

No. _____

IN THE
Supreme Court of the United States

JOSHUA WOLF,
Petitioner,

v.

CINDY GRIFFITH,
Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

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QUESTIONS PRESENTED

Joshua Wolf has been serving an unconstitutional sentence since he was sentenced to mandatory life without parole for a homicide offense committed when he was just sixteen years old. Although Missouri has ordered resentencing for other unconstitutional mandatory sentences imposed upon juvenile offenders, it has not ordered resentencing for Joshua. The questions presented are:

1. Does the State of Missouri's decision that resentencing is required for juvenile homicide offenders sentenced to mandatory 50 year sentences but not for Joshua, a juvenile homicide offender sentenced to mandatory life without parole, contrary to or an unreasonable application of this Court's equal protection jurisprudence as set forth most clearly in *Plyler v. Doe*?
2. Was the State of Missouri's decision that the Sixth, Eighth and Fourteenth Amendments do not require a constitutionally compliant sentencing hearing for a juvenile offender sentenced to an unconstitutional mandatory life without parole sentence contrary to this Court's decisions in *Miller v. Alabama*, *Mempa v. Rhay*, and an unreasonable application of *Montgomery v. Louisiana*?
3. Did the Eighth Circuit unreasonably impose an improper and unreasonable standard for a Certificate of Appealability in contravention of *Buck v. Davis*, and *Miller-El v. Cockrell* when it refused to issue a Certificate of Appealability to Joshua, despite circuit precedent requiring resentencing when a sentence is unconstitutional, and deepening the circuit split on the proper relief for juvenile offenders subject to cruel and unusual mandatory sentences that violate the Eighth and Fourteenth Amendments?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

Wolf v. Griffith, No. 19-1748, 8th Circuit Court of Appeals, October 11, 2019
(Appendix at A2)

Wolf v. Griffith, No. 19-1748, 8th Circuit Court of Appeals, September 4, 2019
(Appendix at A3)

Wolf v. Cassady, No. 16-3334-CV-S-MDH, United States District Court for the
Western District of Missouri, March 7, 2019 (Appendix at A7-A14)

State ex rel. Joshua Wolf, No. SC97209, Supreme Court of Missouri, July 3, 2018
(Appendix at A15)

In re: Joshua Wolf v. Cindy Griffith, in her Capacity as Warden, WD81685,
Missouri Court of Appeals Western District, April 20, 2018 (Appendix at A17)

Wolf v. Cassady, No. SC96913, Supreme Court of Missouri, February 3, 2018
(Appendix at A18)

Wolf v. Cassady, No. 17AC-CC00400, Circuit Court of Cole County, Missouri,
December 21, 2017 (Appendix at A23-A39)

State ex rel. Joshua Wolf, No. SC96023, Supreme Court of Missouri, May 30, 2017
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OPINION BELOW

The opinion of the United States Court of Appeals for the 8th Circuit, which is unpublished, is designated as *Wolf v. Griffith*, Petition for Rehearing *en banc*. A copy of that ruling is in the appendix of this Petition as A2. This opinion arose as a result of the 8th Circuit's opinion, also unpublished, designated as *Wolf v. Griffith*, Request for Certificate of Appealability. A copy of that ruling is in the appendix of this Petition as A3. The District Court's decision denying Joshua's habeas petition, the last merits decision in the case, is also unpublished. A copy of that ruling is in the appendix of this Petition as A6.

JURISDICTION

The District Court issued its opinion denying habeas relief on March 11, 2019. The Eighth Circuit issued its order dismissing the appeal and denying the request for Certificate of Appealability on September 4, 2019. Petitioner timely sought rehearing *en banc*. The Eighth Circuit issued its opinion denying the request for rehearing *en banc* on October 11, 2019. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides:

...nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

A. The final order in a habeas corpus proceeding in which the detention complained of arises out of processes issued by a State court;

...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

In 2001, Joshua Wolf was only sixteen years old and suffering from untreated mental illness. Under Missouri's statutory scheme, upon his conviction for first-degree murder, armed criminal action, and second-degree arson, Joshua was sentenced to mandatory life without parole. The sentencing hearing lasted less than five minutes. Mr. Wolf's counsel at the time stated only, "Judge, under the circumstances with the options the court has available, I'm not going to extend this by arguing for some lesser sentence the court can't impose." (A43). This effectively deprived Mr. Wolf of his right to counsel at sentencing, a critical stage of the proceedings. At no time has a sentencing court ever considered any of the mitigating evidence relating to Mr. Wolf.

After this Court issued its opinion in *Miller* and (later) *Montgomery*, declaring mandatory life without parole sentences imposed on juvenile offenders to be unconstitutional under the Eighth Amendment, Mr. Wolf sought relief from his unconstitutional sentence in Missouri's state courts. In 2016, while his state habeas petition was pending at the Supreme Court of Missouri, the Missouri General Assembly passed Senate Bill 590 (SB 590), in which the Missouri Legislature granted juvenile offenders serving mandatory life without parole sentences the opportunity for parole after serving twenty-five years of their unconstitutional sentence. The Supreme Court of Missouri then denied Joshua relief. (A40).

Petitioner timely sought habeas relief in the United States District Court for the Western District of Missouri. After Respondent claimed that Petitioner failed to exhaust his state court remedies with respect to the newly-enacted legislation, the federal habeas case was stayed while Petitioner challenged the constitutionality of SB 590 in the state courts. Petitioner urged that SB 590's remedy violated his rights under the Sixth Amendment because he was effectively deprived of counsel at sentencing and would not be provided counsel when seeking parole under SB 590 by virtue of the unconstitutional mandatory life without parole scheme. Petitioner also argued that his sentence, despite this "legislative fix," violated his rights under the Eighth Amendment's protections against cruel and unusual punishments. Petitioner contended finally that resentencing some juvenile homicide offenders serving unconstitutional sentences but not others violated his rights under the Fourteenth Amendment's Equal Protection and Due Process guarantees.

During the pendency of these state court proceedings, the Supreme Court of Missouri decided *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 63 (Mo. 2017), *reh'g denied* (Oct. 5, 2017) and concluded that a mandatory 50-year sentence imposed on a juvenile homicide offender violated the Eighth Amendment under *Miller* and **required** resentencing. *See also State v. Hart*, 404 S.W.3d 232, 238–39 (Mo. 2013) (“this case must be remanded for resentencing using a process by which the sentence can conduct the individualized analysis required by *Miller*”); *United States v. Sheppard*, No. 96-00085-04-CR-W-FJG, 2017 WL 875484 (W.D. Mo. Mar. 3, 2017) (resentencing juvenile offender who was sentenced to life without the possibility of parole pre-*Miller*).

Despite recognition from state and federal courts in Missouri that juvenile offenders sentenced to unconstitutional mandatory sentences are **entitled** to resentencing, the Missouri Supreme Court rejected Mr. Wolf’s challenge to the constitutionality of SB 590 and his state postconviction petition seeking constitutional resentencing. (A15). In so ruling, the Missouri Supreme Court implicitly found that unlike other Missouri juvenile offenders serving unconstitutional mandatory sentences, Mr. Wolf is not entitled to resentencing to remedy his unconstitutional sentence.

After exhausting his state court remedies, Petitioner amended his federal habeas petition to add allegations that he had been denied his constitutional right to Equal Protection based on the Missouri Supreme Court’s disparate treatment of juvenile offenders serving mandatory sentences. While Wolf’s habeas petition was

pending, a federal district court found Missouri's parole system – i.e. the so-called legislative fix for Mr. Wolf's unconstitutional sentence – to be unconstitutional due to the failure to provide a “meaningful and realistic opportunity for release” for juvenile offenders. *Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2018 WL 4956519, at *10 (W.D. Mo. Oct. 12, 2018) (“The Court … finds that [Missouri's] policies, procedures, and customs for parole review for *Miller*-impacted inmates violate the constitutional requirement that those inmates be provided a meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation.”).

The Western District of Missouri concluded that the juvenile homicide offender in *Carr*, though serving a mandatory sentence and eligible for parole just like Joshua, was not similarly situated under the Equal Protection Clause. The court also concluded that SB 590 adequately addressed Mr. Wolf's unconstitutional sentence, essentially ruling that the issue was not “ripe” because the unconstitutional parole system for juvenile offenders might be fixed prior to Mr. Wolf's parole hearing. In other words, the court ruled that Mr. Wolf should continue serving an unconstitutional sentence (despite other Missouri offenders being granted resentencing) until his parole hearing in the hopes that the unconstitutional parole system will be “corrected” at that date. (A12).

The district court *sua sponte* denied a certificate of appealability, finding that Mr. Wolf had not made a substantial showing of the denial of a constitutional right or that the issue was debatable among reasonable jurists. Wolf then filed a Request for Certificate of Appealability with the Eighth Circuit Court of Appeals, which was

denied without explanation. (A3). Mr. Wolf subsequently filed a Petition for Rehearing *en Banc*, noting that the court’s decision was contrary to Eighth Circuit precedent requiring resentencing for an unconstitutional sentence; this, too, was denied without an opinion. (A2).). The Eighth Circuit decision is inconsistent with the Fourth and Tenth Circuits, which have both concluded that resentencing of juvenile offenders sentenced to life without parole is required under *Miller*. *See Malvo v. Mathena*, 893 F.3d 265, 274 (4th Cir. 2018), *cert. granted*, 139 S. Ct. 1317 (2019); *Budder v. Addison*, 851 F.3d 1047, 1060 (10th Cir. 2017).

The United States District Court for the Western District of Missouri had jurisdiction to hear this case pursuant to 28 U.S.C. § 2254, and the Circuit Court of Appeals for the Eighth Circuit had jurisdiction to consider whether to issue a Certificate of Appealability in this case pursuant to 28 U.S.C. ¶ 2253(c).

REASONS FOR GRANTING THE PETITION

There is no dispute that Petitioner Joshua Wolf is serving an unconstitutional sentence pursuant to this Court’s rulings in *Miller* and *Montgomery*. And there is no dispute that the Missouri Supreme Court has previously ruled that juvenile offenders sentenced to mandatory unconstitutional sentences by the State of Missouri are entitled to resentencing.¹ Nor is there any dispute that the Eighth Circuit has

¹ *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 63 (Mo. 2017).

previously recognized that offenders within the Eighth Circuit who are given unconstitutional sentences must be **re-sentenced** to properly remedy that wrong.²

This case gives the Court an opportunity to clarify that the Equal Protection Clause prohibits a state from treating similarly situated juvenile offenders who suffer an unconstitutional sentence differently. Although *Montgomery* suggests that a state need not resentence *all* juvenile offenders, once a state has accorded *some* juvenile offenders that remedy, it cannot deprive it to others like Joshua who are similarly situated. This case also presents the important federal question of whether the Sixth Amendment right to counsel protects juvenile offenders who were deprived of a meaningful opportunity to present evidence at sentencing by the operation of unconstitutional mandatory sentencing laws. Finally, this case gives the Court an opportunity to remedy the Eighth Circuit's improper denial of COA, which deepens a Circuit Split regarding whether those former-juvenile offenders now serving unconstitutional sentences are entitled to resentencing.

A. Certiorari Should be Granted to Clarify that the Equal Protection Clause Prohibits a State from Treating Differently Similarly-Situated Juvenile Offenders Serving Unconstitutional Sentences

The Fourteenth Amendment mandates that all similarly situated persons be treated alike. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982). Here, the 8th Circuit and the Missouri Supreme Court agree that the proper remedy for an unconstitutional sentence is re-sentencing. Yet, both have deprived Mr. Wolf of that remedy here. But whether the sentence is a mandatory 50 year sentence or a mandatory life without

² *Raymond v. United States*, 933 F.3d 988, 992 (8th Cir. 2019).

parole sentence, juvenile homicide offenders subject to serious, mandatory sentences are similarly situated and under the Fourteenth Amendment, require similar treatment. The Missouri Supreme Court’s contrary conclusion cannot be reconciled with this Court’s Equal Protection jurisprudence, as set forth in *Plyler*.

The Missouri Supreme Court and the Eighth Circuit agree that offenders serving unconstitutional sentences require resentencing. In general, when an error in sentencing is constitutional, the defendant must be afforded relief “unless the error was harmless” in that the error “did not have substantial and injurious effect or influence on the outcome of the proceeding and caused no actual prejudice to the defendant.” *Raymond v. United States*, 933 F.3d 988, 992 (8th Cir. 2019) (quoting *Cravens v. United States*, 894 F.3d 891, 893 (8th Cir. 2018)).

More specifically, the Missouri Supreme Court recognized in 2013 that juvenile offenders like Mr. Wolf, who are sentenced to mandatory life without parole, **must** be granted resentencing. *Hart*, 404 S.W.3d at 238–39. Resentencing **must** be granted because the “the constitutional defect in [the mandatory sentence] is not its length or the fact that [the juvenile offender] will not be eligible for parole...[T]he sentence ... violates the Eighth Amendment because – and only because – it was imposed without any opportunity **for the sentencer** to consider whether this punishment is just and appropriate in light of [the offender’s] age, maturity and other factors discussed in *Miller*.” *Id.* And the Missouri Supreme Court set forth a procedure under which these offenders suffering unconstitutional sentences **must be** resentenced and has applied that procedure for several other juvenile offenders. *Id. see also United States v.*

Sheppard, No. 96-00085-04-CR-W-FJG, 2017 WL 875484 (W.D. Mo. Mar. 3, 2017) (resentencing juvenile offender who was sentenced in federal court in Missouri to a mandatory life without parole sentence pre-*Miller*).

The Missouri Supreme Court re-affirmed this ruling, even after the passing of SB 590. In *State ex rel. Carr*, 527 S.W.3d 55, the Missouri Supreme Court confronted a habeas petition from an offender who “was sentenced under a mandatory sentencing scheme that afforded the sentencer no opportunity to consider his age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation.” *Id.* at 57.

The Missouri Supreme Court ultimately held that, based on the mandatory nature of Mr. Carr’s sentencing, he **must be** resentenced. *Id.* Mr. Wolf is entitled to that same relief. Like Mr. Carr, Mr. Wolf was sentenced (before Section 558.047 became effective) under a mandatory sentencing scheme that did not provide the sentencing authority with the opportunity to consider Mr. Wolf’s age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation. That Mr. Carr did not receive a life sentence without the possibility of parole, for the purposes of equal protection considerations here, is a distinction without a difference.

Indeed, the *Carr* court’s analysis was based in large part in the *Hart* decision discussed above, which *did involve* a mandatory sentence like Mr. Wolf’s. And yet, despite this consistent “must be resentenced” conclusion, the Missouri denied Mr. Wolf re-sentencing. In doing so, the state court denied Mr. Wolf the same treatment

afforded to other offenders sentenced to unconstitutional mandatory life without parole sentences, thereby violating Mr. Wolf's 14th Amendment right to Equal Protection.

Put simply, there is no rational basis for distinguishing Mr. Carr, Mr. Hart, and Mr. Sheppard from Mr. Wolf for the purposes of equal protection. Regardless of whether offenders in *other* states require re-sentencing to redress an unconstitutional life without parole sentence imposed on a minor, offenders *in Missouri* must be afforded re-sentencing – because the Missouri Supreme Court has already so-ruled. By differentiating Mr. Wolf, Missouri has essentially given itself the discretion to pick-and-choose, at random, which offenders are entitled to a *full* redress of their unconstitutional sentence and which offenders must continue to serve an unconstitutional sentence remedied with an inadequate (and unconstitutional) parole band-aid.

B. Certiorari Should be Granted to Clarify that the Sixth Amendment Right to Counsel also protects the Eighth Amendment sentencing principles announced in *Miller* and *Montgomery*.

1. Petitioner is serving an unconstitutional sentence.

Mr. Wolf was 16 years old at the time of his offense, and he was given a mandatory sentence of life without parole under the statutes prevailing at that time. Petitioner's original sentence is plainly unconstitutional. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that mandatory life without parole sentences for juveniles convicted of homicide violates the Eighth Amendment of the United States Constitution. Mandatory penalty statutes for juvenile offenses, the Court explained, will always prevent the sentencing court from making appropriate consideration of a

juvenile offender's individual characteristics when determining the sentence. *Id.* at 474. If a sentencing authority does not consider an offender's youth during the sentencing process, the sentencing authority cannot assess whether a life without parole sentence "proportionately punishes a juvenile offender." *Id.*

Mandatory penalty statutes prohibit individualized considerations in cases of juveniles and thus undermine what the *Miller* court described as the "foundational principle" of previous United States Supreme Court decisions: "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* As the Court explained, "youth is more than a chronological fact." *Id.* at 476. Juvenile offenders convicted of homicide crimes must be given an individualized sentencing hearing that allows the circumstances of their individual life and crime to be considered in determining appropriate punishment. The Eighth Amendment's restrictions on the sentencing process for juvenile offenders require that the sentencer consider a juvenile's level of maturity, impetuosity, and how he/she views risks and consequences. *Id.* at 2468.

The sentencing court must also evaluate a juvenile's family and home environment and the circumstances of the homicide crime (including the juvenile's extent of participation and external forces may have affected his decision-making at the time of the crime). *Id.* The *Miller* Court also condemned mandatory life without parole sentences for juvenile offenders because such sentences foreclose completely the possibility of rehabilitation. *Id.* The Supreme Court made this holding retroactive

to prior convictions such as Petitioner's in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *as revised* (Jan. 27, 2016).

Petitioner's sentence was imposed without any consideration of these constitutionally-mandated factors. The sentencing court did not and could not evaluate his maturity, impetuosity, or how he viewed risks and consequences. The sentencing court did not and could not evaluate Petitioner's family and home environment, or the circumstances of the homicide crime. And the sentencing court did not and could not evaluate whether Petitioner had any possibility of rehabilitation.

2. It is clearly established that sentencing is a critical stage of the criminal process and defendants are entitled to counsel at sentencing.

For more than fifty years, this Court has recognized that sentencing is a "critical stage" of the criminal process at which defendants enjoy Sixth Amendment and Fourteenth Amendment rights. *See, e.g., Mempa v. Rhay*, 389 U.S. 128 (1967) (holding that counsel is required under the Sixth Amendment at sentencing and hearings where revocation of probation could lead to sentencing imposition); *Townsend v. Burke*, 334 U.S. 736 (1948) (holding that the absence of counsel during sentencing deprived the defendant of due process). At sentencing, an accused enjoys the right to counsel, the right to be present, and the right to confront and cross-examine witnesses. Juvenile offenders like Mr. Wolf, sentenced to mandatory life without parole sentences, were effectively deprived of the right to counsel at sentencing.

Indeed, *at sentencing* Wolf's own counsel stated: "Judge, under the circumstances with the options the court has available, I'm not going to extend this by arguing for some lesser sentence the court can't impose." (A43). This functionally deprived Mr. Wolf of counsel at the critical stage of the proceedings. Contrast this with a *Miller*-offender who *was* granted re-sentencing on habeas by the District Court for the Western District of Missouri. *United States v. Sheppard*, No. 96-00085-04-CR-W-FJG, 2017 WL 875484 (W.D. Mo. Mar. 3, 2017). In *Sheppard*, the court recognized that re-sentencing was the proper remedy for the unconstitutional life without parole sentence imposed on a juvenile offender, thereafter conducting a re-sentencing hearing in which the offender was represented by counsel. *Id.*

When "the process loses its character as a confrontation between adversaries, the [Sixth Amendment's] constitutional guarantee is violated." *United States v. Cronic*, 466 U.S. 648, 656–657 (1984). "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' *Anders v. State of Cal.*, 386 U.S. 738, 743 (1967)." At sentencing, Petitioner's counsel was prohibited from presenting any evidence for a lesser sentence. As this Court decreed in *Miller*, "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 461.

Petitioner was entitled to an individualized sentencing hearing that considers his "chronological age and its hallmark features," "the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional," "the circumstances of the homicide offense, including

the extent of his participation in the conduct and the way familiar and peer pressures may have affected him,” and “the possibility of rehabilitation.” *Id.* *Miller* requires juvenile offenders be permitted to provide evidence of certain youth-specific factors that pertain to the length of the sentence imposed, and *Mempa* assures the assistance of counsel to present that evidence. Wolf had evidence to present, but the statute did not allow for his counsel to present it.

3. Missouri’s unconstitutional parole procedures for juvenile offenders plainly are insufficient to remedy the constitutional violation.

Unlike sentencing, parole “is not part of a criminal prosecution” and only “arises after the end of the criminal prosecution, including imposition of sentence.” *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Sentencing, however, is a crucial component of the criminal prosecution at which the right to counsel attaches. *See Mempa*, 389 U.S. at 134 (citing pre-*Gideon* cases establishing right to counsel at sentencing and affirming that sentencing is a critical stage of the proceedings where counsel is required). Most of the rights enumerated by this Court in *Miller* and *Montgomery* as vital to the resentencing process for juvenile offenders are simply not enjoyed during parole hearings under Missouri law.

Without counsel during the parole proceeding to assist the Petitioner, he is left on his own to advocate regarding the “enumerated factors” that Section 558.047 directs the Parole Board to consider. *See* Doc. 30-8, at 16-17); Doc. 37, at 18-19. For juvenile offenders, who are constitutionally entitled to a sentencing determination of whether life without parole “is just and appropriate in light of [the Petitioner’s] age, maturity and the other factors discussed in *Miller*,” *Hart*, 404 S.W.3d at 238, the

absence of counsel is uniquely problematic and inconsistent with constitutional requirements.

And in Missouri specifically, the parole procedures do not contemplate the fullness of Due Process protections due to offenders at sentencing. Significantly, Missouri's parole system *has* already been challenged directly and *has* been found in violation of the Eighth Amendment by a federal court. *Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2018 WL 4956519, at *10 (W.D. Mo. Oct. 12, 2018) ("The Court ... finds that [Missouri's] policies, procedures, and customs for parole review for *Miller* impacted inmates violate the constitutional requirement that those inmates be provided a meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation.").

The *Precythe* decision sets this case apart from *Montgomery*: Mr. Wolf argued to the state court that Missouri's parole system, in practice, did not remedy his Eighth Amendment violations and pointed to the existence of the *Precythe* litigation as evidence. The state habeas court ignored the *Precythe* case, failed to grant Mr. Wolf his evidentiary hearing (as requested), and in doing so ignored all of the evidence that Missouri's parole system, in practice, fails to remedy the unconstitutional sentence imposed on inmates like Mr. Wolf. The conclusions of the *Precythe* court show that Mr. Wolf's allegations regarding the parole process were correct, and that the state court's conclusion to the contrary was contrary to *Miller v. Alabama*, *Mempa v. Rhay*, and an unreasonable application of *Montgomery v. Louisiana*.

For instance, the Western District noted that the State limits “inmates’ access to information and opportunities to advocate consideration of the *Miller* factors,” prohibiting inmates “from viewing their parole files, including the prehearing report that largely guides the format and content” of Section 558.047 hearings. *Id.* (adding that this runs afoul of one of the purposes of such hearings – to “[p]resent and discuss any other matters that are appropriate for consideration including challenging allegations of fact that they perceive to be false.” 14 CSR § 80-2.010(3)(A)(6)). Moreover, although inmates may have a “delegate” present at the hearing on their behalf, those delegates “are foreclosed from advocating for consideration of the *Miller* factors and other factors that the Board is required to consider.” *Id.* at 20-21.

Overall, it is clear that the Parole Board does not “focus on the factors mandated by *Miller*” during the parole hearings of inmates like Mr. Wolf. *Id.* at 23. Although provided with a litany of factors to consider at parole hearings of *Miller* affected inmates, the Parole Board denies inmates any real opportunity to present evidence bearing on those factors. Thus, the Parole Board has no evidence by which they may consider those factors. The State cannot hide behind the text of Section 558.047, deny Wolf an evidentiary hearing that would clearly reveal the constitutional shortcomings in Section 558.047, and then urge denial of his habeas petition. In doing so, the State “refuse[s] to take affirmative steps to effectuate the law enunciated in *Graham*, *Miller*, and *Montgomery* while simultaneously handicapping the affected inmates’ ability to make the requisite showing.” *Id.*

This Court should grant certiorari and announce that the Sixth Amendment right to counsel is as important for juvenile offenders as the Eighth Amendment's protection against cruel and unusual punishment. At a minimum, the Eighth Circuit's conclusion that this issue was not debatable among jurists of reason should be reversed, as it was a clear misapplication of the standards for issuance of a Certificate of Appealability this court announced in *Buck and Miller-El*.

C. Certiorari Should be Granted Because Reasonable Jurists Could Debate Whether a Missouri Citizen Serving an Unconstitutional Sentence is Entitled to Resentencing.

This Court initially articulated the standard for granting a certificate of appealability in *Slack v. McDaniel*, 529 U.S. 473 (2000) and recently reiterated this standard in *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). “[A] prisoner seeking a COA need only demonstrate ‘a substantial showing’ that the district court erred in denying relief. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting *Slack*, 529 U.S. at 484 and 28 U.S.C. § 2253(c)(2)). A petitioner satisfies this “threshold inquiry” so long as reasonable jurists could either agree or disagree with the district court’s decision or “conclude the issues presented are adequate to deserve encouragement to proceed further.” *Id.* at 327, 336. A petitioner need not establish “that some jurists would **grant** the petition for habeas corpus.” *Id.* at 338. To the contrary, “a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner would not prevail.” *Id.* at 338.

The Eighth Circuit misapplied this standard and attempts to evade review through summary denial of the COA. Reasonable jurists can and do debate whether

it is constitutional to doom a victim of an unconstitutional sentence to an unconstitutional parole system that will deprive the offender of his right to fairly present evidence of those youth-specific factors that this Court has ruled **must** be considered at sentencing. In short, the Eighth Circuit, in analyzing Mr. Wolf's Petition, was to consider only "the debatability of the underlying constitutional claim [or procedural issue], not the resolution of that debate." *Id.* at 342; *see also id.* at 348 (Scala, J., concurring). Indeed, this Court recently cautioned Circuit Courts of Appeal *against* "full consideration of the factual or legal bases adduced in support of the claims," and to focus instead on whether the constitutional question presented could be debated. *Buck*, 137 S. Ct. at 773.

The Eighth Circuit's denial of a certificate of appealability, affirmed *sub silentio* the district court's decision to deny him resentencing and contradicted the court's own previous rulings regarding resentencing. It is apparent (despite the lack of opinion explaining the basis for the denial) that the Eighth Circuit must have considered the underlying merits of Mr. Wolf's claim, despite this Court's prohibition against such consideration. The question before the Eighth Circuit was not whether *Miller* and *Montgomery* require **every** implicated offender to be resentenced. Rather, the question was: given that the Missouri Supreme Court has previously recognized that such offenders are constitutionally entitled to resentencing, did it violate Mr. Wolf's constitutional rights to be deprived of that remedy? Given the number of courts that have recognized that *all Miller* offenders are entitled to resentencing (see fn 3)

It is plain that Mr. Wolf's petition presented constitutional questions are debatable among jurists of reason.

1. The Eighth Circuit's Decision Deepens a Circuit Split on this Very Issue

By denying Wolf's Application for a Certificate of Appealability, the panel ruled that reasonable jurists could not debate whether juvenile offenders sentenced to mandatory life without parole sentences in Missouri are constitutionally entitled to a new sentencing hearing. This conflicts with the decisions of the Fourth and Tenth Circuit Courts of Appeal, which have held that these juvenile offenders are constitutionally entitled to a new sentencing hearing.

In *Malvo*, 893 F.3d at 274, the Fourth Circuit affirmed a grant of habeas relief to a juvenile offender sentenced to life without parole, recognizing that a sentencing judge "violates *Miller's* rule any time it imposes a ... life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility' as distinct from 'the transient immaturity of youth.'" And in *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017), the Tenth Circuit granted habeas relief to a juvenile offender sentenced to 131.75 years in prison because the lengthy sentence violated the Eighth Amendment.

Missouri violated Mr. Wolf's Eighth Amendment rights the day that it sentenced him to mandatory life without parole, and Missouri's continued refusal to grant Mr. Wolf a resentencing (despite granting such relief to other similarly situated petitioners) presents a constitutional question on which reasonable jurists can and have reached varying conclusions. The Fourth and Tenth Circuit Courts have recognized that the only way to remedy this wrong is by granting offenders such as

Wolf the opportunity to be re-sentenced – granting those offenders the protections to which the United States Supreme Court has instructed they are constitutionally entitled. By depriving Wolf of the chance to present his appeal to the Court, the panel deprived Wolf of his only opportunity to remedy the unconstitutional sentence he is currently serving.

By denying Mr. Wolf the opportunity to present his appeal to the panel, the Eighth Circuit not only deepened a circuit split but also ignored jurists that have plainly ruled differently on the very constitutional question presented by Wolf on his appeal. As in *Buck*, a COA should have issued so long as reasonable jurists *could debate* the underlying constitutional question. *Buck*, 137 S. Ct. at 773. Here, reasonable jurists *have debated* and have *ruled the other way*.³ Indeed, the Eighth

³ Petitioner has not even scratched the surface of those reasonable jurists who differ as to whether *all* juvenile offenders sentenced to mandatory life without parole are entitled to re-sentencing rather than legislative “band-aid.” *See, e.g., Greiman v. Hodes*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015) (“[A]lthough *Graham* stops short of guaranteeing parole, it does provide the juvenile offender with substantially more than a *possibility* of parole or a ‘mere hope’ of parole; it creates a categorical entitlement to ‘demonstrate maturity and reform,’ to show that ‘he is fit to rejoin society,’ and to have a ‘meaningful opportunity for release.’”); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (“If a juvenile offender’s life sentence, while ostensibly labeled as one ‘with parole,’ is the functional equivalent of a life sentence without parole, then the State has denied that offender the ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ that the Eighth Amendment demands.”); *Maryland Restorative Justice Initiative v. Hogan*, No. CV ELH-16-1021, 2017 WL 467731, at *21 (D. Md. Feb. 3, 2017) (“It is difficult to reconcile the Supreme Court’s insistence that juvenile offenders with life sentences must be afforded a ‘meaningful opportunity to obtain release

Circuit itself has previously ruled to the contrary, mandating in a previous case that constitutional errors in sentencing require an offender to be resentenced. *Raymond*, 933 F.3d at 992.

Yet the Eighth Circuit ignores these decisions with no explanation. Such a ruling is plainly contrary to the standard this Court has established for COA and merits review by this Court.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant this Petition.

based on demonstrated maturity and rehabilitation' . . . if the precept does not apply to the parole proceedings that govern the opportunity for release."); *Atwell v. State*, 197 So. 3d 1040, 1041–42 (Fla. 2016) (holding that a mandatory life sentence for a juvenile that provided for parole was unconstitutional because the parole process failed to account for "the offender's juvenile status at the time of the offense" and thus, forced "juvenile offenders to serve disproportionate sentences of the kind" that *Miller* forbids); *Hawkins v. New York State Dep't of Corr. & Cnty. Supervision*, 140 A.D.3d 34, 39 (N.Y. App. Div. 2016) ("For those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue.").

Respectfully submitted,

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