Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RODERICK K. FOREST,

Petitioner,

vs.

JASON LEWIS, Superintendent,
Southeast 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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INDEX OF APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

VOLUME I

In the Supreme Court of Missouri

May Session, 2018

State ex rel. Roderick K. Forest,

Petitioner,

No. SC96873 HABEAS CORPUS
Mississippi County Circuit Court No. 17MI-CV00459
Southern District Court of Appeals No. SD35299

Jason Lewis,

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

A-1

IN THE
SUPREME COURT OF MISSOURI

RODERICK K. FOREST,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.** _____
	)	
JASON LEWIS,	)	
	)	
Respondent.	)	

WRIT SUMMARY

Identity of the parties and their attorneys in the underlying action, if any: Roderick Forest represented by Kent E. Gipson, Law Office of Kent Gipson, LLC, 121 East Gregory Boulevard, Kansas City, Missouri 64114; Jason Lewis, Warden, represented by the Office of the Attorney General, 207 West High Street, P.O. Box 899, Jefferson City, Missouri 65102.

Nature of underlying action, if any: N/A

Action of respondent being challenged, including date thereof: Judgment and sentence of Jackson County, Missouri, Case No. 93-2203, dated April 15, 1994.

Relief sought by relator or petitioner: Vacate petitioner's illegal and unconstitutional conviction and sentence of life without parole for one count of murder in the first degree and declare S.B. 590 unconstitutional.

Date case set for trial, if set, and date of any other event bearing upon relief sought (e.g., date of deposition and motion hearing): N/A.

Date, court, and disposition of previous writ proceedings: Circuit Court of Mississippi County, denied December 18, 2017, Case No. 17MI-CV00459; Missouri Court of Appeals, Southern District, denied December 28, 2017, Case No. SD35299.

IN THE
SUPREME COURT OF MISSOURI

RODERICK K. FOREST,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. _____**
	)	
JASON LEWIS,	)	
	)	
Respondent.	)	

PETITION FOR A WRIT OF HABEAS CORPUS

COMES NOW petitioner, Roderick Forest, 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. Forest states as follows:

I.

INTRODUCTION AND FACTUAL BACKGROUND

Petitioner Roderick Forest is currently serving a sentence of life without parole, after being found guilty of a murder that was committed when he was only sixteen years old. (See Exh. 7). Petitioner was indicted on January 25, 1994 by a Saint Louis City grand jury for one count of first degree murder in violation of § 565.020 R.S.Mo. (1986), two counts of armed criminal action in violation of §

571.015 R.S.Mo. (1986), and one count of first degree robbery in violation of § 571.011 R.S.Mo. (1986). (See Exhibit 8). Petitioner was appointed Kristine Kerr, public defender, to represent him.

The case proceeded to jury trial in the Circuit Court of Saint Louis City, where petitioner was found guilty as charged on May 22, 1995. (See Exhibit 7). Petitioner was sentenced on June 30, 1995 by Judge Edward Peek to consecutive sentences of life without parole for the first degree murder charge, ten years for the robbery charge, and life imprisonment and five years for each of the two counts of armed criminal action. (*Id.*)

Petitioner, thereafter, filed a timely notice of appeal and a timely motion for post-conviction relief pursuant to Rule 29.15 under the consolidated review system that existed in Missouri until 1996. The motion court denied relief without an evidentiary hearing. The Court of Appeals affirmed petitioner's convictions and denied post-conviction relief on June 02, 1998. *State v. Forest*, 973 S.W.2d 492 (Mo. App. E.D. 1998).

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 November 27, 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 both advancing *Miller* violations in their direct appeals. This 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 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*, this 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 October 11, 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 March 06, 2017.

Petitioner filed his present Rule 91 for a writ of habeas corpus in the Circuit Court of Mississippi County on August 07, 2017. The circuit court below denied the petition on December 18, 2017. (See Exh. 9). Petitioner filed this petition in the Missouri Court of Appeals, Southern District on December 22, 2017. The petition was summarily denied in a two-sentence order less than one week later. (See Exh. 10). 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. 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." 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. Claim III of this petition will raise an ineffective assistance

of appellate counsel claim due to the failure to brief a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). 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 issued 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 does 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 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.*

In petitioner's case, the denial of a meaningful opportunity for release is compounded by the fact that the trial court ordered that all of petitioner's sentences be served consecutively. Although the board has not modified petitioner's face sheet nor informed him of his parole eligibility, it appears that due to his consecutive sentences, he will have to serve at least forty years before he is eligible

for parole. *See* 14 CSR 80-2.010(1)(E). As a result, petitioner will still be unable to petition the parole board for a parole hearing after serving twenty-five years of his mandatory LWOP sentence as authorized by S.B. 590. These consecutive sentences deny petitioner a meaningful opportunity for parole consideration "based on demonstrated maturity and rehabilitation" as mandated by the United States Supreme Court in *Graham*. *Graham*, 560 U.S. at 75.

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. 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 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). 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

A-33

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.

CLAIM III

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO APPELLATE COUNSEL'S FAILURE TO RAISE A *BATSON* CLAIM WHEN THE STATE EXCLUDED A BLACK JUROR ON THE BASIS OF RACE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION. HAD COUNSEL PERFORMED COMPETENTLY, THERE IS A REASONABLE LIKELIHOOD THAT PETITIONER WOULD HAVE BEEN GRANTED A NEW TRIAL ON DIRECT APPEAL.

The Equal Protection Clause of the United States Constitution prohibits the prosecutor's use of preemptory challenges to exclude jurors identified as belonging to a cognizable racial minority solely on the basis of race. *Batson v. Kentucky*, 476 U.S. 86 (1986). While an individual does not have a right to serve on a jury, the juror does have the right not to be excluded on the basis of race. *Powers v. Ohio*, 499 U.S. 400, 409 (1991). The United States Supreme Court, and subsequently this Court, has set forth a three-step inquiry to determine the validity of claims under *Batson*. First, the defendant must make a *prima facie* showing that the prosecution exercised its preemptory challenges based on race. *Batson*, 476 U.S. at 96; *State v. McFadden*, 191 S.W.3d 648, 651 (Mo. banc 2006). Second, upon a *prima facie* showing, the State must put forth a race-neutral reason for the exclusion of the juror. *Id.* Third, the defense must demonstrate that the State's purportedly race-neutral explanation is pretextual and that the true reason is race. *Id.* This can be accomplished by showing that the State's reason is implausible or by pointing out the existence of a similarly-situated juror of another race who was not struck. *State v. Marlowe*, 191 S.W.3d 464, 469 (Mo. banc 2007). "Evidence of purposeful discrimination is established when the stated reason for striking an African-American venireperson applies to an otherwise-similar member of another race who is permitted to serve." *State v. Bateman*, 318 S.W.3d 681 (Mo. banc

2010) (quoting *McFadden*, 191 S.W.3d at 651). The trial court's findings following a *Batson* challenge will be set aside if they are clearly erroneous. *Id.*

A review of the voir dire proceedings indicate that petitioner properly raised a *Batson* challenge and subsequently presented a *prima facie* showing that the prosecution used one of its preemptory challenges on the basis of race in striking Venireperson Cecelia Stevens. (Tr. 336-338). In response, the State offered a purportedly race-neutral reason for the strike. (Tr. 342). The State argued that the strike was due to Ms. Stevens' upcoming appointment with an oral surgeon on Friday at 4 P.M. (Tr. 342)

The court then denied petitioner's motion to set aside the strike. (Tr. 344). The court held that the State could be concerned with Ms. Stevens' possible preoccupation during the trial due to her upcoming appointment and that that was a "reasonably specific and clear race neutral explanation for the strike." (Tr. 343-344). Petitioner's trial counsel then preserved the challenge for appeal. (Tr. 344).

Petitioner's appellate counsel was ineffective for failing to raise the trial court's error in denying petitioner's motion to set aside the strike of Ms. Stevens in petitioner's direct appeal. First, as in *McFadden*, the State mischaracterized Ms. Stevens' statements. *McFadden*, 545 U.S. at 244 ("Thus, [Prosecutor] Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields

unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation."). Here, the prosecution, or more accurately, the court, expressed concerned at Ms. Stevens' possible preoccupation, however her testimony actually indicated the opposite. (Tr. 20, 343). Ms. Stevens indicated that she would have been able to attentively participate in the trial and that it might even have been possible for her to reschedule her appointment if needed. (Tr. 20).

In addition, the State used a preemptory challenge to strike a Black juror while allowing a similarly situated White juror to serve on the jury. Ms. Stevens was removed from the jury panel because of worries that she could be preoccupied with her appointment, despite Ms. Stevens stating that it might be possible for her to reschedule the appointment. (Tr. 20). The State failed to strike a similarly situated White juror from the panel. The State accepted Venireperson Hereford as a prospective juror despite his having an obligation on the same day as Ms. Stevens. (Tr. 19). Despite Mr. Hereford's obligation, the State accepted him as a juror "with no evident reservations."

It is also worth noting that the State failed to express concern when, during deliberations, Juror Samitt stated that she failed to disclose a work obligation, despite being asked about upcoming plans during *voir dire*, and was scheduled to leave town the following day at 5:30 P.M. (Tr. 795-801). The day and time of Ms. Samitt's previously undisclosed work obligation was at nearly the identical time as

Ms. Stevens' dental appointment for which she was struck from the jury panel. The trial court made last minute accommodations to allow for Ms. Samitt's obligation and expressed no concern about her possible preoccupation during the trial, however permitted the prosecution, over objection by petitioner, to strike Ms. Stevens due to concerns about her ability to remain focused during trial.

The State's proffered reason for striking Ms. Stevens is implausible. Both Mr. Hereford and Ms. Samitt expressed similar conflicts, however the prosecution expressed concern only over the plans of the Black prospective juror. This supports the conclusion that race was a significant factor in determining which jurors were subjected to preemptory challenges from the prosecution and which were not.

Finally, the trial court failed to let the State's explanation for the strike serve as the basis for the strike and instead supplanted its own reasoning. As a reason for the strike, the State stated that Ms. Stevens needed to leave for the appointment with the oral surgeon by 4:00 P.M. on Friday. (Tr. 342). The court had previously stated that working around Ms. Stevens' appointment would pose no problem. (Tr. 20). In response to the State's reason, the court stated "it could distract her" and "it seems to me that is something that counsel could take into consideration being concerned about her preoccupation." (Tr. 343-344). The State had made no mention of concerns about Ms. Stevens' preoccupation or level of distraction.

In *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), the United States Supreme Court held that, "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown to be false." Here, the trial court did just that and in doing so relieved the prosecution of its burden to prove a race neutral reason for the strike.

This Court must analyze this claim under the familiar test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A prisoner seeking post-conviction relief based on ineffective assistance of counsel must demonstrate that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under substantially similar circumstances and that petitioner was thereby prejudiced. *Id. See also Milner v. State*, 968 S.W.2d 229, 230 (Mo. App. S.D. 1998). In the context of a *Batson* claim, *Strickland* prejudice is established if it can be demonstrated that there is a reasonable probability that, but for the errors or ineffectiveness of counsel, the appellate court would have granted petitioner a new trial on direct appeal. *Tisius v. State*, 183 S.W.3d 207, 215 (Mo. banc 2006).

Based on the foregoing facts, neither the issue of *Strickland* performance nor prejudice is a close question. A reasonably competent attorney would have raised the clear *Batson* claim which was properly preserved by trial counsel. Had the

claim been raised, there is a reasonable probability that petitioner would have been granted a new trial on direct appeal. 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 convictions for the offenses of murder in the first degree, armed criminal action, and robbery in the first degree or, grant such other and further relief that the Court deems fair and just under the circumstances.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2018, the foregoing was filed via case.net. A copy of this petition and exhibits thereto were served on respondent via Email: mike.spillane@ago.mo.gov and U.S. Mail: Michael Spillane, Office of the Attorney General, 207 West High Street, P.O. Box 899, Jefferson City, Missouri 65102 .

/s/ Kent E. Gipson
Counsel for Petitioner

A-43

IN THE
SUPREME COURT OF MISSOURI

RODERICK K. FOREST,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. _____**
	)	
JASON LEWIS,	)	
	)	
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	Indictment
EXHIBIT 9	Decision, Judgment, and Order from Mississippi County
EXHIBIT 10	Order from the Missouri Court of Appeals

A-44