that the Eighth Amendment is violated when a juvenile defendant is sentenced to LWOP for fifty years without the jury having any opportunity to consider the mitigating and attendant circumstances of youth. *Id.* The court held that "by their very nature, mandatory penalties 'preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it'" and that "judges and juries must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 4. In granting the resentencing of juveniles given LWOP for fifty years and failing to provide similar relief to juveniles given LWOP sentences, equal protection of the law is violated under the Fourteenth Amendment. Further, under the reasoning of this Court in *Carr*, juveniles who have received even harsher sentences than those juveniles in

Carr must be entitled to resentencing hearings under the protections of the Eighth Amendment as well.

The resentencing remedy ordered in *Carr* significantly strengthens petitioner's claim that this Court's March and July 2016 orders and the legislative response to the March order that culminated with the passage of S.B. 590, violated the equal protection clause of the Fourteenth Amendment by treating similarly situated juveniles differently without any rational basis for doing so. *See Bush v. Gore*, 531 U.S. 98, 105-106 (2000).

Lastly, there is disparate treatment between this case and the *Hart* and *Nathan* cases cited above. Both of those men, unlike petitioner, received a resentencing hearing. There is simply no rational basis for affording resentencing hearings to some prisoners who received unconstitutional sentences under *Miller* and not affording the same remedy to the other eighty-one men and women.

Because it is clear that petitioner is being held in custody in violation of the Constitution for numerous reasons, this Court must issue a writ of habeas corpus and order a resentencing proceeding before the trial court that conforms with *Miller* and *Montgomery*.

CLAIM II

S.B. 590 VIOLATES THE SEPARATION OF POWERS CLAUSE OF THE MISSOURI CONSTITUTION AND § 1.160 R.S.Mo.

Apart from the federal constitutional infirmities of S.B. 590, set forth in Claim I, there are two separate state law grounds for granting the writ of habeas corpus in this case. First, by vesting resentencing power in the parole board, S.B. 590 violates the separation of powers clause embodied in Article II, Section 1 of the Missouri Constitution. Second, S.B. 590 conflicts with another statute that is not referenced in this legislation, § 1.160 R.S.Mo. (2010). Petitioner will address each of these issues in turn.

At the time petitioner's crime was committed, state law mandated LWOP and the death penalty as the only possible punishments for any individual convicted of first degree murder. In accordance with this law, petitioner was sentenced by the trial court to LWOP.

It is clear that a sentence of LWOP for twenty-five years for this offense has not been legislatively mandated. The separation of powers clause of the Missouri Constitution prohibits the legislature from amending a previously imposed sentence. S.B. 590 is unconstitutional because it authorizes the parole board, a part of the executive branch of state government, to revise a sentence imposed by the judiciary.

S.B. 590 also clearly violates the plain language of § 1.160 R.S.Mo. This statute prohibits the legislature from changing a sentence after the crime was committed. *See State v. Nash*, 339 S.W.3d 500, 507-8 (Mo. banc 2011) (§ 1.160 is

intended to require that a crime be prosecuted pursuant to the laws in effect at the time of its commission, not those enacted later.).

There is no way to harmonize S.B. 590 and § 1.160. In fact, there is no mention of § 1.160 in S.B. 590. As a result, S.B. 590 is unenforceable because it is in fundamental conflict with § 1.160 that expressly prohibits the legislature from amending the law to change a sentence validly imposed under the laws that exist at the time of the offense. Habeas relief is warranted.

CONCLUSION

WHEREFORE, for all the foregoing reasons, petitioner respectfully requests that this Court require the State of Missouri to show cause as to why habeas relief should not be granted and thereafter, after a thorough review of the facts and law, enter an order granting a writ of habeas corpus vacating petitioner's conviction for the offense of murder in the first degree or, grant such other and further relief that the Court deems fair and just under the circumstances.

Respectfully submitted,

/s/ Kent E. Gipson
KENT E. GIPSON, #34524
Law Office of Kent Gipson, LLC
121 East Gregory Boulevard
Kansas City, Missouri 64114
816-363-4400 • Fax 816-363-4300
Kent.Gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2018, the foregoing was filed via case.net. A true and correct copy of this petition and exhibits thereto were served via email to stephen.hawke@ago.mo.gov.

/s/ Kent E. Gipson
Kent E. Gipson

IN THE
SUPREME COURT OF MISSOURI

DAMON L. CALDWELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. _____**
	)	
TROY STEELE,	)	
	)	
Respondent.	)	

EXHIBITS IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

EXHIBIT 1	Affidavit of James Hardy
EXHIBIT 2	Order Denying Parole to James Hardy
EXHIBIT 3	James Hardy's Parole Application Package
EXHIBIT 4	Parole Denial in Other Juvenile LWOP Cases
EXHIBIT 5	Ramsey Parole Order
EXHIBIT 6	S.B. 590
EXHIBIT 7	Judgment and Sentence
EXHIBIT 8	Memorandum, Order, and Judgment from St. Francois County
EXHIBIT 9	Order from the Missouri Court of Appeals, Eastern District

SWORN AFFIDAVIT
OF
JAMES HARDY

I, James Hardy, after being duly sworn on my oath state as follows:

1. My name is James Hardy. I am a prisoner currently serving a sentence of life without parole in the South Central Correctional Center in Licking, Missouri. This sentence was imposed for a murder I committed when I was a juvenile.

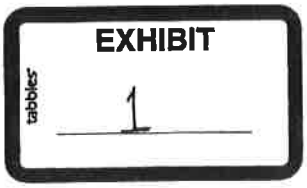
2. In the aftermath of the Supreme Court's decision in *Miller v. Alabama* and the passage of S.B. 590 by the Missouri legislature, I was scheduled for a parole hearing on December 20, 2016 because I had served over twenty-five years of my sentence.

3. In preparation for the hearing, I put together, with the assistance of my attorney, a lengthy parole package that was submitted to the Board detailing my efforts at rehabilitation during my incarceration. This packet included the fact that I had completed thousands of hours of restorative justice and volunteer programs while imprisoned.

4. Under the Parole Board guidelines, I was allowed to have one person appear before the Board with me at my hearing as a "representative." I elected to have my father appear before the Board with me as my representative. My father is a well-respected certified public accountant in the Joplin, Missouri area who has, among other things, testified in court numerous times as an expert witness primarily on financial issues in civil litigation.

5. At my parole hearing myself, my father, and the institutional parole officer were present in the parole room at the prison and appeared before one member of the Board and a parole analyst via closed circuit TV. The Board member and parole analyst, I assume, were in Jefferson City. The Board member who presided over my hearing was Mr. Reznik. The entire hearing lasted approximately forty-five minutes.

6. At the outset of the hearing, Mr. Reznik asked me to give an account of the crime. I gave a detailed and full account of what I did and accepted full responsibility for my actions. Mr. Reznik's follow-up questions appeared to focus



almost exclusively on the circumstances of my crime. Among other things, he asked me if I was a devil worshiper and whether I ever called myself "The Devil" while I was in prison. Mr. Reznik also asked me about whether I used drugs and about my relationship with my family when I was teenager.

7. The only mention Mr. Reznik made of my participation in volunteer and restorative justice programs at the prison was a mention of the fact that I had completed the Intensive Therapeutic Community (ITC) program and he gave his opinion that the program was very highly regarded.

8. After Mr. Reznik finished questioning me, he allowed my father to briefly speak on my behalf. At the outset, Mr. Reznik made it clear that my father's statements would be limited to the issue of family support, should the Board elect to parole me. After my father gave a very brief statement that could have only lasted a minute or two about what family support could be provided to me, he asked Mr. Reznik if he could say more. At that point, Mr. Reznik cut my father off and he was not allowed to speak on any other issues pertaining to my maturity and growth as a person during the time I have spent in prison.

9. At the very end of the hearing, the institutional parole officer asked me a question regarding why I believed I would be a good candidate for parole under the new guidelines and provisions of S.B. 590. I responded by saying that, while I did not want to make the hearing a formal legal proceeding, that I met all the criteria of S.B. 590 to be released. I also mentioned that I had worked very hard since 1998 to become a better person and avail myself of all available self-help programs. In response, Mr. Reznik admitted that I did meet all of the criteria of S.B. 590 but that I had committed a horrible crime by my own admission. Shortly thereafter, the hearing concluded.

10. At the hearing, it appeared that Mr. Reznik seemed to focus on whether or not I was a devil worshiper, which I emphatically denied, and hardly mentioned my list of accomplishments while I was incarcerated.

Affiant further saith naught.

JAMES HARDY

STATE OF Missouri)
) ss
COUNTY OF Texas)

On this ___ day of _____, 2017, before me, the undersigned notary public, personally appeared James Hardy, known to me to be the person whose name is subscribed to within the instrument and acknowledged that he executed the same for the purposes therein contained. In witness whereof, I hereunto set my hand and official seal.

Dated: 3-14-17

Notary Public

ANDREW CARTER HENDRIX
Notary Public - Notary Seal
State of Missouri
Commissioned for Phelps County
My Commission Expires: August 01, 2020
Commission Number: 16084674

DOC ID: 164676 Cycle: 19880525
DOC Name: HARDY, JAMES M 35-228

RECEIVED
JAN 30 2017
SCCC Parole Office

Institution/Housing Unit SCCC/003

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 12/20/2016. You will be scheduled for a reconsideration hearing 12/00/2021.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

Release at this time would depreciate the seriousness of the present offense based on:
A: Circumstances surrounding the present offense.
B: Use of excessive force or violence.
C: Community opposition.

EXHIBIT
tabbies 2

DOC ID: 164676 **Cycle:** 19880525
DOC Name: HARDY, JAMES M

If you have any questions regarding this decision, please contact your Institutional Parole Officer.

md _____ /MKF (Date Created: 01/12/17)

Parole Application

James M. Hardy
164676

Pursuant to RSMo 558.047, petitioner attests to being sentenced to a term of imprisonment for life without eligibility for parole, and that said sentence was imposed prior to August 28, 2016. Petitioner further attests to being under eighteen years of age at the time of the commission of the offense or offenses, and to having served twenty-five years of incarceration on the sentence of life without parole.

Petitioner requests that the Parole Board conduct a review of said sentence to determine whether parole should be granted.

JAMES M. HARDY 164676

Name (Please Print) DOC #

I hereby attest that a copy of this petition has been served upon the office of the prosecuting attorney of JASPER County, this 19 day of AUGUST 2016.

Signature

Notary:

ANDREW CARTER HENDRIX
Notary Public - Notary Seal
State of Missouri
Commissioned for Phelps County
My Commission Expires: August 01, 2020
Commission Number: 16084674

Table of Contents

Section 1

Statement to the Parole Board
Statement of Challenges
Violations
Summary of Certificates and Achievements
Outreach to Law Enforcement

Mr. Ellis McSwain, Jr., Chairman
Missouri Board of Probation and Parole
3400 Knapp Drive
Jefferson City, MO 65109

Dear Mr.McSwain and Members of the Parole Board;

On December 6, 1987 I committed a deplorable act of violence that took the life of Steven Newberry, an innocent man. This act devastated Steve's Family, the lives of countless members of the community, and left a deep wound on society.

The first several years of my incarceration found me taking zero accountability for this act, and my negative behaviors. I placed blame on those around me, my upbringing, imagined unfair treatment and drug abuse. I looked for excuses, and refused to take responsibility for my actions.

In April of 1997 I held my then 4 month old nephew in my hands during a visit. I returned to my cell and wept. For the first time in my life the incredible value of life crashed in on me. The immediate depth of my remorse was overwhelming - and the understanding of the great harm I had caused so many good people crushed me.

That same year I used drugs for the last time.

Being sober allowed me to think beyond myself. Of how I could be a better son, brother and uncle. How I could hopefully become a worthwhile father to my then 10 year old daughter.

Struggling to be a responsible, accountable adult took a great deal of effort in the beginning - and I knew that I would need support. I began taking self help and recovery programs in 1998, and have continued that effort since. I quickly discovered that program participation required absolute honesty and self examination. These classes take sacrifice of self interests, and most importantly they take a continual realization that I committed a great harm for which I will forever owe amends. I am profoundly ashamed.

I have learned more about myself and what it takes to live a responsible, accountable life than could be written in this statement. ICVC, ICTC and the ITC programs truly imparted to me the greatest of humility, and a set of tools for being a wholesome

person. I have learned and experienced more about the devastating ripple effect of my selfish acts than I ever wanted to face. My selfishness, lack of appreciation, low self esteem, dishonesty, fear and the blaming of others were the root of all my poor choices.

Because of my actions Steven Newberry lost his life. Steve's family was incredibly harmed. My community was wounded. My family was crushed. I am responsible for this.

I have grown into a mature man. I am always willing to give of myself, always ready to admit when I have made a mistake and able to live a lifestyle sworn to cause no harm.

I want to build and contribute. I want to help and to heal. To be productive and an inspiration. I will always endeavor to treat others with understanding, dignity, honor and respect for the remainder of my life.

I have enclosed a summary of my achievements and rehabilitative efforts. I hope that you will consider the work I have done to become a responsible person, and allow me to return to the home of my family where I can become a positive, contributing member of the community.

Sincerely;

James Hardy #164676

STATEMENT OF CHALLENGES

1) Live a responsible life

I acknowledge that living responsibly is a daily challenge that must be faced with empathy and awareness. I must continue to think beyond myself and consider how my actions will affect others. I must stay centered in the present to protect myself from being overwhelmed. I must be brutally honest and realistic with myself and those around me. I must confront my fears and remain willing to accept accountability for any mistake I make, no matter how small.

2) Maintain and build a family foundation

I am open with my family. They know my past and my present, and I look forward to building a positive future with them. I know that I must remain open to them, their critiques, admonitions and advice. I must be willing to sacrifice my desires for the betterment of my family bonds. I will strive to build a deeper trust with my family so they know they can always depend on me.

I hope to build and maintain a meaningful relationship with my daughter, her husband and my 4 year old granddaughter. To be a good role model for my nieces and nephews, to impart on them that there is no mistake too big to overcome; to show by example that you are never too old to make the next right choice, or achieve a goal through hard work, focus and the love of your family.

3) Enter the Community

I will secure employment, a driver's license, a social security card, and savings/checking accounts. I will strive to build a healthy relationship with my parole officer through a willingness to do whatever is asked of me. I will open every aspect of my life to him/her and earnestly seek their advice and criticisms. I will do my best to be a good friend, neighbor, employee and student.

4) Extend myself

There is a great deal in life that I always wanted to be a part of. Fears of possible failure and living in the negative opinions of others prevented me from partaking in much of life. I know, too, that it is impossible to recapture lost time. With these things in mind, it is my intention to extend my services to the law enforcement community in which I reside. I will serve in any capacity that my skill set would allow. I certainly desire to reach out to troubled youth at the crossroads of their lives; using the knowledge and experience I've gained to guide them in making the next right choice. I would like to be involved in the betterment of my community, helping to organize events and beautification projects. Most importantly, I want to be an active part of keeping my community drug free.

5) Stay Realistic

I know there are a great many hurdles I will face as a parolee. I will remain patient and do my best to not become frustrated. I will have much to prove to my community, and this will not happen overnight.

I will be steady and consistent. If I become overwhelmed I will immediately reach out to my support network, my family, my parole officer and to local law enforcement for advice and a safe hand to hold onto in times of crisis. I will take any difficulties seriously, no matter how small or trivial they seem.

I will remain sober at all times.