Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER POLK,

Petitioner,

vs.

JASON LEWIS, SUPERINTENDENT
SOUTHEAST CORRECTIONAL CENTER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is a Missouri prisoner who is serving a mandatory sentence of life without parole for a murder, committed when he was seventeen years old, that was declared unconstitutional in *Miller v. Alabama*, 132 S. Ct. 2455 (2012). After the *Miller* decision issued, petitioner filed a petition for a writ of habeas corpus in the Missouri Supreme Court seeking a new individualized sentencing proceeding as required by the Eighth Amendment under *Miller*.

After the decision issued in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Missouri Supreme Court issued an order and judgment granting the petition, in part, holding that *Montgomery* did not require a resentencing proceeding and that the Eighth Amendment violation under *Miller* could be rectified if either the Missouri legislature or the Governor allowed petitioner and other similarly situated Missouri prisoners to petition for parole after serving twenty-five years. Shortly thereafter, the Missouri legislature passed S.B. 590, which modified Missouri's first degree murder statute and its parole laws to allow juveniles who received mandatory sentences of life without parole to petition the parole board to hold a hearing after they have served twenty-five years of their sentences. After the Governor signed this legislation, the Missouri Supreme Court withdrew its previous order and summarily denied petitioner's habeas corpus petition, citing the enactment of S.B. 590.

Petitioner then filed another original habeas corpus petition in the Missouri Supreme Court asserting that S.B. 590 was constitutionally insufficient to remedy his Eighth Amendment rights to an adversarial resentencing proceeding and a meaningful opportunity for release. The Missouri Supreme Court summarily denied petitioner's habeas petition.

Based upon the foregoing events, this case presents the following questions regarding whether the Missouri Supreme Court's ruling that this legislation, that allows juveniles the possibility of obtaining parole after twenty-five years without the necessity of a resentencing proceeding, violates the Sixth, Eighth, and Fourteenth Amendments.

1. Does the Eighth Amendment, as interpreted in *Miller* and *Montgomery*, require juvenile defendants, who had previously been illegally sentenced to mandatory terms of life imprisonment without parole for murder, receive adversarial resentencing proceedings.

2. Do Missouri's parole laws and procedures, as modified by S.B. 590 to permit juveniles serving mandatory life sentences without the possibility of parole to request a parole hearing after serving twenty-five years, violate the Eighth and Fourteenth Amendments by failing to provide juvenile offenders a meaningful and realistic opportunity for release.

3. Do the Sixth and Fourteenth Amendments require that a jury must find beyond a reasonable doubt that a juvenile's crimes reflect "irreparable corruption" and were not the result of "transient immaturity" before a sentence of life without parole may be imposed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Polk respectfully requests that a writ of certiorari issue to review the judgment and decision of the Missouri Supreme Court that denied his petition for a writ of habeas corpus challenging his mandatory sentence of life without parole ("LWOP") that was imposed upon him for a murder that occurred in 1994 when petitioner was seventeen years of age.

OPINIONS AND ORDERS BELOW

The July 03, 2018, order of the Missouri Supreme Court in *State ex rel. Polk v. Lewis*, No. SC96917, denying the original petition for a writ of habeas corpus, is unpublished and is published in the appendix at A-1.

JURISDICTIONAL STATEMENT

The Missouri Supreme Court issued its final judgment on July 03, 2018. Under 28 U.S.C. § 2101(c) and Rule 13.1, the present petition for a writ of certiorari was required to be filed by petitioner within ninety days. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution that states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury…and to have the Assistance of Counsel for his defense."

This case also involves the Eighth Amendment to the United States Constitution that states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This case also involves the Fourteenth Amendment to the United States Constitution that states, in pertinent part: "[N]o state shall…deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves § 217.690.1 RSMo Cum. Supp. (2016) that states: "When in its opinion there is reasonable probability that an offender of a correctional center can be released without detriment to the community or to himself, the board may in its discretion release or parole such person except as otherwise prohibited by law. All paroles shall issue upon order of the board, duly adopted."

STATEMENT OF THE CASE

A. Procedural History

Petitioner is currently serving a sentence of life without parole, after being found guilty of a murder which occurred on January 11, 1994 when petitioner was seventeen years old. (A-113-121). Petitioner was indicted by a Saint Louis City grand jury on May 23, 1996 for one count of first degree murder in violation of § 565.020 RSMo (1994), four counts of armed criminal action in violation of §

571.015 RSMo (1994), one count of first degree assault in violation of § 565.050 RSMo (1994), and two counts of first degree robbery in violation of § 569.020 RSMO (1994). (A-122-124). Under Missouri's first degree murder statute, the only possible penalties that the jury could impose on an offender, including juvenile offenders, convicted of first degree murder was the death penalty or life imprisonment without the possibility of parole. *See* § 565.020.2 RSMo (1994).

The case proceeded to jury trial in the Circuit Court of the City of Saint Louis, where petitioner was found guilty as charged on July 26, 1996. (A-113-121). He was sentenced to concurrent sentences of life without parole for the first degree murder charge, twenty-five years for each of the armed criminal action charges, thirty years for each of the first degree robbery charges, and life imprisonment for the first degree assault charge by Judge Timothy J. Wilson on September 06, 1996. (*Id.*).

Petitioner, thereafter, filed a timely notice of appeal. The Court of Appeals affirmed petitioner's convictions and denied relief on February 10, 1998. *State v. Polk*, 961 S.W.2d 918 (Mo. App. E.D. 1998). Petitioner filed his motion for post-conviction relief, pursuant to 29.15, on April 19, 1998. Petitioner was denied post-conviction relief without an evidentiary hearing on October 09, 1998.

After this Court issued its opinion in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), petitioner filed a petition for a writ of habeas corpus, pursuant to Mo. S. Ct.

R. 91, in the Missouri Supreme Court on February 04, 2013. Petitioner's state habeas corpus petition primarily raised the claim that his mandatory sentence of LWOP under Missouri law imposing his first degree murder conviction violated the Eighth Amendment under *Miller* and thus required that he receive a new sentencing hearing

In 2013, while petitioner's state habeas corpus case was pending, the Missouri Supreme 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 LWOP and both advancing *Miller* violations in their direct appeals. The Missouri Supreme Court ordered that both men be resentenced and 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 LWOP sentences languished before the Missouri Supreme Court for three more years until this Court issued its decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that held that its decision in *Miller* is retroactive. On March 15, 2016, the Missouri Supreme Court issued blanket orders in this case and in the eighty

other pending cases involving juveniles who received LWOP for first degree murder, granting habeas relief in part. Relying on a passage from the majority opinion in *Montgomery*, the Missouri 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. (A-102-112). This legislation adopted the same remedy judicially crafted by the Missouri Supreme Court in its March 15, 2016 order in this case, that allowed juveniles who previously received LWOP for first degree murder to petition the parole board for a parole hearing after serving twenty-five years of their sentence. (*Id*.). This 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, the Missouri Supreme Court issued a superseding order vacating its previous order of March 15, 2016. This order denied petitioner's rehearing motion as moot and summarily denied the habeas petition, citing S.B. 590.

On January 22, 2018, petitioner again filed a petition for writ of habeas corpus, pursuant to Mo. S. Ct. Rule 91, in the Missouri Supreme Court. (A-2-37). Petitioner asserted in his petition that S.B. 590 was constitutionally insufficient to remedy his right to an adversarial resentencing proceeding and a meaningful opportunity for release. The Missouri Supreme Court summarily denied the habeas petition on July 03, 2018. (A-1). The present petition for a writ of certiorari is now before this Court for discretionary review.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER JUVENILE DEFENDANTS WHO RECEIVED A SENTENCE OF LIFE WITHOUT PAROLE FOR MURDER MUST RECEIVE ADVERSARIAL RESENTENCING PROCEEDINGS TO COMPLY WITH THE EIGHTH AMENDMENT REQUIREMENTS MANDATED BY *MILLER* AND *MONTGOMERY*.

This Court, in a series of recent decisions, has forbidden as unconstitutional sentences of LWOP for all juveniles except the rare juvenile whose 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). This Court has further held that this substantive Eighth Amendment rule is retroactive. *Id.* In these decisions, this Court found that youthful defendants are constitutionally different from adults for purposes of sentencing due to three distinctive attributes of youth that mitigate their culpability: transient immaturity; vulnerability to external forces; and character traits that are still being formed. *Montgomery*, 136 S. Ct. at 734.

For these reasons, "not only must 'a judge or jury…have the opportunity to consider mitigating circumstances before imposing the harshest penalty for juveniles,' but also the sentencer must actually 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to

a lifetime in prison.'" *Malvo v. Mathena*, 893 F.3d 265, 271 (4th Cir. 2018) (quoting *Miller v. Alabama*, 132 S. Ct. at 476).

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. This Court has also categorically forbidden, 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 further fails to provide them 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 all the previous decisions of Missouri Supreme Court below, in this case, 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*, this 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 this 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*. *Id*.

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 supported by this Court's decision in *Tatum v. Arizona*, 137 S. Ct. 11 (2016). In *Tatum*, this Court granted, vacated, and remanded a handful of Arizona juvenile LWOP cases for resentencing in light of *Montgomery*. *Id.* This 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, this Court held that the Eighth Amendment requires that a sentencer 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*, the Missouri Supreme 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 this Court in *Montgomery*, unlike the current Missouri law, did not eliminate resentencing of juveniles 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 obviously remains undisturbed establishes that he is still serving an unconstitutional sentence. In the aftermath of *Miller* and *Montgomery*, other jurisdictions have recognized that the Eighth Amendment requires a resentencing proceeding be held at which the sentencer is precluded from imposing an 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*, No. 13-3439, 2016 WL 4379244 (E.D. Pa. Aug. 17, 2016); *Songster v. Beard*, 201 F.Supp.3d 639 (E.D. Pa. 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.

The Fourth Circuit reached a similar conclusion regarding juveniles sentenced to mandatory terms of LWOP without the benefit of individualized

sentencing. The court vacated four LWOP sentences of one of the well-known "D.C. Snipers" holding that resentencing was required to determine "(1) whether [the offender] qualifies as one of the rare juvenile offenders who may, consistent with the Eight Amendment, be sentenced to life without the possibility of parole because of his 'crimes reflect permanent incorrigibility' or (2) whether those crimes instead 'reflect the transient immaturity of youth,' in which case he must receive a sentence short of life imprisonment without the possibility of parole." *Malvo v. Mathena*, 893 F.3d 265, 267 (4th Cir. 2018). The court further held that under *Miller* a prerequisite to imposing a LWOP sentence for a juvenile offender was a finding by the trier of fact of irreparable corruption or permanent incorrigibility and consideration of youth and attendant circumstances. *Id*. at 275. The court found that the failure to do so resulted in a failure to satisfy the requirements of the Eighth Amendment and mandated that the offender be resentenced. *Id*.

Based on the foregoing requirements of *Miller* and *Montgomery*, the Missouri Supreme 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 life without parole sentences only 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 life without parole 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.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER MISSOURI'S CURRENT PAROLE LAWS VIOLATE THE EIGHTH AMENDMENT BY FAILING TO PROVIDE JUVENILES CONVICTED OF MURDER AND SENTENCED TO LIFE WITHOUT PAROLE A MEANINGFUL AND REALISTIC OPPORTUNITY FOR RELEASE.

Apart from guaranteeing individualized sentencing and resentencing procedures for juveniles, the *Miller* line of cases also hold that the Eighth Amendment requires that juveniles convicted of crimes must be afforded a meaningful opportunity to obtain release. *Miller*, 132 S. Ct. at 2475. This 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, this Court has made it clear that, for a juvenile to receive a meaningful opportunity for release, this 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 this 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. ELH-16-1021, 2017 WL 467731, at *27 (D. Md. Feb. 03, 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. (A-102-112). The current Missouri parole statutes and guidelines gives the board unlimited discretion whether or not to grant an offender parole. *See* § 217.690.1 RSMo (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. (A-102-112). Because the parole board has unlimited discretion to deny release to juveniles sentenced to LWOP and there is no meaningful judicial review permitted of such decisions, resentencing is the only mechanism to provide petitioner with 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 fifteen 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. (A-90-101). 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 (W.D. Mo. 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.

Under S.B. 590, petitioner has not yet become eligible for parole consideration. However, the *James Hardy* case provides an example of S.B. 590's failure to provide juvenile offenders with a meaningful opportunity for release before Missouri's parole board. (A-39-89). Mr. Hardy was denied parole despite an exemplary prison record and extraordinary efforts made at rehabilitation. (*Id.*) As the documents attached to the underlying petition regarding the *Hardy* case illustrate, the board has not yet departed from its usual practice, in all cases, of holding short hearings that focus almost solely on the circumstances of the offense and whether there is any opposition from the victim's family or the community and then proceed to deny parole based primarily on the seriousness of the offense. (*Id.*) In the *Hardy* case and in 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.*)

The result in *Hardy* is not an aberration. In the last two years, the board has conducted approximately twenty parole hearings under S.B. 590. (A-90-101).

However, at this time, there have been no juvenile offenders released on parole under S.B. 590. (*Id.*) Only a few of the offenders sentenced to a mandatory term of life without parole as a juvenile have received parole dates in the future. For example, Bradley Houston received a parole date in 2020, Edward Ramsey received a parole date in 2021, and Michael McRoberts received a parole date in 2022. (*Id.*) In almost every other case, the board denied parole and gave the inmate a four or five-year setback. (*Id.*)

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 this Court's 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 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. (A-102-112). 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 prisoners a meaningful and realistic opportunity for release that the Eighth Amendment requires.

The facts of this case and the lack of procedural and substantive safeguards inherent in Missouri's current parole system provide this Court with an ideal

opportunity to interpret the constitutional contours of what is required by the commands of *Graham* and *Miller* to provide a juvenile a meaningful and realistic opportunity for release. This has been a recurring problem in several states that have spawned and will spawn future litigation on this important constitutional question. This Court's discretionary intervention is necessary to provide an answer to this question and provide uniform guidance to the states on this important issue.

III.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE SIXTH AMENDMENT REQUIRES THAT A JURY DETERMINE WHETHER THE CRIMES COMMITTED INVOLVED IRREPARABLE CORRUPTION AND WHETHER THE CRIMES REFLECTED TRANSIENT IMMATURITY BEFORE A SENTENCE OF LIFE WITHOUT PAROLE CAN BE CONSTITUTIONALLY IMPOSED UPON A JUVENILE CONVICTED OF MURDER.

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 juvenile murder cases. Absent a finding by the sentencer of irreparable corruption, a juvenile convicted of murder may not be exposed to an LWOP sentence. *Miller* and *Montgomery* also preclude a juvenile from receiving an LWOP sentence unless the sentencer finds that the murder was 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*, 242 So.3d 280 (Fla. 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 this Court's 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 this Court's prior decision in *Enmund v. Florida*, 458 U.S. 782 (1982). In reaching this result in *Cabana*, this 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. 474 U.S at 384-386. Instead of an enhancement provision, this 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 this 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 this Court's other Sixth Amendment decisions would trigger the right to jury findings on these issues. This case presents the court with an ideal opportunity to decide whether *Ring* has overruled *Cabana*, thus entitling juvenile defendants the right to a jury determination on the eligibility factors that would, in a rare case, permit a sentence of LWOP to be constitutionally imposed under *Miller* and *Montgomery*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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